BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/ LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

CHIPPEWA COUNTY

Case 245
No. 67418
MA-13877

Appearances:

Roger W. Palek, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, for the labor organization.

Andrea Voelker, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the municipal employer.

ARBITRATION AWARD

The Wisconsin Professional Police Association/Law Enforcement Employee Relations and Chippewa County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there under. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to provide a randomly selected panel of five staff members from which they could select an arbitrator to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the use of a patrol vehicle for commuting purposes. The parties designated Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held Chippewa Falls, Wisconsin, on March 25, 2008; a stenographic transcript was available to the parties on April 8, 2008. The County and Association submitted written arguments on June 2 and June 4, 2008, respectively, and the County submitted a reply on July 1, 2008.

ISSUE

The Association frames the issue as:

"Whether the rescission of the Grievant's vehicle during the time when she was temporarily assigned to the jail violated the contact, and, if so, what is the remedy?"

The County frames the issue as:

"Did the County violate the parties' collective bargaining agreement when it denied the Grievant the use of a patrol vehicle during the period she worked as a jailer, instead of as a patrol officer, after she requested and was granted a temporary reassignment? If so, what is the appropriate remedy?"

I frame the issue as:

"Did the County violate the collective bargaining agreement when it took back Officer Kari Anderson's patrol vehicle when she worked a temporary assignment in the Jail during the late stages of her pregnancy in August, 2007? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

The County possesses the sole right to operate the County government and all management rights related to the same, subject only to the provisions of this Agreement, past practices, and applicable law. Except as expressly modified by other provisions of the contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

B To hire, promote, transfer, and assign employees in positions within the Sheriff's Department;

. . .

D. To maintain efficiency of County operations;

. . .

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

. . .

ARTICLE 23 – RESIDENCY

The following residency requirements are for patrol/investigator positions only:

Residency within the County must be established within six (6) months of successful completion of probationary period as a patrol officer or investigator. Residency patrol office/officer vacancies will be offered to existing patrol officers on a seniority basis, before vacant officer patrol positions are offered to new applicants.

The Sheriff may deem it necessary that a particular patrol vacancy be filled by an employee who resides, or is willing to reside, in a particular area in the County. If the Sheriff deems a particular residence area as necessary, that information will be included in the job posting. All other employees must, however, reside within the thirty-five (35) miles of Sheriff's Department headquarters.

OTHER RELEVANT LANGUAGE

County Ord. 42-4 Sheriff patrol division residency requirement

(a) Purpose. The county establishes residency requirements for sheriff's department patrol division in order to assure greater exposure of law enforcement personnel throughout the county. Residency requirements will allow for patrol division officers to commence duty from their home and be regionally available for emergencies and services in the area they reside. Residency requirements will distribute officers throughout the county. To accomplish this end of designated residences, the county shall provide vehicles for officers and require the vehicles to be stationed at the officer's residence in off-duty hours.

. . .
. . .
. . .

(d) *Vehicles Provided.* The residency requirement shall apply only for such period a the county shall provide the vehicles for the officers effected.

. . .

BACKGROUND

The grievant, Kari Anderson, has been employed by the Chippewa County Sheriff's Department since May, 2001, when she was hired as a jailer. She posted into the position of

patrol officer in March, 2004. As a patrol officer, she became subject to the residency requirement contained in Article 23 of the parties' collective bargaining agreement, and met that requirement by virtue of the home she already owned in the designated area. It is about 20 miles from Anderson's home to the Chippewa County Jail and Sheriff's Department.

Sheriff Department Policy 201.01 requires patrol officers to wear their protective vests "at all times, while working," except when the officer "is involved in plain clothes or undercover work or special detail that the Supervisor determines would be compromised by use of body armor." Policy 20.105 exempts officers from the body armor policy "when a physician determines that an officer has a medical condition that would preclude use of body armor."

Anderson was pregnant with her first child when she posted into the patrol position; she did not begin work as a patrol officer until after the birth, at which time she was provided with a County patrol vehicle pursuant to county ordinance 42-4.

On or about March 14, 2007, Anderson informed Lt. Mitch Gibson, one of her supervisors, that she was again pregnant. On March 14, 2007, Gibson sent the following e-mail to the County personnel office:

> Malyana/Shirley, I have been advised by Kari Anderson that she is 4 months pregnant. She seemed to be apprehensive about letting us (k)now, fearful of no light duty maybe. I advised her that I thought it was totally up to her as far as how long she wants to work on the road and I would get the specifics from you as far as light duty. She is 4 months along and the due date is Sept. 5th. I would hope if (at) all possible we could work out a deal with the jail to allow her to work in the control center and possibly have Zunker fill in for her when the time comes for light duty. I believe that she is still on good terms with the jail as she is still on their cert team. I advised her that she should touch base with your Dept. and that I would let her know what I find out. I am a little apprehensive about SWAT and CERT participation from the stand point of the possibility of being exposed to Flash Bangs which are percussive devices.

The following morning, County personnel director Shirley Ring replied to Gibson as follows:

> Thanks. I have let Malayna know that Kari may be stopping in. I will look into the options available once she informs us of her circumstances and what she is comfortable with (and what her physician is recommending). We will then let you know what needs to be changed (if anything).

Eugene Gutsch is a Field Services Captain with the Chippewa County Sheriff's Department, and as such is one of Anderson's supervisors. On or about July 25, 2008, Gutsch prepared a statement for the files, accurate in all accounts, as follows:

. . .

On Tuesday 07-24-07 at approximately 2pm Officer Anderson and her husband came to my office. Officer Anderson stated she wondered if there was some light duty available or work that needed to be done in Investigations, as she was becoming uncomfortable in the squad due to her pregnancy. Officer Anderson stated her vest (body armor) was not fitting well enough to be comfortable in the squad.

I told Officer Anderson I knew of no light duty or alternate duty available in Investigations or Patrol, but suggested the Jail may have alternate work available as had been indicated to her sometime ago.

I asked Officer Anderson what time frame she was looking to get out of the squad due to her discomfort. She stated immediate and then asked if she could have some time to think about it. I told Officer Anderson I would contact Captain Jerabek and inquire availability and get back to her.

I also told Officer Anderson she would need to provide her own transportation to and from the Jail, as her assigned squad would be needed for the person that may be coming out of the Jail. This person is the temporary assignment given to Jason Zunker.

Officer Anderson said she did not feel this was right, as she should be entitled to her squad for driving to and from the Jail. She said she would have to further consider going to the Jail because of the expense and inconvenience to have to use her own vehicle. I told Officer Anderson I would check with the Jail and see what was available for her and get back to her later today (Tuesday).

Officer Anderson's husband stated they could not afford to have her not work and be off on family leave before the baby was due.

After Officer Anderson left the office I made contact with Captain Jerabek making him aware of the request by Officer Anderson. He said he would speak with Lt. Proue and get back to me.

A short time later Captain Jerabek called back and stated he would be able to use Officer Anderson and asked that she come in and speak with Lt. Proue on her first day of work (Wednesday 07-25-07) to setup a schedule.

I called Officer Anderson and informed her of the arrangements to meet with Lt. Proue on her first day back to work and she along with Lt. Gibson would meet with Lt. Proue and work out a schedule.

> A short time later after speaking with Officer Anderson she called back and said she was no longer interested in going to the Jail as the association was prepared to make an issue for her not having her car to commute. I told Officer Anderson that was interesting as I had told no one of our conversation and was surprised the association was so quick to get involved. She said, you know how it goes.
>
> I told Officer Anderson the ball was in her court and my understanding was she was going to continue on Patrol. She said yes she was going to continue on Patrol until her due date.

Anderson did not discuss the matter any further with Gutsch, whose next involvement with this matter came when the personnel office notified him about two weeks later that Anderson would be working at the jail until her due date. Gutsch than made provisions to retrieve the patrol vehicle from Anderson's residence on August 9.

About that same time in late July 2007, Anderson had two telephone conversations with Ring, which Ring contemporaneously summarized as follows:

> K Anderson spoke with Gibson re: comfort level in squad and with protective vest. I followed up with Anderson, stressing to her that she has options (vac, comp, and possibly hours in the jail). She asked specifically about working investigations as that is something she is interested in doing. I told her that she must have that conversation with Capt Gutsch as I do not know if there is work that she could do in investigations and I am not in a position to speak for Capt Gutsch. The same thing applies to the jail. She must have that conversation first with Field Services management (Gibson/Gutsch) and then with Capt Jerabek. She stated that she was going to stay in patrol for now. I reiterated to her that she should let someone know if her situation changes.
>
> Second phone contact with K Anderson
>
> Anderson contacted my office to inform me that she had reached the point where she could not continue in the patrol duties (too uncomfortable in the squad and the vest was not fitting appropriately) she informed me that she had spoke with Gibson/Gutsch about the possibility of this happening and that there might be hours in the jail. She stated that she needed all the time she had on the books for after the birth of the baby. I directed her to her supervisors and Capt Jerabek as I can not determine whether or not she can work hours in the jail.

The County did not have any larger vests that would fit the grievant during the advanced stages of her pregnancy. When the County had ordered new vests in the past, they did not arrive for between two and four months.

Anderson's physician never placed any medical restrictions on her, and no one from the county ever determined she was physically incapable of serving as a patrol officer.

The formal reassignment by the County of a patrol officer to other duties requires the preparation by a command officer of a document detailing the reassignment, to be signed by the sheriff. There is no evidence that any such document was prepared formally reassigning Anderson from patrol duties to the jail. Sheriff James Kowalczyk testified he was aware of Anderson's situation, believed that she had made a request for such a temporary reassignment, and that he did approve her request. There is no evidence that Gutsch or any other supervisor directed or ordered Anderson to temporarily transfer to a jail assignment.

At some point in early August, it was determined that Anderson's first day back at the jail would be August 9. At the department's direction, and contrary to Anderson's stated desire, the department took possession of the patrol vehicle she had been using; quartered at the central fleet location, the patrol vehicle was used by a replacement officer on five shifts over the next twelve days. Anderson worked in the jail until August 28 (12 shifts) before giving birth on August 29. [1] Following the birth, Anderson took Family and Medical Leave until returning to her assignment as a patrol officer.

On August 13, 2007, the Association filed a grievance with the County claiming that the county had violated Article 1 and Article 23, as follows:

> **REQUESTED REMEDY:** That Officer Anderson is provided the use of a County vehicle on work days.
>
> **ISSUE:** Did the County violate the Article 1 and 23 when the use of a departmental vehicle was denied her while temporarily assigned to the Jail.
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> **FACTS:** On August 9, 2007, Officer Anderson was told she would not be able to have use of her departmental vehicle while temporarily assigned to the Jail. Officer Anderson has a permanent Patrol assignment where she is required to live within a certain area of the County and has been provided a Departmental vehicle on that basis.
>
> **ARGUMENT:** Officer Anderson is maintaining that residence and continues to work. The temporary assignment in the Jail is for documented medical reasons. Under current practice and County Ordinance 42-4, Officers who post for and maintain Patrol positions are provided County vehicles. Other members of the Department who have assigned vehicles have not lost use of the vehicle while they continue to work. The Association acknowledges Department vehicles may have been temporarily reassigned when Officers are unable to and are not performing any work.

[1] Under the collective bargaining agreement, patrol officers and jailers are paid the same.

On August 17, the Association re-filed the grievance on a formal county grievance form, adding as a further remedy, "or an equivalent level of benefits that the squad car provides."

Following Sheriff Kowalczyk's denial of the grievance on August 23, WPPA Business Agent Joe Durkin appealed the matter to Personnel Director Ring, offering to waive any time limits "as Officer Anderson is expecting any day and will be on Family Leave." Durkin wrote:

> We believe the central issue to be that Officers posting for Patrol positions under the Residency Article 23, have been granted a certain level of benefits, i.e., providing a County vehicle to the employee for work and to keep at their residence during off-duty hours. The Association's position is that this benefit cannot be unilaterally changed without bargaining those changes with the Association. Since the WPPA is the exclusive bargaining agent for the Association and we have not been advised that the County wanted to change this level of benefit before doing it, we believe this also violates Article 1 – Recognition, of the agreement.

Ring denied the grievance on September 5, writing to Durkin:

> . . .
>
> Kari made a request to change her assigned duties. Management reviewed her request, determined what options were available, and outlined the conditions of those options. Kari made her decision knowing the options and the conditions of those options.
>
> . . .

On September 17, Durkin appealed Ring's decision to the county Personnel Committee, which also denied the grievance. On November 6, the Association filed a timely request for grievance arbitration.

POSITIONS OF THE PARTIES

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

> The use of a county vehicle for commuting is a mandatory subject of bargaining; therefore, the County may not unilaterally discontinue this benefit. It is beyond reasonable dispute that the use of a County-provided vehicle for commuting provides an employee with an economic benefit; absent a mutually-negotiated change, the County did not have the unilateral right to discontinue this benefit.

The evidence establishes that a binding practice of providing residency-restricted patrol officers with a county vehicle for commuting purposes existed; therefore, the County violated the collective bargaining agreement when it refused to allow the grievant to drive her County vehicle to and from work.

It is a condition of employment that patrol officers have residency restrictions. In exchange for the limitations such a restriction places on patrol officers, the parties agreed that the County would provide the officers with a commuting vehicle. As a practical matter, the grievant was still required to maintain her residency in the County during her temporary transfer. Therefore, consistent with past practice, she was entitled to a vehicle for commuting. The County simply cannot decide to transfer her and then unilaterally eliminate a contractual benefit to which she was entitled.

Testimony showed there were three patrol officers who were ordinarily provided with county vehicles who kept their County vehicles when working temporarily in non-patrol assignments.

The evidence of past practice is extensive, showing that patrol officers who are bound by the residency requirement of Article 23 continue to enjoy the benefit of a County vehicle even while they are on a temporary non-patrol assignment. There should be little question of whether a binding practice was established and that the County's actions violated it.

Officer Anderson did not request a transfer to a temporary assignment and even if she did, it would be completely irrelevant to the question of whether or not the county has a contractual obligation to provide a vehicle to patrol officers who have a temporary non-patrol assignment. While the transfer mystery is an unusual and interesting diversion, it is completely irrelevant to the issue of whether there is a contractual obligation on the part of the County to provide the grievant with a County vehicle. It is a fat and lively herring liberally slathered in water-resistant red paint. The past practice is elegantly clear in establishing that vehicles have always been provided to officers who have been placed in temporary non-patrol assignments. Furthermore, there is no evidence that even a patrol officer who requested a temporary non-patrol assignment would forfeit the County-provided vehicle.

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

The County did not violate the parties' collective bargaining agreement when it temporarily rescinded the grievant's patrol vehicle after she requested, and was granted, temporary reassignment to the jail. The purpose of ordinance 42-4 was not to assist officers with their commuting, but to allow officers to start duty

from their home and be available for emergencies. It would be irresponsible for patrol officers who are not able to perform the duties of that position to be holding themselves out as officers by using their patrol vehicles to commute.

While patrol officers are in paid-duty status as soon as they check in on their patrolradio, jail officers are not paid for their commute and are not on duty until they arrive at the jail. The grievant asked for, and received, a voluntary, temporary accommodation, yet she has demanded the maintenance of benefits of a position in which she was not working at the time. The grievant was working as a jailer and jailers do not get patrol vehicles.

There is no past practice that would prevent the County from temporarily denying the grievant the use of a patrol vehicle during the period in which she worked as a jailer instead of as a patrol officer.

There is no past practice that would prevent the County from temporarily denying the grievant the use of a patrol vehicle during the period in which she worked as a jailer instead of as a patrol officer. The County has routinely used a fact-specific analysis to determine whether a patrol officer can use a patrol vehicle during periods of light or restricted duty. The County considers public expectations, whether there are liability issues, and employee safety. Despite the grievant's testimony that she was able to perform her regular patrol duties, it was the grievant who asked for light duty and told Lt. Proue that she would be working in the jail until her due date. The County merely took her at her word when she claimed she could no longer wear the vest and was not comfortable working patrol duties.

Also, the vehicle which grievant had been using was needed by her patrol replacement, a reality that was a significant factor in the County's decision.

A review of situations arising when employees returned to work under Worker's Compensation shows three instances in which patrol officers used their own vehicles if they were unable to perform patrol duties upon their initial return to work. Because there have been no instances of the County granting a request comparable to that made by the grievant, the Worker's Compensation experience is informative.

Throughout this situation, the County acted in good faith, even going above and beyond any contractual or statutory requirement by granting the grievant's request to work temporarily as a jailer, even though it was under no obligation to do so. But for the County's willingness to let grievant work temporarily in the jail, she most likely would have gone out on paid or unpaid leave; the County was under no obligation to grant her request for light duty. No one from the County directed her to work in the jail; the grievant approached the

> County and asked for the light duty work. Then, once they agreed to let her temporarily work in the jail, she proceeded to demand the use of the same patrol vehicle she had just claimed she was uncomfortable working in to begin with.

The Association did not file a reply brief. The Employer filed a reply brief in which it further posited as follows:

> The Association has clearly failed to satisfy its burden of establishing a past practice. Other than one witness testifying to situations he had "heard about," the Association offered no testimony from the individuals involved, nor any detailed information at all. Further, the situations the Association witnessed testified to all involved worker's compensation, which the Association in its brief contended was not particularly relevant. The past practice which the Association claims was neither clearly enunciated, readily ascertainable, nor unequivocal.
>
> The Association also fails to offer any evidence that there was a quid pro quo between the residency requirement and the provision of a patrol vehicle. There is no evidence in the record about the bargaining history of these provisions.
>
> The Association in its brief raises the allegation that the County discriminated against grievant on the basis of her pregnancy, but then admits the County did not violate state or federal law. The grievant asked for an accommodation due to her discomfort and inability to wear the protective vest; the County treated her in the same manner it has treated all other employees who were temporarily disabled, and has never alleged grievant was unfit for duty due to her pregnancy. It was the grievant herself who asked for the accommodation because of her discomfort and inability to wear the necessary vest. It is disingenuous for the grievant to claim she needs a temporary transfer, yet claim at the arbitration hearing that she was perfectly able to continue performing patrol work. But apparently the grievant wanted to keep "her" patrol vehicle while demanding a reassignment due to her severe discomfort and inability to wear her vest. Such a position is unreasonable.

DISCUSSION

This grievance involves a patrol officer who asked the county to provide a temporary reassignment because she could no longer wear her protective vest or drive comfortably in her patrol vehicle due to her pregnancy, but who still wanted to use her patrol vehicle to commute after the county offered a temporary reassignment to the jail.

In mid-March, 2007, the grievant, Kari Anderson, told a supervisor, Lt. Gibson, that she was pregnant, with a due date of September 5. Gibson told her she could work on the road as long as she wanted, and he would find out about light duty thereafter, particularly back in

the jail. He promptly contacted county personnel director Ring, who reaffirmed that the county would look into options to accommodate Anderson and her physician.

In late July, Anderson told Capt. Gutsch that she was uncomfortable in her body armor and patrol vehicle and was looking for a temporary reassignment, preferably to light duty. She said she wanted this to be done immediately (but also asked for more time to think about it). Gutsch told Anderson that the only availability was at the Jail and that she'd have to give up her patrol vehicle, which Anderson challenged. After Capt. Jerabek confirmed that Anderson could come back to the jail, Gutsch contacted Anderson and told her to meet with Lt. Proue on her first day back to work out a schedule. Soon thereafter, Anderson renounced her interest in the jail assignment, and informed Gutsch the association would be challenging the loss of the vehicle for non-patrol commuting. Gutsch reaffirmed that the initiative belonged to Anderson, who told him she planned to stay on patrol until the first week of September.

Also in late July, Anderson spoke directly with Ring about her discomfort in the patrol vehicle and with the body armor. Ring reminded her of her options, including the jail, but said that she was not the person with whom Anderson should be discussing specific departmental assignments. In a second conversation, Anderson contacted Ring and told her she could no longer continue on patrol due to the vest not fitting and her discomfort in the squad, and that she understood from Gibson and Gutsch there might be hours for her at the jail. Ring again told her she needed to discuss such a reassignment directly with department supervisors.

On August 9, without any supervisor directing her or ordering her to stop her patrol work and accept a temporary assignment, Anderson reported for duty at the jail. On that date, the county retrieved the patrol vehicle she had been using, so that it would be available for her replacement on patrol.[2] Anderson and the Association then grieved the temporary loss of the patrol vehicle, and the County's refusal to allow her to use the vehicle for commuting purposes.

There are two bases upon which the association could prevail in this proceeding. The first is if the explicit language of the collective bargaining agreement supports its contention. The second is if there is a binding past practice that does so.

Neither the language of County Ord. 42-4 (a) nor the policy it reflects supports the association's position. That ordinance first establishes residency requirements "in order to assure greater exposure to law enforcement personnel" throughout the county and also to "allow for patrol division officers to commence duty from their home" and be available for emergencies and services in the area in which they reside. "(T)o accomplish this end of designated residences," the ordinance then requires the county to provide vehicles for officers, to be stationed at the officer's residence. That is, the personally assigned vehicles are a

2 Anderson testified that on August 9, Gutsch told her to leave the patrol vehicle at the jail following her first shift and the department would drive her home, but that she refused, informing him she needed to drive the patrol vehicle home because of her children, and the department could come get it. Gutsch testified he had no recollection of the specifics of how the department retrieved the vehicle.

condition of employment *for patrol officers* in recognition of their patrol duties. But Anderson had asked to be excused from her patrol duties and given a temporary reassignment, and the county honored her request. As Anderson was not serving as a patrol officer, she was not entitled to the conditions of employment specific only to that position.

Moreover, Anderson herself could not and did not satisfy the terms of employment required of a patrol officer. The County and its people have the reasonable expectation that Chippewa County officers driving in Chippewa County in Chippewa County patrol vehicles will respond to any and all public need for a law enforcement officer. If Anderson were driving a patrol vehicle to or from the jail, she would be required to provide assistance and respond to calls. Even though she had been temporarily relieved of her permanent patrol assignment, Anderson was thus required to dress and perform as a patrol officer during her commute, including wearing her body armor. But by her own declaration, she could no longer do that.

All patrol officers except those on special assignment or with a overriding and verified medical condition are required to wear body armor "at all times, while working." Anderson satisfied none of the standards for exemption, and thus would be required to wear her body armor at all times while commuting to and from the jail. But she held herself out as being physically unable to do so. Anderson cannot seek release from her patrol duties because she could not wear her vest, then demand the right to drive a patrol vehicle when doing so would require her to wear her vest. The County therefore had the right to prevent her from driving a marked County patrol vehicle.

The Association also contends that there was a binding past practice which supports its claim.

The Association correctly states the standards which must be met to establish a binding past practice. As I summarized in HARTLAND-LAKESIDE SCHOOL DISTRICT, DEC. NO. 6918 (Levitan, 11/14/05)

> The standard to establish a past practice has been well-settled for more than fifty years. In its most famous articulation, to become binding on both parties, a practice must be "unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." CELANESE CORP. OF AM., 24 LA 168, 172 (JUSTIN, 1954). Or as the U.S. Supreme Court held in a seminal case, a practice "must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. (I)t must be accepted in the sense of being regarded by those involved as the normal and proper response to the underlying circumstances presented. UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 581-581 (1960). As the distinguished arbitrator Richard Mittenthal explained in an influential exegesis on the topic, a course of conduct must have clarity and consistency, longevity

> and repetition, and mutual acceptability "before it can legitimately be regarded as a practice."

The Association relies heavily on JACKSON COUNTY, MA-10536 (Levitan, 11/10/99). In that case, officer sheriffs had been routinely allowed to use their assigned patrol vehicles for commuting purposes during periods when they were on restricted light duty. For example, one officer had used his assigned patrol vehicle on 15 occasions to commute to duty as a dispatcher while recovering from knee surgery; another had used his assigned patrol vehicle to commute to his light duty assignment following a leg injury. The grievant himself had previously driven his assigned patrol vehicle to commute to light duty assignments following injuries several years earlier, and was also allowed to keep his patrol vehicle at his residence for several months while on extended sick leave/worker's compensation. Then the Sheriff read a magazine article that gave him concerns over the County's liability, employee safety and public understanding if the practice continued, and unilaterally abrogated the past practice authorizing such use.

As I wrote in sustaining the grievance and ordering the County to reimburse the grievant for mileage expenses incurred when he should have had use of a County vehicle:

> The Association presented testimony and evidence of several officers 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 officers 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.

In CITY OF NEW LONDON, MA-5945 (Knudson, 6/30/97), the arbitrator found that the City had implemented and followed a policy for twenty five years of providing police officers with transportation to and from their houses when they were either completing or starting a shift. The City then unilaterally decided to discontinue this practice, requiring all officers to provide their own transportation to and from the police station. The arbitrator found that the City did not have the right to discontinue the practice of transporting police officers to and from the Police Department during the term of the contract.

In support of its claim as to a binding past practice, the Association claims there were three patrol officers who kept their County vehicles while temporarily working in non-patrol assignments. The Association cites as “the most telling example of past practice” the time that Officer Chris Pake continued to use his patrol vehicle for commuting purposes while temporarily assigned to dispatcher duties. But the County notes that it had unilaterally and involuntarily reassigned Pake back to dispatcher duties because it was short-staffed. Although

the Association claims that the issue of how Anderson's temporary reassignment came about is just an irrelevant diversion, the details of the respective situations are obviously critical in assessing where there are binding past practices. Anderson expressed to several County managers her discomfort in her vest and patrol vehicle, and her desire to work temporarily on a different assignment, and was soon afforded that opportunity, which she voluntarily took; Pake expressed no unhappiness about his patrol duties, or desire for change, but was involuntarily and unilaterally reassigned by his supervisors so the County could address a staffing need.

I agree with the Association that the County "simply cannot decide to transfer her and then unilaterally eliminate a contractual benefit (to) which she was entitled." Indeed, that is why the County did not take Officer Pake's patrol vehicle away when it involuntarily transferred him back to dispatch for a period of time. But that is not what happened with Officer Anderson, who explicitly and repeatedly requested an assignment for which she did not have to wear her protective vest and spend an entire shift in her patrol vehicle.

The Association contends that Anderson "believed she was obligated to report to the jail for a temporary assignment and she dutifully complied." The record does not support that contention.

In support of its analysis, the Association relies on the following testimony by Anderson, on direct examination:

> Q: At that time did Captain Gutch order you to the jail or did you have any further conversation with Captain Gutch about returning to the jail?
>
> A: That was the only place that they had any work for me to do, so I went back.
>
> Q: Okay. Did you agree at that time to having your vehicle taken?
>
> A: No.

That is, Association counsel asked the grievant the central question: Did Captain Gutsch order her to end her patrol assignment and report to the jail? But the grievant simply did not respond in the affirmative, instead merely confirming the County testimony – the jail was the only place the County had for temporary assignment, so Anderson "went back." She was not directed or ordered. She was offered the opportunity to return to the jail during the last stages of her pregnancy, and she "went back." There simply is no way Anderson could have "believed she was obligated" to report to the jail. Instead, the record clearly establishes that Anderson asked for an alternate assignment; that the one she was offered was in the jail, and that she voluntarily – without any direction, command, or order – accepted the temporary reassignment to the jail.

As I understand what it takes to establish a past practice, and as I understand the facts of this grievance, the circumstances involving Officer Pake do nothing to establish a past practice that extends to Anderson's situation. The cases on which the Association relies are easily distinguished from this grievance.

There simply is no past practice – and certainly not one which is readily ascertainable, clearly and mutually understood, and of long-standing – whereby patrol officers who request temporary reassignment to the jail because they are unable to fit in their protective vests and feel uncomfortable in their patrol vehicle and are allowed to keep their patrol vehicles for their personal commute during their temporary reassignment.

The Association also claims that three officers –Al Diede, Bob Cunningham and Kem Oemig – all retained County vehicles while on worker's compensation (WC) light duty. However, County records indicate that Oemig performed patrol duties for six hours per shift; Diede drove his own vehicle, and Cunningham used a fleet vehicle but not a patrol vehicle.

Given the statutory provisions of the WC system, I do not believe past situations involving other officers on worker's compensation provide meaningful past practice for Anderson's non-WC reassignment. And even if they did, these particular situations clearly differ from Anderson's so much on so many so points that they offer nothing to the Association's case.

Finally, the County had a clear and legitimate need for the patrol vehicle, so that a replacement officer could use it after assuming Anderson's patrol duties (which, indeed, another officer did).

Anderson could no longer serve as a patrol officer, yet she claims the right to have a patrol vehicle – which her patrol replacement would need –for the 20 miles commute to her temporary reassignment as a jailer. That is, Anderson found it too uncomfortable to wear the vest and be in the patrol vehicle, yet she wanted the County to still provide the vehicle – in which she would still have to wear the vest – in order for her to commute to the jail. I reject that claim

Neither the collective bargaining agreement, past practice, nor any version of public policy, support the grievant's claim.

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

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 29th day of September, 2008.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

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