

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-22-04

(UNFAIR LABOR PRACTICE)

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|---------------------------|---|--------------------|
| OREGON AFSCME COUNCIL 75, | ) |                    |
| LOCAL 2831,               | ) |                    |
|                           | ) |                    |
| Complainant,              | ) |                    |
|                           | ) |                    |
| v.                        | ) | RULINGS,           |
|                           | ) | FINDINGS OF FACT,  |
|                           | ) | CONCLUSIONS OF LAW |
| LANE COUNTY               | ) | AND ORDER          |
| HUMAN RESOURCES DIVISION, | ) |                    |
|                           | ) |                    |
| Respondent.               | ) |                    |
| _____                     | ) |                    |

This matter comes before this Board on no objections to the proposed order issued by Administrative Law Judge (ALJ) Vickie Cowan on January 7, 2005, following a hearing on August 20, 2004, in Eugene, Oregon. The hearing closed on August 31, 2004, upon receipt of the parties' post-hearing briefs.

Jim Steiner, Union Representative, Oregon AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

David B. Williams, Assistant County Counsel, Lane County Courthouse, 125 E. 8<sup>th</sup> Avenue, Eugene, Oregon 97401, represented Respondent.

On April 15, 2004, Oregon AFSCME Council 75, Local 2831 (Union) filed this unfair labor practice complaint alleging that Lane County (County) violated ORS 243.672(1)(a) and (e) when it unilaterally discontinued the practice of allowing building inspectors to take County vehicles home overnight. On May 13, 2004, the Union amended its complaint and withdrew the subsection (1)(a) allegation. The County filed a timely answer denying certain allegations and alleging affirmative defenses.

The issue presented for hearing is: Did the County violate ORS 243.672(1)(e) by unilaterally discontinuing the practice of allowing building inspectors to take County vehicles home overnight?

The ALJ concluded that the Union had not met its burden of establishing a past practice and recommended dismissal of the complaint. We adopt the ALJ's proposed order as modified below and dismiss the complaint.

### RULINGS

The ALJ's rulings were reviewed and are correct.

### FINDINGS OF FACT

1. The Union is the exclusive representative of a bargaining unit of employees employed by the County, a public employer.

2. The County and the Union are parties to a collective bargaining agreement (CBA) effective July 1, 2003 through June 30, 2005.

3. Article IX, Section 8—Reporting Place—of the parties' CBA provides, in relevant part:

“(A) Nonexempt employees shall report to their permanent place of reporting so as to begin work at the designated starting time and shall return to their reporting place so as to be off work by the designated quitting time.”

4. Article XVII—*Relationships*—provides, in relevant part:

#### “Section 1 — Change in Conditions

“(A) Except as provided for in Paragraph (B) below, all employment relations as defined by ORS 243.650(7) not specifically mentioned in this Agreement shall be maintained at not less than the level in effect at the time of the signing of this Agreement.

“(B) If the COUNTY proposes to implement a change in matters within the scope of representation as defined by ORS 243.650(7) and not specifically mentioned in

this Agreement that would result in more than a de minimus effect [sic] on the bargaining unit, the COUNTY will notify the UNION in writing prior to implementing the proposed change. Upon timely request of the UNION (within fourteen (14) days), the following shall apply:

“\* \* \* \* \*

“Section 3 — Waiver

“\* \* \* Therefore, except as otherwise specifically provided in this Agreement, the COUNTY and the UNION, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter covered by this Agreement without mutual consent.” (Emphasis in original.)

5. The County’s Administrative Procedure Manual, issued May 11, 1992, and still in effect, provides that only the County administrator may permanently assign a vehicle to an employee. Overnight occasional use of a County vehicle requires authorization by a department head. The Manual further provides that department directors are to submit to the County administrator a list each year identifying employees who have assigned vehicles. Finally, the Manual states that “[a]n assigned County vehicle may be driven to and garaged at home only if the employee is required to respond to after-hours call-outs.” (Chapter 1, section 21(V)).

6. The County’s policy manual provides that the Department director may authorize the temporary assignment of County vehicles to employees under certain circumstances. A temporary assignment is defined as an occasional overnight check out or retention of the vehicle when necessary to allow an employee to work late in the evening, when return of the vehicle is impractical, when a vehicle is checked out overnight for performing a required after-hours task, or when issued on a temporary basis for extended after-hours use. (Section 2.635, “Vehicle Assignment Criteria.”) Permanent assignment of a County vehicle to an individual is an exception to County policy and must be authorized by the County administrator.

7. The County’s building inspectors are employees of the Public Works Department. The inspectors report to the County building official. The building official reports to the Land Management Division manager, who in turn reports to the Public

Works director. The Public Works director is considered the Department head for County policies.

8. From 1990 to 2003, Roger McGuckin was the County's building official. In 1990, McGuckin authorized four building inspectors, Jim Lamb, Denny Bordeaux, Calvin Aumuller, and Jim Wiota to take County vehicles home overnight on a daily basis<sup>1</sup>

9. On March 28, 1990, McGuckin prepared a memorandum outlining his rationale for allowing building inspectors to take vehicles home. The memo is not addressed to anyone, nor does it include McGuckin's signature.<sup>2</sup> In the memo, McGuckin indicated that the inspectors would be more productive if they went directly to the inspection site each morning instead of reporting to the Public Works office. Inspectors inspect buildings in the entire County. Each inspector was assigned to a specific area of the County. Some of these inspection sites are over an hour from the main office, but may be only minutes away from the employee's residence. The supervisor believed it benefitted the County to have the employees report directly to their first inspection site. Inspectors were thus able to perform more inspections per day because a significant portion of their day was not spent commuting to and from the main office. The inspectors went to their first assignment from their homes and returned home after their last inspection of the day. Finally, McGuckin acknowledged that his decision to assign vehicles in this way was not in compliance with fleet policy and would be discontinued if abused.

10. In or around 1996, McGuckin hired Scott McIntyre as a building inspector. McGuckin authorized McIntyre to take a County vehicle home on a daily basis.

11. The building inspectors continued to take their vehicles home at night for the next 13-plus years, and kept the vehicles at their homes while they were on vacation. The inspectors considered their vehicle as their office, and the first inspection site as their reporting place.

12. In 1997 or 1998, someone broke into the vehicle assigned to Inspector Aumuller while it was parked at his home. Aumuller called County fleet services. Fleet services sent repairmen to Aumuller's home to repair the vehicle. Aumuller built a cabinet for his vehicle and utilized it as an office in the field. Prior to the change

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<sup>1</sup>Wiota and Lamb no longer work for the County.

<sup>2</sup>McGuckin retired in approximately November 2003. The Union did not call him as a witness in this hearing.

in practice, Aumuller considered his first inspection site as his first place of reporting, with the Public Safety building second.

13. John Goodson was the Public Works Department head from 1982 to 2001. Goodson does not recall ever approving vehicle take-home privileges for building inspectors.

14. Oliver Snowden has been the Public Works Department head since 2001. He does not recall ever approving vehicle take-home privileges for building inspectors.

15. Bill VanVactor has been the County administrator since 1993. He has no recollection of ever approving vehicle take-home privileges for building inspectors.

16. Goodson, Snowden, and VanVactor regularly approve recurring vehicle take-home approvals for other employees. None of them was aware that building inspectors were taking vehicles home until shortly before the practice was stopped in February 2004.

17. Tony West became County building official in November 2003, after McGuckin's retirement. West reports to Division Land Manager Jeff Towery. Prior to becoming building official, West was a member of the bargaining unit. While a bargaining unit member, he became aware that building inspectors took vehicles home daily.

18. Towery assumed his position in August 2002. Towery became aware in late November or early December 2003, that the inspectors were taking vehicles home. Towery searched the records to determine if the building inspectors had ever received approval from either the Department head, Snowden, or the County administrator, VanVactor, and found nothing.

19. By memo dated February 6, 2004, Towery notified the Union president that effective February 10, 2004, the practice of inspectors taking vehicles home would cease, that the inspectors must report back to their workstations at the end of each day, and that they could no longer use County vehicles to commute to or from their residences. According to Towery, the practice of allowing building inspectors to end their work day and leave work without reporting back to the County office, and driving County vehicles home, conflicted both with Article IX, section 8, of the CBA and Administrative Policy Manual Chapter 1, Section 21(V), as set forth above.

20. By memo dated February 6, 2004, the Union demanded to bargain the change in working conditions.

21. On February 9, 2004, the County responded that it would meet with the Union to answer any questions, but that bargaining to change the contract was not appropriate

22. By letter dated February 27, 2004, the Union provided the County with some historical information and requested that the County reconsider its position.

23. By letter dated March 12, 2004, County Labor Relations Manager Frank Forbes responded to the Union that it was the County's position that the CBA clearly covers the issue. Specifically, Forbes cited Article IX, Section 8. According to Forbes, if the Union thought that the County was in violation of the contract by forbidding building inspectors to leave work without reporting back to County offices and ceasing to take their assigned cars home, the Union should file a grievance under the contract. There is no mention in the record that the Union filed such a grievance.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The County did not violate ORS 243.672(1)(e) when it refused to bargain the impact of disallowing building inspectors to take vehicles home at night.

It has long been established that an employer may not unilaterally alter an employment condition during the term of the CBA. *AFSCME v. Wasco County*, Case No. C-176-75, *order on remand* 4 PECBR 2397 (1979), *aff'd* 46 Or App 859, 613 P2d 1067 (1980). In *OSPOA v. State of Oregon, Department of State Police*, Case No. UP-109-85, 9 PECBR 8794, 8806-807 (1986), this Board determined that an employer's decision to discontinue the off-duty use of employer-owned vehicles is permissive for bargaining. However, the impact of such a decision is mandatory for bargaining because the impact indirectly affects an employee's monetary benefit by reducing wear and tear on the employee's personal vehicles and eliminating the cost of fuel.

For more than a decade, building inspectors have taken their County-assigned vehicle home overnight. The Union argues that the County unilaterally changed a condition of employment when it discontinued this past practice without first bargaining the impact on employees wages, hours, and working conditions. The County argues that there was no established past practice because there was no mutual agreement between the parties. The County also asserts that the practice is in violation of the CBA, and moreover that the Union waived any right to bargain based on the entire agreement clauses of the contract

Under *State of Oregon, Department of State Police, supra*, the County had no duty to bargain its decision to disallow building inspectors further use of County vehicles to commute to and from work. However, if there was an established past practice which allowed building inspectors to do just that, then the County would be obligated to bargain the impact of discontinuing that practice. When the employment condition is based upon past practice, the party alleging the past practice has the burden of proving its establishment. In this case, the burden is on the Union.

In *OSEA, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80, 6 PECBR 4726 (1981), we established a method for determining whether a particular action constitutes a binding past practice. First, we consider whether the alleged practice is an appropriate subject for bargaining, if proven. Here, the alleged practice is the use of a County vehicle during off-work hours. Because this practice has an indirect monetary impact on employees, the duty to bargain could be enforced, if established.

Next, we consider whether the alleged practice is clearly established. To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the circumstances under which the past practice was created, and the existence of mutuality. Mutuality concerns the question of whether practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or whether the practice arose from choices made by the employer in the exercise of its managerial discretion without any intention of future commitment. *Redmond School District, supra*.

There is no dispute that the building inspectors have been allowed to take County-owned vehicles home consistently on a daily basis for more than a decade. That is a sufficiently long and consistent enough practice to meet the first two criteria. The third criteria, acceptability, is lacking. Given the circumstances under which the practice arose, mutuality also seems absent.

It is true that Roger McGuckin, one time building official and the employees' previous supervisor, authorized the building inspectors' personal use of County the vehicles. The County argues, however, that McGuckin lacked the authority to authorize this use because it was contrary to County policies. We agree.

Under those policies, a building official has no authority to approve the temporary or permanent assignment of County vehicles to employees. Only the County administrator, or the head of the Department of Land Management have that authority. Moreover, the use which building inspectors made of their cars was contrary to County policy: there is no evidence that County cars were assigned to inspectors because of after-hours work they performed. No County administrator or Department head authorized inspectors to take cars home. While Towery had notice of the practice in

November or December 2003, he is not authorized under County policies to assign County cars. The County administrator and the head of the Public Works Department, who do have that authority, denied any knowledge of the practice until February 2004.

To constitute acceptability, the employees and their superiors must have knowledge of the particular conduct and must regard it as the correct and customary means of handling the situation. Acceptability may be implied from long acquiescence in a *known* course of conduct. *Redmond School District, supra*, 9 PECBR 4735-36, citing Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 2005, 1017, 1037-39 (1961). See also *Elkouri and Elkouri: How Arbitration Works* (BNA Sixth Edition 2003), p. 608, n. 14, and cases cited therein. Among the cases the Elkouris cite in this note, either in support of, or as illustrative of, the principles they enunciate, are two in which the facts are similar to our case. Thus, in *Immigration and Naturalization Service*, 77 LA 638 (1981), the arbitrator ruled that, where the national policy of a federal agency employer governed a matter, a local departure from that policy could not result in a binding practice where higher management had been unaware of the local change in operations. Similarly, in *Sperry Rand Corp.*, 54 LA 48 (1969), the arbitrator reasoned that leniency by individual supervisors must be distinguished from mutual agreement or acquiescence by the contracting parties in a consistent course of repetitive action. He then ruled that employees cannot gain, through a supervisor's lenient treatment, rights which were not negotiated or acquiesced in, and uniformly applied by, management to all similarly situated hourly employees.

Apart from the testimony of building inspectors regarding its existence, the only evidence the Union produced regarding notice and acceptability of the practice to the County is a memo apparently written by McGuckin in 1990. However, the memo is not addressed to anyone, nor is it signed. In it, McGuckin acknowledged that his decision to allow building inspectors to take County cars home was not consistent with County policies. McGuckin was not called as a witness to verify the document or explain to whom the document was sent. County management witnesses all testified that they had never seen it. Indeed, no County employee who had the authority to assign County cars to County employees had any knowledge of the practice started by McGuckin, memorandum or no. According to County policies, its employees could only take County cars home to help them perform after-hours work.

The practice on which the Union relies is entirely inconsistent with the policies followed by the rest of the County. While the County is not comparable in size to the Immigration and Naturalization Service, under the particular circumstances of this case the same principles apply: when higher management, with the authority to effectuate County policy, had no knowledge of a change in that policy which was made in one work unit, a binding past practice was not established.

It was neither acceptable by both parties, nor was there mutuality. There was no joint understanding between the County and the Union regarding this practice, and no indication that the County ever intended to continue it.

This conclusion is reinforced by comparing the alleged past practice to the language of the labor contract. Article IX, section 8, of the contract provides that employees shall report to their "permanent place of reporting" at the beginning and at the end of each work day. According to the uncontradicted evidence offered by the County, the permanent place of reporting for building inspectors is the Public Safety building in Eugene, and not individual inspection sites. If building inspectors must report to the Public Safety building at the beginning and ending of the day, there is no need for, and no justification of, the practice of allowing building inspectors to take their cars home overnight.

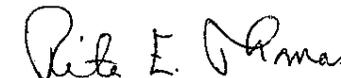
It follows that the Union has not met its burden of establishing a binding past practice regarding the off-hours use of County-owned vehicles by building inspectors. *Redmond School District, supra*. In the absence of an established practice, the County has no obligation to engage in impact bargaining, as the Union asserts. Having made this determination, we need not address the County's additional arguments. The complaint will be dismissed.

ORDER

The complaint is dismissed.

DATED this 30<sup>th</sup> day of June 2005.

  
\*  
Paul B. Gamson, Chair

  
Rita E. Thomas, Board Member

  
James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Chair Gamson Concurring:

I concur in the majority's result and its reasoning. I write separately to express my view that we should exercise caution in using arbitration awards as precedent.

First, the fundamental tasks are different. An arbitrator's job is to interpret a contract; this Board's task is to interpret a statute. An arbitrator's contract interpretation is of little use to us in interpreting a statute.

I am especially wary here because the issue concerns past practice, and we use that concept in a very different way than arbitrators do. Arbitrators use past practice as an aid to contract interpretation; we use it as proof of the existence of a working condition that an employer cannot change until the parties complete bargaining. Although it did not happen here, confusing these different uses of past practice could lead to wrong results in some cases.

Second, an arbitration award is not designed or intended to be precedent on a question of law. A private arbitrator is hired by the parties to interpret their contract and owes no fealty to the Public Employee Collective Bargaining Act or its underlying policies. This Board has frequently held that we do not review arbitration awards for errors of law, and that an arbitrator has the "right" to be wrong on matters of law. In these circumstances, I see little to recommend the adoption of an arbitrator's view of the law.

The majority correctly states and applies the law regarding past practice. In my view, its reliance on arbitration cases is unnecessary and serves only to confuse rather than clarify.