

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OSHKOSH CITY EMPLOYEES' ASSOCIATION

and

CITY of OSHKOSH

Case 214
No. 49902
MA-8096

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.

Mr. Warren P. Kraft, City Attorney, City of Oshkosh, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and decide the grievance of Word Processing Operators concerning their break and lunch periods. A hearing was held in Oshkosh, Wisconsin, on February 1, 1994, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on July 25, 1995.

ISSUE:

The issue is:

Did the City violate Article XIII of the collective bargaining agreement when it prohibited Word Processing Operators from combining their 15-minute rest periods with their unpaid lunch break? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE XIII

REST PERIODS

SECTION 1. Full time employees shall be granted two (2) fifteen (15) minute rest periods per work day, one (1) to be scheduled during the first half of the work day, and one (1) to be schedule during the second half of the work day. Such breaks may not be accumulated.

BACKGROUND:

For the past 13 and a half years, Word Processing Operators have used their contractual 15-minute breaks with their lunch breaks, to take a longer lunch period of either 45 minutes or one hour. Dawn Herzig became Office Manager of the Police Department on January 11, 1993, and issued the following memo four days later:

It has been brought to my attention that the employees of the word processing department are taking a one hour lunch period. In reviewing the contract, I have discovered that you are allowed one half hour unpaid lunch time and two 15 minute breaks. According to article 13 entitled REST PERIODS:

SECTION 1. "Full time employees shall be granted two (2) fifteen (15) minute rest periods per work day, one (1) to be scheduled during the first half of the work day, and one (1) to be scheduled during the second half of the work day. Such breaks may not be accumulated."

Therefore from this day forth, employees of word processing will take their one-half hour lunch separate from their two 15 minute breaks. The breaks may not be coupled with the lunch period, nor with another break.

If you have any problems with this, please contact me or Lt. Wilkinson.

Captain Graves and Police Chief Thome brought the matter of breaks and lunch to the attention of Herzig during her first day on the job.

Catherine Lehndorf has been a Word Processing Operator for 13 and a half years. The duties of a Word Processor in the police department or safety department include processing police reports, jail reports, arrests, and records. The County used to employ this group of Word Processing Operators but the City took over this service in January of 1989.

During the time that Lehndorf worked for either the County or the City, she regularly took one or both breaks with her lunch period to have a longer lunch period. She used her discretion to determine whether or not to take a break, depending on the work load. She did not tell her supervisor when she was taking a break or when she was going to lunch. Before Herzig became Office Manager, Lt. John Bellin was her supervisor. Lehndorf was never told that she could not combine her breaks with her lunch period, and never heard an objection regarding her practice. She was never denied the opportunity to combine her breaks with lunch. She views this practice as a benefit, as the one-half hour lunch period is not enough time to eat and unwind. Also, her husband is an employee of the police department, and she often takes lunch breaks with him.

The office arrangement currently does not allow the supervisor, Herzig, to look directly into the Word Processing Operators' office. Before a door closed off the view, Lehndorf could see into Bellin's office and he could see into her office.

Penny Hoge has been a Word Processing Operator in the Police Department for 11 and a half years, and before room dividers were put up in January of 1993, she could see Bellin and Herzig in their office until Herzig changed her desk. Like Lehndorf, she often took either 45 minutes or one hour for lunch, depending on the work load. She believes that her supervisors were aware of this practice.

Herzig supervisors other employees, such as Telecommunication Clerks, Complaint Desk Clerks, Records Personnel, Court Liaison Clerk, all of whom are covered by the collective bargaining agreement. Complaint Desk Clerks combine their breaks with their lunch periods.

THE PARTIES' POSITIONS:

The Union asserts that there was a clear, long-standing practice that allowed the Word Processing Operators to combine their breaks with their lunch periods. While the City claims it was unaware of the practice, its evidence consisted of a supervisor who was hired four days before the elimination of the practice. The Union asserts that a practice cannot be negated simply by hiring a new supervisor who can legitimately claim that she has no knowledge of a given practice.

The Union contends that it has shown that the practice was consistent, long-standing, mutually accepted, and that the practice is binding. A coffee break policy is a mandatory subject of bargaining, and where a work rule relates to a mandatory subject of bargaining, the rule itself is bargainable. The City does not have the right to unilaterally change a mandatory subject of bargaining. Further, the Union charges that the change was arbitrary, capricious and discriminatory. The Complaint Desk Clerks, other employees covered by the same labor contract, continue to be allowed to combine their coffee breaks with their lunch breaks. The City is not applying the contract consistently. The contract only prohibits the accumulation of breaks, not the combination of breaks. Employees may not carry over their breaks from one day to the next. The City has not shown any legitimate business reasons why one group can continue to combine breaks and another group cannot.

The City asserts that the clear language of Article XIII indicates that the parties have previously achieved a meeting of the minds as to how coffee breaks are to be handled. The Employer has the right to issue rules and regulations concerning the operations of its facility, and the Personnel Policy Manual contains the specific prohibition that coffee breaks are not to be combined with the lunch period. Also, Article VI covers work hours for the Word Processors and indicates that changes in the work schedule shall be subject to negotiation.

While the Union rests its argument on a past practice, it is well established that clear contract language prevails over custom and practice. A party may insist on complying with clear contract language in the future even where it was not followed in the past. The City took the necessary steps to enforce the specific language of the contract. The Union has not shown that the City mutually assented to what the Union calls a clear, long-standing practice. The City disputes a 13 and 1/2 year practice where these employees did not become City employees until

January 1, 1989. Further, no one informed Lt. Bellin when they took their breaks and did not discuss their break schedule with Lt. Bellin when they became City employees in 1989. The employees simply continued their practice as when they were County employees. The lay out of the police department also allowed the Word Processors to leave the area for breaks without being observed by past and current supervisors. Thus, there was no mutual acceptance of the practice. The Union seeks a remedy that requires the arbitrator to add language to Article XIII, an act which the arbitrator has no authority to do.

DISCUSSION:

The City correctly points out that if the contract language is clear, the past practice does not prevail in lieu of such language. The only language at issue here is the last sentence of Article XIII, regarding rest periods, which states: "Such breaks may not be accumulated." The question is whether combining breaks with lunch periods would run afoul of that sentence.

Although the City strenuously objected at hearing to the relevancy of other employees' use of breaks and combining breaks with lunch periods, the fact that other employees -- who are in the same bargaining unit, working under the same contract language, working for the same supervisor -- combine breaks with lunch periods is relevant. The City cannot claim in one instance that the contract language is clear and that the past practice conflicts with it, while in the other instance, it interprets the language in a different manner or allows a practice to stand in conflict with it. The evidence established that the Complaint Desk Clerks, who work under the same collective bargaining agreement, combine their breaks with their lunch periods. And Herzig is aware of that practice. Therefore, if there is any ambiguity in the language, the City has created part of it by enforcing the language in different ways.

Accordingly, I find it appropriate to look to the past practice to help in interpreting what the parties meant by the statement that "breaks may not be accumulated." The City disputes the practice as not mutually accepted, arguing that supervisors did not necessarily know when the Word Processing Operators were taking their breaks, and that the employees simply continued their practice of taking breaks that they enjoyed when they were County employees.

It is not necessary that everyone in management be aware of a practice in order to find mutual acceptance of the practice. The Police Chief and a Captain brought the matter to the attention of the new Office Manager, Herzig, during her first day on the job. Thus, supervisors and managers high up in the Department had the requisite knowledge of the practice and had accepted it for a period of years.

Whether the duration of the practice was 13 and 1/2 years or five years is of little consequence to determine whether the practice was long standing, because it occurred on a daily basis was and repeated so many times that it was readily ascertainable over a reasonable period of

time.

If the City had a legitimate business reason to discourage the practice of combining lunch with breaks, it did not bring it forward. If there is an emergency or if there are operational needs which would require the services of the Word Processing Operators to be on duty in such a manner that a 45 minute or hour lunch break would interfere with the operations of the Department, the City may, under that guideline, refuse to allow employees to combine breaks with lunch periods. However, as a general rule, unless or until the parties change the language through contract negotiations, the practice of combining breaks with lunch periods should be allowed because of the way the parties in the past have interpreted the language of Article XIII. The Arbitrator will not disturb that interpretation.

AWARD

The grievance is sustained. The City is ordered to allow the Word Processing Operators to combine their breaks with their lunch periods in accordance with the guideline noted above.

Dated at Elkhorn, Wisconsin, this 16th day of August, 1995.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator