BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 326, AFSCME, AFL-CIO

and

MARATHON COUNTY

Case 263
No. 57509
MA-10657

Appearances:

Ruder, Ware & Michler, S.C., by **Attorney Dean R. Dietrich,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Marathon County.

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of Marathon County Highway Department Employees Local 326, AFSCME, AFL-CIO.

ARBITRATION AWARD

Marathon County Highway Department Employees, Local 326, AFSCME, AFL-CIO, hereafter Union, and County of Marathon, hereinafter County, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on April 26, 1999, requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed James R. Meier on April 30, 1999. Due to a scheduling conflict the arbitration was transferred to Paul A. Hahn on July 8, 1999. Hearing in this matter was originally scheduled for July 21, 1999 and was postponed until September 20, 1999. Hearing in this matter was held on September 20, 1999 at the Personnel Department in the Marathon County Courthouse, Wausau, Wisconsin. The hearing was not transcribed. The parties filed post-hearing briefs which were received by the Arbitrator on November 8, 1999. The parties were given the opportunity and filed reply briefs which were received by the Arbitrator on November 22, 1999. The record was closed on November 23, 1999.

ISSUE

Union

The Union did not submit a statement of the issue.

County

Whether the County violated the Labor Agreement when it denied the Grievant's request to reimburse him for the cost of prescription eyeglass lenses? If so, what is the appropriate remedy?

Arbitrator

I adopt the statement of the issue as proposed by the County as being a fair representation of the issue which I must decide.

RELEVANT CONTRACT PROVISIONS

Article 1 – Recognition

The County recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Marathon County Highway Department excluding supervisory, professional and office personnel, the commissioner, assistant commissioner, engineer, assistant engineer, shop supervisor, patrol superintendent, assistant patrol superintendent, and purchasing agent for the purposes of conferences and negotiations with the employer or its authorized representative on questions of wages, hours and other conditions of employment.

Article 2 – Management Rights

Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

. . .

4. To establish reasonable work rules and rules of conduct.

. . .

Article 3 – Grievance Procedure

1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

2. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, the signature of the grievant and the date.

. . .

6. Arbitration:

. . .

F. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

STATEMENT OF THE CASE

This grievance arbitration involves Highway Department Local 326, representing the employes set forth in Article 1 – Recognition (Jt. 1) and Marathon County. The Union alleges a contract violation by the County for not reimbursing the Grievant in an amount of approximately $93.00 for damage to his personal prescription eyeglasses that occurred while Grievant was at work on May 27, 1998. On May 27, 1998, Grievant was assigned to work with a chainsaw and chipper which required the use of safety eyewear pursuant to the County Employee Handbook. (Jt. 2 and Jt. 3) Grievant asked Mike Wanke, County Highway Department purchasing agent, for safety glasses and was given a box of UVEX safety glasses. Upon completion of his shift, Grievant noticed that the safety glasses had scratched the lens of his personal prescription eyeglasses. Grievant discussed the scratched lenses with County Highway Commissioner Speich and Risk Manager Evgenides. At that point, the Grievant was denied his request for replacement of his prescription eyeglass lenses. (Jt. 2, pg. 1)

On July 7, 1998, Grievant wrote to the Company which made the UVEX safety glasses advising them that his prescription glasses had been scratched and informing the Company that the County had refused to reimburse him to replace his eyeglass lenses. Grievant requested assistance to rectify his problem and inquired as to the Company's position to reimburse the Grievant for replacing his prescription lenses. The Company responded on July 13, 1998 informing the Grievant that for several years the boxes containing UVEX eyeglasses had a

warning leaflet attached to the safety glasses advising the potential wearer that the safety glasses might damage prescription lenses. (Jt. 2, pgs. 1 and 2) On August 6, 1998, the Grievant submitted a grievance to Commissioner Speich alleging that the UVEX eyewear box given to Grievant did not contain a caution leaflet informing Grievant of the potential damage to prescription eyewear and requesting reimbursement of $93.00 for replacement of Grievant's prescription lenses. (Jt. 2, pg. 7)

On August 6, 1998 Commissioner Speich denied the grievance for the following reasons: (1) Grievant was issued new safety glasses in the original box; (2) the glasses were purchased over a year ago and there is no evidence that the manufacturer attached one of the labels to this particular batch of glasses; (3) the Grievant was aware of alternate safety eyewear available; and (4) it is the employe's responsibility to determine what items fit his needs. (Jt. 2, pg. 9) The grievance proceeded through the parties' contractual grievance procedure. On November 4, 1998 Marathon County Personnel Director Karger denied the grievance as it failed to state a specific section of the labor agreement that had allegedly been violated, and that the County suspected that an older supply of glasses did not contain a warning leaflet. The County by Karger denied the Union's request for a "non-precedential settlement." (Jt. 2, pgs. 10 and 11) The Union processed the grievance to the County Personnel Committee which met on December 7, 1998 and denied the Union's request for a non-precedential settlement and postponed the hearing on the grievance to a later date. (Jt. 2, pg. 13) On March 1, 1999 the Personnel Committee met again, considered the grievance and denied it. Notification of this action was received by the Union in a March 4, 1999 letter from Personnel Director Karger. (Jt. 2, pg. 16) The Union subsequently advised the County that it intended to proceed to arbitration over the dispute.

No issue was raised at the hearing as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on September 20, 1999. The hearing closed at 10:55 a.m.

POSITION OF THE PARTIES

Union Position

The Union argues that there is no dispute that the County required the Grievant to wear the protective eyewear which directly resulted in damage to Grievant's personal prescription eyeglasses. The Union further argues that while the manufacturer of the UVEX safety glasses took the position that all the glasses for several years have had a warning label attached to them, there is no testimony to rebut the Grievant's testimony that the warning was not attached to the glasses or in the box of safety glasses issued to him on May 27, 1998.

The Union takes the position that the County's right under the Management Rights clause to promulgate work rules, and therefore the Employee Handbook (Jt. 3), requires that the responsibility for proper personal protective equipment is the County's and not, as alleged by the County, the employes'.

Citing arbitration treatise and case law, the Union submits that the exercise of the County's management function to direct the work force places the responsibility on the County to adequately care for the Grievant's personal property. This is true, the Union submits, even in cases where there is an absence of specific language other than a reference to work rules and even where the employer was not determined to be negligent.

Citing two instances where the County reimbursed employes for damage to personal property, the Union argues that there is a past practice of the County assuming liability for personal losses. The Union takes the position that in this case before the Arbitrator, even if the contract language is found to be ambiguous regarding the County's liability, the evidence of past practice requires a finding that the practice has given meaning to the ambiguous language of the contract and as such the practice is enforceable as being a part of the parties' labor agreement. Therefore, the Union submits, either by specific contract language or past practice, the County is liable to reimburse Grievant for the cost of replacing his prescription eyeglasses.

In its reply brief, the Union objects to the County's raising of a procedural arbitrability challenge for the first time in the County's initial post-hearing brief. The Union argues that the County did not raise an arbitrability issue throughout the processing of the grievance nor did the County raise an arbitrability issue at the arbitration hearing. The Union argues that the majority of arbitration case law supports a finding that the County, by waiting until its post-hearing brief to challenge the arbitrability of the grievance, has waived its right to defend the Union's grievance on that basis.

The Union restates its position that County Highway Commissioner Speich is in error when he stated, in denying the grievance, that it is the employe's responsibility to determine what safety items fit the employe's needs. The Union argues that it was the County's obligation to have informed the Grievant of the potential damage to his personal eyeglasses from wearing the UVEX safety glasses.

Lastly, the Union submits that for the reasons set forth in its post-hearing briefs the grievance should be sustained by the Arbitrator and the Grievant made whole for his loss.

County Position

The County takes the position that the grievance is not arbitrable. The County submits that the grievance procedure requires that any grievance state the specific section of the parties' labor agreement alleged to have been violated. Since there is not any provision which

mentions, in any respect, the County's obligation to pay for damaged personal property for bargaining unit personnel the grievance is not arbitrable. The County argues that the collective bargaining agreement provides that the arbitrator shall not modify, add to or delete from the express terms of the agreement; the Arbitrator in this case is limited to an interpretation and application of the written provisions of the labor agreement. Since no such written provision exists, the County submits, the grievance is not subject to arbitration and therefore should be "summarily dismissed."

As it relates to the facts of the case, the County points out that the practice of the County is to issue safety glasses to employes that request them, and, as this is a personal safety item, the County does not issue used glasses. The County submits that the box of UVEX glasses given to the Grievant was issued pursuant to its standard procedure. The County further points out that there is no evidence in the record that the box of glasses issued to the Grievant did not include the manufacturer's warning. The County submits that since the box of glasses issued to the Grievant was purchased in 1997, (citing Jt. 2 at p. 9) it is reasonable to assume that this particular batch of glasses did contain the caution leaflet shown in Joint Exhibit 2 at pages 3 and 4.

The County submits, as its third argument, that to require the County to reimburse the Grievant for damaged prescription lenses would result in an irreconcilable conflict in the future. The County argues that there is no work rule or contract language that names the County as liable for any damage done to an employe's personal property while using protective safety equipment. The County submits that the Grievant could have chosen a style of safety eyewear that would not have been placed directly on his prescription eyeglasses and would not have scratched his lenses.

The County cites arbitration and treatise case law regarding situations where an employe's equipment or personal property is damaged or stolen while on the Company's premises, noting that most cases have involved tools. The County then addresses the elements considered by arbitrators in determining Company liability. Under the question of whether the County's safety and health provision was applicable, the County takes the position that most arbitrators have rejected the argument that safety and health provisions of labor agreements apply in cases where an employe's equipment or personal property is stolen or damaged while on Company premises. As to whether a bailment relationship existed between the parties, the County points out that the Grievant's personal property (eyeglasses) was not given to the County to be held in trust for him. As to whether the County exercised reasonable care or was negligent in regard to the Grievant's property, the County takes the position that it exercised reasonable care in issuing Grievant what the County believed were a new pair of personal safety eyewear with the applicable warning. As to whether the contract contained language express or implied to impose liability, it is again the County's position that the parties' collective bargaining agreement does not contain any language whatsoever that would find the County liable for damage to Union members' personal property. As to whether there have been contract negotiations on the subject, the County submits that the parties have never negotiated about reimbursement of damaged or lost personal property.

In its reply brief the County takes the position that it was the Grievant that chose the UVEX brand protective eyewear over other types of safety eyewear, and that the Grievant had the option of choosing safety goggles or a safety shield instead of the UVEX safety eyewear. The County submits that it is impossible for the County to anticipate the potential damage that may be caused to an employe's personal property every time the employes select a form of safety eyewear. The County takes the position that to place the burden and responsibility on the County to maintain responsibility for the Union members' personal property overreaches the boundaries of reasonableness.

The County, in response to the Union's past practice argument, states that no binding past practice exists to support the Union's position. The County points out that the Union's entire evidence were two incidents where the County reimbursed employes for their damaged property. The County, after discussing the standard criteria to prove the existence of a past practice, states that there has been no mutuality between the parties as to any past practice for reimbursing employes for damaged personal property. When the County reimbursed the employes for the two incidents testified to by the Grievant, this was the result of mere happenstance or generosity and therefore is not binding on the County. Lastly, as to the past practice argument, the County points out that two instances of reimbursement to an employe for damage, which was caused not by the County but by another employe, does not support a finding that the alleged past practice was unequivocal and clearly enunciated an acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice mutually accepted by both parties.

In summary the County argues that the Grievant was free to choose which form of safety eyewear the Grievant felt most comfortable with and the County acted reasonably in issuing the Grievant the UVEX safety eyewear. The labor agreement (Jt. 1) does not make the County liable for damage to personal property items in an employe's possession. The County submits that granting the Grievant's request would result in special treatment to one employe and similar requests are sure to follow. The County states that it could not possibly have violated the terms of the collective bargaining agreement and the grievance therefore is not arbitrable and should be summarily dismissed. For the foregoing reasons, including its arbitrability defense, the County requests that the Arbitrator dismiss the grievance in its entirety.

DISCUSSION

The essential facts in this matter are not in dispute. (Jt. 2) I first address the County's arbitrability argument. The County first raised this defense in its post-hearing brief. The Union, in its reply brief, vigorously objects to the County raising this issue or position in its post-hearing brief. The County's argument is that the grievance procedure of the parties' labor agreement requires that for a grievance to be arbitrable the action of the County must violate a specific term of the agreement. There clearly is no provision of the agreement that specifically

refers to, discusses or determines the obligation of the County to reimburse employes when their personal property is damaged while on the job and in the performance of their assigned duties. The Union responds to this argument by taking the position that the Management Rights clause of the agreement and the work rules created under that clause that require an employe to wear eye protection when performing certain work is the provision that covers this fact situation. (Jt. 1 and 3) The Union further argues that the County has waived its right to make this argument at this point in this matter. 1/ Lastly the Union argues in its post-hearing brief that even if there is not a specific provision of the agreement covering the facts before me I can make a decision by considering the common law of the workplace. 2/

1/ WINNEBAGO COUNTY, WERC CASE 184, NO. 43883, MA-6098 (GRATZ, 1990). Cited at page 2 of the Union reply brief.

2/ STEELWORKERS V. WARRIER & GULF NAVIGATION CO., 46 LRRM 2416, 2419 (1960). Cited at page 9 of Union post-hearing brief.

I will first dispose of the waiver argument. I am in agreement with the Union that the County waited too long in the process to raise the arbitrability argument or defense to the Union's grievance. The County cites arbitrator Sembower in JOY MFG. CO. for the proposition that an employer can raise an arbitrability issue at any time in the arbitration proceedings because the arbitrability of the grievance relates to the arbitrator's jurisdiction to hear the grievance. 3/ However, as Sembower makes clear ". . . it is an extremely valid objection on the part of either party if one of them raises so significant an issue as this for the first time in arbitration. . . ." 4/ I also note that in Sembower's case the arbitrability argument was raised for the first time at the arbitration hearing. At least if this defense is raised at the arbitration hearing, the Union has an opportunity to defend or ask for a continuance to prepare a defense; such is not the case when an employer raises the issue for the first time, as in this case, in its post-hearing brief. 5/ I further believe the weight of the case law argues for waiver by the County in this case of the arbitrability defense and I so find.

3/ JOY MFG. CO., 44 LA 304, 306 (SEMBOWER, 1965). Cited at page 10 of County post-hearing brief.

4/ ID. AT PAGE 306.

5/ I have carefully reviewed my notes of the County's Opening Statement at the arbitration hearing in this matter. I find that the arbitrability defense was not raised during the Statement or at any other time during the hearing.

I next address the Union's argument that even in the absence of a specific contract provision I should find that typical common-law practices of the work place can become part of a collective bargaining agreement. 6/ While it can certainly be argued that the Supreme Court, as cited in the aforementioned footnote, took a broad view that not every issue between parties can be covered by the language of a collective bargaining agreement, one cannot forget or ignore the context of that case. The Court was dealing with a refusal of an employer to arbitrate and the grievance clause in that case was very broad, unlike the definition of a grievance in the case before me. Further, one cannot ignore the dissent of Justice Whittaker who would hold that arbitrators are not imbued with such general powers but are confined to the provisions of the labor agreement. 7/ I believe that I subscribe to the theory of the majority of arbitrators that we must look to the provisions of the labor agreement for our authority and for guidance in our analysis and decision making.

6/ STEELWORKERS, SUPRA, AT PAGE 2419.

> ***The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law -- the practice of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.***

7/ STEELWORKERS, SUPRA, AT PAGE 2422.

> ***This is an entirely new and strange doctrine to me. ..... I find nothing in the contract that purports to confer upon arbitrators any such breadth of private judicial power.***

In this case, I believe that the County's requirement for the wearing of safety eyewear on certain jobs contained in its workrules (Jt.3) and enacted under the Management Rights clause provides the contract language under which I am able to consider whether the County has any obligation to reimburse the Grievant for replacing the lenses to his prescription eyeglasses as alleged in the grievance. I note here that I agree with the cases cited by the County that the Safety and Health article of the parties' agreement does not apply to personal wear or items such as glasses but only to the person himself. I also find that there is no past practice by the County of reimbursing employes for damage to their personal belongings while on the job. The Union offered evidence of only two incidents covering twenty five years of the Grievant's employment where the County reimbursed Grievant and another employe for damage caused by another employe. The Union's past practice evidence meets none of the commonly accepted standards for proving a binding past practice. 8/

8/ CELANESE CORP. OF AMERICA, 24 LA 168, 172 (JUSTING, 1954)

> ***In the absence of a written agreement, 'past practice,' to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.***

Cited at page 3 of County Reply Brief.

I therefore limit my analysis to the specific facts of this case under the contractual and work rule provisions that I have found to give me the jurisdiction to rule in this matter. I further define the issue as to whether the County had an obligation to provide the Grievant with safety equipment that was not defective or to put it another way would be suitable for the purposes for which it was intended; I find that the County had such an obligation.

I credit the testimony of County witness Wanke, the County Highway Department Purchasing Agent, that the normal procedure, which he followed in this case, was to issue employes who needed protective eyewear a box containing new glasses. I also, however, credit the testimony of Grievant, an employe of thirty three years, that neither the UVEX glasses he received from Wanke nor the box in which they were contained had the warning label that would have advised the Grievant that the UVEX glasses could not safely be worn with his prescription eyewear. While the County argues that Grievant could have chosen other eyewear, there was, without the warning, no reason for him to do so and Wanke's testimony makes clear that the UVEX safety glasses were commonly chosen by employes when they were required to wear safety eyewear.

I believe and so find that if the County requires employes to wear safety equipment, it has a corresponding obligation to ensure that equipment is safe for the employe to use. 9/ In this case, while there was nothing wrong with the UVEX glasses themselves, without the warning to employes with prescription eyewear, the glasses were defective. To hold otherwise would make the employe liable for something over which he has no control or even knowledge. I believe it is reasonable to assume that had the warning been attached to the eyeglasses Grievant would not have used them or, if he had, the finding in this case would be different. I liken it to the hypothetical if the County issued an employe a safety shield for bridge or blacktop work with a crack in the shield, the County would have an obligation but so would the employe if the crack were clearly visible. There was nothing in this case to give the Grievant any idea that he was putting his prescription eye glasses at risk by wearing the UVEX glasses.

9/ WILSON MANUFACTURING COMPANY, 70 LA, 995-996 (TYLER, 1978).

> ***I do not agree that it requires specific contract language to determine that the Company has a degree of responsibility for employe tools. The right to demand (tools) requires an equal amount of right of responsibility to protect these tools when they are in the custody of the company. . . .***

I am not unmindful or unappreciative of the concern of the County that by finding for the Grievant in this matter it will, in the County's words, result in irreconcilable conflict in the future. Therefore, I will state clearly for the parties that my decision is limited to the specific facts of this case. My decision should not be taken that I have found or made a decision that there is an obligation on the County to reimburse employes for damage to or loss of their personal property.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The County violated the Collective Bargaining Agreement when it failed to reimburse the Grievant for damage to his personal eyeglasses.

REMEDY

The Grievant will be reimbursed for the reasonable cost of replacing the prescription lenses of his personal eye glasses scratched in the process of wearing UVEX safety glasses on May 27, 1998. The County has the right to request reasonable proof of said replacement cost.

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

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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