

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**GERMANTOWN MUNICIPAL EMPLOYEES UNION
LOCAL 3024, AFSCME, AFL-CIO, WISCONSIN COUNCIL 40**

and

THE VILLAGE OF GERMANTOWN

Case #68
No. 66897
MA-13675

(On Call)

Appearances:

Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Post Office Box 727, Thiensville, Wisconsin 53092, appearing on behalf of Local 3024.

James Korom, Attorney at Law, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, appearing on behalf of the Village of Germantown.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the Village of Germantown (hereinafter referred to as either the Village or the Employer) and AFSCME Local 3024 (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the Village's right to assign on-call duty, and to limit employees' rights to trade on-call duty. The undersigned was so designated. A hearing was held on June 28, 2007 at the City's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted briefs and reply briefs, the last of which were received by the undersigned on August 14, 2007, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

The parties agreed that the following issues should be answered herein:

1. Did the Employer violate the collective bargaining agreement when it eliminated the straight cover option for Highway employees to find volunteers to take their places for on-call duty?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 - RECOGNITION

1.01 The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for regular full-time and regular part-time employees of the Village of Germantown employed in the Highway Department, Parks Department, Water Department, and Waste Water Department, excluding professional, supervisory, managerial, confidential, temporary, casual, seasonal and clerical employees for the purpose of collective bargaining on matters concerning wages, hours, and all other conditions of employment.

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 Rights: The Board possesses the sole right to operate the Village and all management rights repose in it, subject only to the provisions of this contract and applicable laws. These rights include, but are not limited to the following:

- A. To direct all operations of the Village;
- B. To establish reasonable work rules and schedules of work in accordance with the terms of this Agreement;
- . . .
- F. To maintain efficiency of Village operations;
- G. To introduce new or improved methods or facilities; or to change existing methods or facilities provided if such affects the wages, hours or working conditions of the employees, the Union will be notified in advance and permitted to bargain the impact upon the wages, hours or working conditions;

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

...

ARTICLE 8 – ARBITRATION

...

8.05 Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

...

ARTICLE 13 – OVERTIME AND HOLIDAY PAY

13.09 Paging Device: Employees who are required to carry a paging device during non-working hours for the purpose of recall for overtime work within the Department to which they are assigned, will be compensated at the following rate (Monday through Sunday), for each week the employee is assigned a paging device. Pager assignment compensation will be paid two times each calendar year during the first pay period following May 1 and November 1. Employees who are assigned a paging device are required to promptly respond to all pages. If overtime work is required, the employee will report to the department or work site, as appropriate, as soon as possible within a reasonable time period after receiving the page. At all times during the week in which the employee is assigned a pager, the employee will not consume alcoholic beverages and will not use any drug which impairs or is capable of impairing the ability of the employee to perform work of any type. Employees may exchange the paging device with other employees within the department, with prior notice to and approval of the department head or other designated management official. Nonetheless, the assigned employee remains responsible for providing overtime recall coverage and will receive the full weekly payment. Employees who violate or fail to adhere to the terms of this section are subject to disciplinary action.

Effective January 1, 2008 \$80 per week

Effective January 1, 2007, Utility employees who are required to carry a paging device pursuant to this Section more than once every four (4) weeks will receive \$100.00 compensation for that week in lieu of the normal \$80.00 compensation rate. In lieu of the \$100.00, the employee may take compensation at the rate of five (5) hours of compensatory time off.

BACKGROUND

The Village provides general municipal services to the people of Germantown, Wisconsin, including the operation of a Department of Public Works. The Union is the exclusive bargaining representative for the Village's Public Works employees. The DPW encompasses three broad operations – the Parks Department, the Water and Wastewater Utility, and the Highway Department. At the times relevant to this case, Jay Olszewski was the Highway Superintendent, and the staffing for the Highway Department portion of the bargaining unit consisted of two Crew Leaders, two Mechanics and eight Highway Operators.

The Union and the Village have been parties to a series of collective bargaining agreements. In 1997, the parties agreed to add Section 13.09 to the contract, providing pay for employees to carry pagers between May 1 and November 1. Included in §13.09 was a provision allowing employees to exchange weeks of pager duty with one another: “Employees may exchange the paging device with other employees within the department, with prior notice to and approval of the department head or other designated management official. Nonetheless, the assigned employee remains responsible for providing overtime recall coverage and will receive the full weekly payment.” This language was first applied to the Utilities, then extended to Parks. Within the Highway Department, Mechanics and Crew Leaders were on-call every other week, but Highway Operators were not required to carry a pager, until 2003.

In 2003, Olszewski had recently been appointed Superintendent, and he advised employees that he intended to apply the pager language to the Highway Operators. Given the number of Operators, each employee would carry the pager and be on-call for three weeks per season. However, unlike the other departments, where the employee who was on-call could swap his week with another employee, Highway Operators were allowed to either swap or use a straight cover option, whereby the employee having on-call duty would arrange to have someone else work his on-call week, without being obligated to perform that employee's on-call work later in the year. Employees wishing to use the straight cover option were required to make all of the arrangements themselves, and to submit a form to Olszewski, showing who was covering and for what period. Olszewski would then provide the name to the Police Department, so that the dispatchers knew which employee to contact for after-hours emergencies.

The parties exchanged proposals for the 2006-2008 collective bargaining agreement on November 10, 2005. In its initial proposals, the Village proposed to modify §13.09 to allow employees to be placed on-call for other departments, and to allow it broad latitude to take action if employees did not respond to the page within 15 minutes. The Union's initial proposal would have changed the payment from a flat dollar amount to one hour of pay for each day of on-call. In the course of negotiations, the Utility workers complained about too frequent on-call duty. At some point, the Union proposed to eliminate on-call, and have supervisors carry the pager. Ultimately, the parties agreed to change §13.09 to increase the compensation from \$80 to \$100 per week (or five hours of comp time) if the employee was on-call more than once every four weeks. The new contract was signed on November 28, 2006.

In mid-December, 2006, a crew leader from the Utilities mentioned to Union President Daniel Skrober that he'd heard Olszewski had decided to take away the straight cover option for on-call duty in the Highway Department. Skrober approached Olszewski and asked if this was true, and Olszewski said he hadn't finalized it yet, but had pretty much decided to end the straight cover option. Skrober contacted Council 40 Staff Representative Lee Gierke, and asked him to look into the matter. Gierke called Director of Public Works Bert Caverson and asked him what he knew of the matter. Caverson said he hadn't heard anything, but would check. He spoke with Olszewski, who said he decided to revert to the same system used elsewhere in DPW, whereby employees could swap weeks or days, but could not simply give them away. Olszewski sent Caverson a memo, in which he said that he had told the staff when on-call went into effect in 2003 that the straight time option was a privilege and would be changed if it was abused. He alleged that it was being abused, because some employees chose to never work any on-call weeks. He also noted that Highway Operators were increasingly difficult to find during snow emergencies, which he related to a reduced level of willingness to take responsibility for essential job functions.

Caverson sent a letter to Gierke, confirming that the straight cover option would no longer be available:

December 18, 2006

. . .

Dear Mr. Gierke:

I am writing in response to your phone call of Thursday, December 14, 2006 concerning on-call procedures within the Village of Germantown Highway Department. I have since spoken to the department supervisor to clarify policy changes that may have occurred and if so, the circumstances causing the change. I may have misunderstood the information that you relayed to me as it was my understanding that you were concerned that we no longer allowed employees to swap on-call responsibility, if there was a legitimate reason. In all of the Public Works Department divisions, on-call swapping has been allowed and will continue to be allowed as long as it is not abused or creates scheduling problems.

What has been clarified and will be adhered to as departmental policy is the requirement that Village of Germantown Highway Department employees have a responsibility to serve in an on-call capacity throughout the calendar year as is the case in the other departmental divisions. The term "swap" means to trade weeks assigned and the employee requesting the swap will be required to serve their responsibility as the on-call employee at the time assigned to the other employee involved in the swap.

There are four employees in the Highway Department that have not served in an on-call capacity once in the past two years. Their interpretation of swap is to abdicate their responsibility, to the Village to serve on an on-call basis. As we learned during negotiations, on-call is best served if all employees do their part and take their turn as it is scheduled. Employees that continuously ignore their responsibility are placing an extra burden upon their fellow employees and are not placing themselves in a position where learning can be the result of call-outs.

I would hope that you would see the merit of this clarification to the on-call policy and explain to your members the benefits gained by all employees working together from a financial as well as a learning perspective.

/s/ Bert Caverson, P.E.
Director of Public Works

. . .

The instant grievance was filed on December 21st, alleging that the Village was unilaterally changing an established past practice in violation of the Recognition, Management Rights and Overtime provisions of the contract. The parties processed the grievance through the various steps of the grievance procedure and discussed it at each step, but were not able to resolve it. It was referred to arbitration. At the arbitration hearing, in addition to the facts recited above, the following testimony was taken:

Union President Dan Skrober testified that the on-call duty was new to the Highway Department as of 2003, and that when Olszewski instituted it, he distributed a form to employees that included the straight cover option. Olszewski said it was important to keep track of who was going to be on duty, and that the straight cover option would be discontinued if there were any problems with the paperwork. Skrober said he was unaware of any instances of problems with the paperwork on straight cover between 2003 and 2006, and that the Village had never come to him with problems of any type with the practice.

Skrober said that on-call duty caused him problems because he has a special needs son who cannot be left alone. He acknowledged that Olszewski works with employees to resolve conflicts between personal obligations and pager duty. Prior to the elimination of the straight cover option, he had never worked on-call. Instead, he would approach the senior employee, Mark Kauth, who preferred overtime and additional work, and offer it to him. Skrober said he saw no connection between on-call duty and snowplowing call-outs. He agreed that the Village maintains a list of available non-unit personnel for plowing, but said that was because the Department works shorthanded, not because employees don't respond to call-outs. Skrober said he had received training in repairing traffic signal poles that are knocked down, but had never actually repaired a pole. According to Skrober, there are four other people in the

Department who get the first call for work like that, principally because they have experience working in the sign shop. He noted that it is common for different people to have different specializations, and that he had never refused any work assignment.

Union Vice-President Eric Kleiss echoed Skrober's testimony that Olszewski said when he instituted the pager duty that the straight cover option would be discontinued if there were problems with the paperwork. Kleiss said he didn't know of any problems with the system before it was discontinued. Kleiss stated that he tried to avoid on-call duty, and generally gave his weeks to Mark Kauth. He explained that he had a hectic schedule, and generally worked two jobs, so on-call duty posed a problem for him. He agreed that Olszewski had worked with employees to alleviate specific schedule problems when they were on call. Reading the contract language, Kleiss stated that the contract clearly called for the employee scheduled for on-call, rather than the employee replacing him, to receive the on-call pay. Notwithstanding that language, the employee actually performing the work had always received the on-call pay.

Jay Olszewski testified that he took over as Highway Superintendent at the start of 2003. When he took over, supervisors and mechanics were working on-call, but Highway Operators were not. He told the Operators that they would be scheduled for on-call duty, but that he would allow them to secure volunteer replacements, so long as there were no problems with the system, and the paperwork was done correctly so he would know who was actually covering the duty. He told the Operators, however, that he was concerned with avoiding too narrow a skill set among the work force.

According to Olszewski, by late 2006 he had pretty much decided to eliminate the straight cover option. He was concerned that the majority of the Operators were adopting a mind set in which they had no responsibility to the Village outside of regular working hours. This was reflected not only in the widespread use of the straight cover option, but in an increasing difficulty in locating regular employees when there were snow emergencies. He perceived a very high correlation between the two. He also felt that there was a danger, as the workforce aged, of having a narrowing pool of employees with the skill set required to respond to emergencies. He specifically cited traffic signals knockdowns. In those cases, live current is involved, so special training is required. His sense was that employees who did not participate in on-call duty were not motivated to pay attention and learn when they were trained in knockdowns. While he conceded that knockdowns would theoretically be part of an Operator's duties during normal work hours, Olszewski said as a practical matter not everyone was assigned to that work. He agreed that he is the one who decides which tasks are assigned to which employees, and what training each employee receives. He also agreed that there had never been an instance in which he didn't have on-call coverage, though he said there had been cases in which the identity of the employee providing the coverage had changed several times between the original switch and the actual date of the duty. He mentioned one case in particular, where the volunteer had to back out shortly before the on-call period, and the duty reverted to the employee originally scheduled for on-call, who then arranged for another employee to cover. In that case, there were three different employees potentially covering the time.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the City violated Section 13.09 of the labor agreement, as it has been clarified by the past practices of the parties. Since the beginning of on-call duty in 2003, employees in the Highway Department have been allowed to seek out other employees to cover their on-call responsibilities. This is referred to as the straight cover option. The practice of a straight cover option has been widely known and sanctioned, and completely uniform. It has spanned two sets of contract negotiations, during which neither party sought to change it. The practice serves to flesh out the contract language concerning pager duty, and has the same status as express contract language. It cannot be discarded on the whim of the Employer. If they wish a change, they must negotiate with the Union and obtain agreement.

The Village's claims that the practice of having employees secure replacements for on-call weeks somehow places a burden on it are both insufficient to justify a unilateral change, and wholly unproven. Again, the practice clarifies contract language and even if there is some difficulty with it, it can no more be discarded than can the underlying contract language. Moreover, the Village has failed to prove that there is any difficulty with the practice. The employee has the responsibility for arranging the coverage, so there is no administrative burden. The cost is a flat dollar amount, no matter who provides coverage, so there is no fiscal burden. The process was completely voluntary for both employees, so there is no element of coercion or unfairness. The practice is workable in the Highway Department because of the greater size of the workforce there than in other Village Departments, so there can be no argument about equity for other employees who do not have this option. The sole actual difficulty was one case, in which an employee who had volunteered backed out, requiring the original employee to find someone else, and the supervisor to contact the Police Department with a new name. That is no burden at all.

The Village was reduced to speculating that employees who didn't carry a pager were not as concerned with their jobs as those who did, and trying to connect an unwillingness to do on-call duty with a reduced availability for snow plowing. The first is purely nonsensical. The second is irrelevant. Employees with family commitments are not less concerned with their jobs, though they may balance concern for their jobs with meeting their family obligations. As for snow plowing, that is a completely different issue, unrelated to on-call duty. The Union notes, however, that the same family issues that cause an employee to avoid on-call duty may cause them to avoid snow plowing. There is nothing sinister or surprising about it. If the issue of on-call work poses burdens, it is the employees who bear them. The former system worked well for both parties. The new system provides little benefit for the Village, while causing serious problems for employees, in arranging child care, coordinating with a working spouse, or attending to a second job.

The arbitrator must reject the Village's attempt to switch the burdens in this case. The Village repeatedly asked during the hearing whether the Union sought to bargain over this issue when the change was announced. The Union had no need to bargain – the deal allowing substitutes for on-call had already been struck, and if the Village wanted to change it, it was the Village's obligation to seek negotiations. The arbitrator must likewise reject the Village's effort to recast the practice as some sort of experiment. One supervisor claimed to have said this was a "trial" in 2003. No other witness remembered any such statement. The practice was absolutely clear and consistent for four years. It was the key element in persuading the Highway Department employees to accept the on-call system that had existed in the wastewater utility since 1997. It is unlikely that employees would have accepted the expansion of on-call without protest if the only thing that made it palatable – the straight cover option – could be discontinued at the Village's option.

The Village's Reply to the Union's Arguments

The Village first seeks to correct misstatements in the Union's argument. The Union wrongly claims that on-call duties were introduced to the Highway Department in 2003. In fact, supervisors and mechanics were on-call before 2003. 2003 was when these responsibilities were expanded to the Highway Operators. The Union also claims that on-call duty is some sort of unilateral creation of the Village. In fact, on-call duties were negotiated into the contract in 1997 and that language applied to all employees, without exception. The Village refrained from applying it to the Highway Operators until 2003, but the authority to do so had been negotiated with the Union. The Union claims that Olszewski abruptly announced a change in policy. In fact, he first mentioned the possibility in response to employee questions, whereupon the Union immediately became involved. The Union claims that on-call duty prevents employees from working second jobs. This is a gross exaggeration. On-call duty occupies three weeks per year, and employees have the ability to exchange weeks between themselves to avoid schedule conflicts. Finally, the Union claims that there is no credible evidence that employees were told in 2003 that the straight cover option was subject to revocation if it caused problems. In fact, there is sworn testimony from Olszewski to that effect, and no other witness contradicted it. At best, they said they "could not recall" the statement, meaning as far as the Union witnesses were concerned, it may have been made or may not have been made.

The Village objects to the Union's supposition that this is a past practice case. This is a contract language case, and the contract language is clear. The contract allows an exchange of on-call duty between employees – a give and a take. It does not allow employees to wholly refuse the duty. That being the case, there is no recourse to past practice. Even if the arbitrator saw some ambiguity in the word "exchange", he should first look to the provision as a whole for guidance before relying on external evidence such as practices. For example, the provision calls for payment of on-call pay to the originally scheduled employee. Clearly it assumes that that employee will even up accounts with the other employee by working his week of on-call duty later in the year. Thus the language itself establishes the Village's interpretation, and the arbitrator has no need to examine past practices or other external evidence in arriving at his Award.

The Position of the Village

The Village takes the position that the employees misunderstand the role and the limitations of past practice. The contract imposes a clear obligation on employees to perform pager duty. It allows employees the option of exchanging weeks of pager duty with other employees, but it does not mention giving away that duty. The word “exchange” means what it says – trading one week for another. The Union seeks to have it read to cover only half of the transaction – the giving away of a week, without receiving one in return. That is not what the contract says, and no appeal to past practice can change the clear meaning of written language.

The straight cover option has been permitted to Highway Operators in the Highway Department, and no one and nowhere else, at management’s discretion. The extension of this privilege to a single group does not transform it into a binding practice. Leniency in the administration of contract language does not create new rights, particularly where, as here, it is extended to a single group of workers and not to others who are covered by the same language.

The Village observes that a past practice requires clarity, consistency and acceptability. None of these characteristics may be said to apply to the straight cover option. There is no clarity to the practice, in that it was not uniformly available to all employees. There is no consistency, in that it was available only for a relatively brief period of time. Most importantly, there is no acceptability. The Operators may have found it acceptable as a binding term, but management never expressed any interest in that. When it was introduced, Olszewski made it clear that it would only be allowed so long as he felt the employees were not taking advantage of the privilege. His statements indicated that this was not binding or perpetual, and that the practice could be discontinued. For all of these reasons, the arbitrator should conclude that there was no binding past practice.

The Village argues that, even if the straight cover option rose to the level of a binding past practice, the underlying circumstances have changed sufficiently to warrant a change in the practice, so long as there is a legitimate business justification. In this case, the Village has compelling reasons for changing the practice. The on-call personnel are required to practice emergency preparedness skills in the course of their work, since the nature of on-call work is to respond to emergencies. In light of the new federal requirements for heightened disaster and terrorism preparedness, the Village had a strong basis for requiring all of its employees to participate in on-call duty. It is the opportunity to practice and hone those skills. Moreover, the employees who perform on-call duties will be more thoroughly cross-trained than those who do not. Aside from the Village’s legitimate interest in upgrading the skills across the work force, this protects the Village from a void in its skill set should the older employees begin to retire.

The Village also notes that the employees making use of the straight cover option are the same employees who cannot be relied upon regularly to answer calls for snow plowing. It suggests that these workers place a burden on the Village and on other workers to pick up the slack for their unwillingness to put in extra hours, and that eliminating the straight cover option is one way of addressing that inequity.

The Village points out that its Management Rights clause is quite broad, and permits it to change methods, means and personnel, subject to its obligation to give advance notice to the Union. In this case, the notice was given months before the change would have any impact on the bargaining unit, and the Union failed to seek bargaining. Instead, it brought the instant grievance. That is not bargaining, and the arbitrator should conclude that the Union has thereby undercut its own grievance. The Village points out that the contract, by its express terms, prevents him from modifying the agreement. Should the arbitrator elevate the past practice over the express terms of the Pager provision and the Management Rights clause, he would be guilty of exceeding his jurisdiction, and his award would be of no account.

The Union's Reply to the Village's Arguments

The Union reiterates that the practice in the Highway Department is indisputable, and argues that the Village's efforts to excuse its unilateral change are speculative, irrelevant and insufficient. The Village claims administrative burdens as a result of the practice, but in fact over the four year period there is only a single case in which any supervisor had to do anything related to the straight cover option. In that case, a supervisor had to make a single phone call to tell the police of a change in the employee providing coverage. As for the claim that these workers do not volunteer for snow plowing, even if that were true, it has nothing at all to do with pager duty. They are different duties, governed by different contract sections, occurring at different times of the year. The fact that employees have a right to refuse to plow snow in winter months has no bearing on the separate and distinct fact that they have the right to find another employee to cover their pager duties in non-winter months.

The Village's claim that the straight cover option somehow interferes with its ability to train employees is simply that – a claim, without any proof to back it up. Supervisor Olszewski related an anecdote about some unidentified employees not paying attention during training on how to deal with downed light poles. If that truly happened, he should have addressed it with those employees. That he did not suggests that, it either did not happen or was not a significant problem. As with the snowplowing argument, there is no logical relationship between employees paying attention in training and employees performing on-call duty. Nor is there any reason to believe that on-call duty provides a better chance to use training skills. The specific example used by the Village is how to respond to a traffic light being knocked over. There is no evidence of how often this happens, but given the size of the Village, the Union expresses skepticism that it is a frequent event. Given an infrequent event, and a rotation of on-call duty among employees, the Union believes it is unlikely that employees will have many chances to ply their traffic light skills if the Village prevails. Again, the Village's claimed concern bears no rational relationship to the straight cover option.

The Village's argument that it must cross-train its employees to protect itself from a brain drain is likewise unrelated to on-call duty. The specific employee the Village cited as difficult to replace – Mark Kauth – is also an employee who values earning extra money by working overtime. Eliminating the straight cover option arguably worsens his employment conditions, and gives him an incentive to leave the Village, creating the very evil the Village claims it needs to avoid.

Finally, as to the claim that the Union somehow bore the burden of demanding bargaining, the Union reiterates that it was not the party seeking a change in the status quo. The Union speculates that if it had sought to bargain, the Village would simply have seized on that as proof that it had no vested rights under the practice. The Union notes that bargaining over a new contract had just recently been concluded and asserts that if the Village had wanted to change the straight cover option, it should have taken it to table, rather than laying in the weeds and attempting to secure through unilateral action what it never could have obtained through bargaining.

DISCUSSION

Section 13.09 of the parties' labor contract provides that employees may be required to carry a pager and be recalled for overtime work:

13.09 Paging Device: Employees who are required to carry a paging device during non-working hours for the purpose of recall for overtime work within the Department to which they are assigned, will be compensated at the following rate (Monday through Sunday), for each week the employee is assigned a paging device. Pager assignment compensation will be paid two times each calendar year during the first pay period following May 1 and November 1. Employees who are assigned a paging device are required to promptly respond to all pages. If overtime work is required, the employee will report to the department or work site, as appropriate, as soon as possible within a reasonable time period after receiving the page. At all times during the week in which the employee is assigned a pager, the employee will not consume alcoholic beverages and will not use any drug which impairs or is capable of impairing the ability of the employee to perform work of any type. Employees may exchange the paging device with other employees within the department, with prior notice to and approval of the department head or other designated management official. Nonetheless, the assigned employee remains responsible for providing overtime recall coverage and will receive the full weekly payment. Employees who violate or fail to adhere to the terms of this section are subject to disciplinary action.

This language was negotiated in 1997, and was applied at that time to the water and wastewater utility employees, and to the mechanics and supervisors in the Highway Department. None of those employees were given a straight cover option. They were allowed to trade on-call assignments, but not to avoid on-call duty entirely. The language was then applied to Highway Operators in 2003, but those employees were given the straight cover option, in addition to the ability to make trades. That right was not extended to other employees. The withdrawal of the straight cover option beginning in 2007 led to the filing of this grievance.

The first question is whether the contract is ambiguous, so as to allow consideration of the Union's argument that the straight cover option is a past practice that sheds light on ambiguous language in Section 13.09 and is thereby incorporated into that section. While the right to "exchange" the on-call duty could conceivably extend to giving it away entirely, that is not consistent with the provision as it has been understood in other departments, nor with the language providing that, in the event of such an exchange, the assigned employee would receive the weekly on-call payment. The pay arrangement rather clearly contemplates a true exchange - that the originally assigned employee will be performing the work at some point in the season and thus will earn the pay. The straight cover arrangement, as administered in the Highway Department, does not feature the originally assigned employee retaining the on-call pay. Moreover, if the practice of straight cover was an expression of the negotiated exchange language in the contract, it would presumably extend to employees other than Highway Operators. The contract provision applies to the Parks, Water, and Waste Water Departments as well, yet none of those employees has ever asserted any claim that straight cover should be available to them. Thus I conclude that the straight cover option is not incorporated in the negotiated "exchange" language in the contract. If it has binding force, it must be as a free standing practice, mutually accepted by both parties.

The Village argues that the straight cover option cannot be a binding past practice, since it is inconsistent with the negotiated on-call provisions. There is, however, a difference between saying that the straight cover option is not provided for in Section 13.09, and saying that it conflicts with Section 13.09. Nothing in the straight cover option as it has been applied in the Highway Department requires either party to directly violate any of the express provisions of Section 13.09. Employees wishing to exchange shifts can still do so, under the terms of the labor agreement. Straight cover is a different option, which has co-existed with the exchange system in the Highway Department. If both parties intended that the straight cover option be a durable and binding practice, there is nothing in Section 13.09 that prevents it.

The familiar rule is that a past practice, in order to be enforceable, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as fixed and established practice accepted by both parties. These elements of proof are required to establish, in the face of one party's denial, that there is a sufficient degree of mutuality underlying the practice to demonstrate to the arbitrator that the practice reflects a prescribed manner of proceeding. The practice is inferential evidence of an agreement, and it is considered in light of other evidence, including other inferences. One of the most basic and pragmatic of those inferences is that parties are far more likely to have intended a binding practice to arise in the areas of worker benefits and compensation than in areas concerned with management of the operations.

While the right to give away on-call duty is doubtless a valuable thing to workers, and in that sense is a benefit, it is at its core a transfer, from management to the individual employees, of the right to determine who is assigned to perform work. The right to assign

work is, as a general proposition, a fundamental management right. The right to “...determine the ... personnel by which Village operations are to be conducted” is specifically reserved to management by the terms of Article 2 of the collective bargaining agreement. Certainly management can enter into a binding agreement with the Union to abridge that right. It has done so in Section 13.09, permitting employee trades of on-call weeks. The question here, though, is whether the Village would have informally entered into a practice further restricting this management right, with the intention of being bound to that practice. While it is clear that they did enter into such a practice, the evidence persuades me that there was no intent to be bound to it.

The straight cover option was unilaterally introduced by Olszewski when he took over a Superintendent and decided to have Operators assigned to on-call duty. He had the clear right to make the underlying decision under Section 13.09, and had no need to make any concessions to the Operators in order to include them on the on-call rotation.¹ There was no bargaining or give and take associated with the decision, nor with the introduction of the straight cover option. Olszewski presented the Operators with a form to use for straight cover, and told them he intended to make the option available so long as there were no problems. The Union’s witnesses recall his statement as having been limited to problems with completing and submitting the paperwork, while Olszewski recalled it as being a broader statement, including problems besides mere paperwork. In either event, Olszewski unilaterally introduced the system, and at that time he reserved to himself the right to unilaterally terminate it if certain conditions were not met. That is inconsistent with a negotiated and binding, albeit informal, agreement.

The practice of a straight cover option is clear, unequivocal and well established. In those ways, it has the superficial traits of a binding practice. However, it lacks the normal indicia of a mutual intent to be bound. It is a restriction of a basic management right, imposed unilaterally by management with no quid pro quo from the Union and no input from the workers², and with a reserved right to terminate it under conditions unilaterally defined by management. For these reasons, I conclude that the Village did not violate a binding past practice when it required Highway Operators to perform on-call duty on the same basis as all other bargaining unit employees. Inasmuch as the collective bargaining agreement expressly authorizes the exchange system the Highway Department reverted to in 2007, I find no contract violation, and the grievance is denied.

¹ This would be a very different case if there was no pre-existing right to require on-call duty of the Operators. In that case, the straight cover option could reasonably be viewed as a quid pro quo for their acquiescence to the assignment.

² Neither evidence of some sort of formal negotiation nor an identifiable quid pro quo is required to establish a binding past practice. They would, however, be persuasive evidence of a mutual intent to be bound to what is otherwise a wholly unilateral system.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Employer did not violate the collective bargaining agreement when it eliminated the straight cover option for Highway employees to find volunteers to take their places for on-call duty.
2. The grievance is denied.

Dated at Racine, Wisconsin, this 8th day of January, 2008.

Dan Nielsen /s/

Daniel Nielsen, Arbitrator