Chiesa #10

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

-and

UNION,

OPINION AND AWARD

THE CASE

The grievance in this matter is dated September 19, 2001. In part it reads as follows:

"NATURE OF GRIEVANCE: Article 30, Maintenance of Standards. Article 33 Validity.

"DATE OF OCCURRENCE: September 9, 2001

"STATEMENT OF FACTS: Television and VCR are not being allowed to be used in the Fire Dispatch Office.

"SUGGESTED ADJUSTMENT: Return to the same standards that were in place prior to moving into 39 Monroe Ctr. N.W."

On September 9, 2001 the fire dispatch operation was relocated from the basement of an old facility to a new building which also housed police headquarters. The old facility was occupied by both fire and police dispatchers who, while perhaps to a degree separated by a petition, were working in close proximity.

The parties agreed that for many years; in fact, over 20 years prior to September 9, 2001, dispatchers were allowed to use a television set and later a VCR for their personal entertainment. It was explained at the hearing that the practice was that fire dispatchers could view a TV, which they had supplied, and use a VCR, which the Employer supplied, to view entertainment items

during what is referenced in the contract as limited duty time.

Prior to September 9, 2001 and currently, fire fighter dispatchers work a 12-hour shift, the first beginning at 6:00 a.m. and ending at 6:00 p.m., and the second beginning at 6:00 p.m. and ending at 6:00 a.m. Dispatchers alternate between two 12-hour day shifts followed by two 12-hour night shifts. They generally are scheduled to work 28 shifts out of every 56-day period. Effective February 1, 2001 the Chief issued policy #805. In part it reads as follows:

> "Each Fire Station, Training Center, Dispatch, and Fire Administration have been provided with VCRs. Additionally, each facility has received several blank tapes as well as training videos. The VCRs are for both training and personal entertainment purposes.
>
> "As with other station equipment, the station officer is responsible for obtaining any needed repairs to the Deputy Chief.
>
> "The VCRs:
>
> "1. May be used for viewing training tapes or recording of training programs.
>
> "2. Are NEVER to be used to view/record pornographic, prurient, or X-rated videos/programs.
>
> "3. May be used during limited duty time for entertainment purposes as long as:
>
> a. No copyright infringement occurs.
>
> b. No offensive type tapes (as determined by community standards and/or the company officer) are shown.
>
> "TELEVISIONS:
>
> "While most stations have arranged through their station funds to provide one or more TVs for the station personnel use in addition to viewing training sessions, the use does not preclude certain restrictions from being made to comply with Employer and Fire Department policy.
>
> "With the advent of the variety of cable channels, most stations have some form of 'pay' channels such as HBO, CINEMAX, SHOWTIME, etc. ... The shows/ movies on these stations cover a broad spectrum of programming. While the programming on these channels are generally acceptable, the company officer should keep in mind what should be considered reasonable with respect to what should be viewed in a department facility.

> "Additionally, there are 'pay-per-view' channels that are now offered by the cable service. While there may be an occasional exception as determined by and paid through the company officer for a sporting event or a special allowable program on this service, the pay-per-view channels are PROHIBITED."

The evidence establishes that the policy referenced above accurately depicted the practice existing at the time. Further, the evidence suggests that at the time the above policy was issued, the parties knew that the dispatch center would be moving from its location into the new location at One Monroe Center.

It is not exactly clear when the Union was notified that when the dispatch operation moved to the new location dispatchers would no longer have use of the TV and VCR as was the practice at the old location. There is some suggestion that perhaps the Union was given notice prior to June 30, 2001 that the previous practice was going to be eliminated, but there is other evidence suggesting that the Union was not made aware of the change until September 9, 2001.

The above grievance was filed with the Chief issuing a first-step response on October 22, 2001. In part the response reads as follows:

> "Reply: Management made the decision to no longer provide for or permit the use of the television and recorder for entertainment purposes in Fire Dispatch. The implementation of this decision coincided with the relocation of Fire Dispatch to the new Communications Center. The right to establish such work rules and/or processes are included in Article 4, Section 1, entitled Management Rights.
>
> "However, Management is prepared to offer a video monitor and VCR for the Dispatchers to view training tapes or updates, provided that the monitor is not immediately in the Dispatcher's work area, or viewable by operating Dispatchers.
>
> "Based on the above, this grievance is denied."

Subsequently issues arose regarding the dispatchers' inability to secure critical up-to-date weather information. The concerns were considered by Labor Relations in conjunction with discussions with the Chief who issued an August 14, 2002 notice to the dispatchers which in part

reads as follows:

> "Effective immediately, the use of a television is permitted within Fire Dispatch for the sole purpose of obtaining pertinent weather information. This use is limited to the local networks and the Weather Channel and is clearly limited to time periods when the need for up to date weather information is a business necessity.
>
> "This permission may be rescinded upon obtaining other suitable means of providing up to date weather information.
>
> "Should their (sic) be any questions regarding this matter, please contact this writer."

The grievance was processed through the grievance procedure and presented to me for resolution. It should be noted that additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have carefully considered the entire record even though it would be impossible and probably 0 inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

> ARTICLE 4. MANAGEMENT RIGHTS
>
> "SECTION 1. DIRECTING WORK FORCE
>
> "Except as otherwise specifically provided herein, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of membership in the Union.

"SECTION 2. RULES OF CONDUCT

"Rules of conduct not inconsistent herewith in effect at the date of this Agreement shall be continued. Management shall have the right to amend, supplement, or add to said rules during the term of this Agreement, provided that Management shall first meet and confer with the Union prior to any such amendments. Such rules shall be reasonable and shall relate to the proper performance of the Fire Fighter's duties and shall not be applied in a discriminatory manner. It is recognized that rules covering off-duty conduct are related to the proper performance of a Fire Fighter's duties."

ARTICLE 14. WORK ASSIGNMENT

"SECTION 5. CLEANING, DUTY HOURS, REMODELING, RIVER DUTY AND WEATHER CONDITIONS

"E. The hours between 1600 and 0745 on Mondays through Fridays, 1/2 day (1200-0700 hours) on Saturdays, Sundays, and general paid holidays set forth in this Agreement shall be termed as Limited Duty Time. Only those non-emergency duties customarily performed in the past shall be required. Employees' responsibilities with respect to river duty shall be limited to river rescue operations and shall not include river clean up details of any kind."

ARTICLE 30. MAINTENANCE OF STANDARDS

"SECTION 1

"Management agrees that all conditions of employment not otherwise provided for herein relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at the standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement."

ARTICLE 33. VALIDITY

"SECTION 1.

"The provisions of this Agreement shall supersede any existing rules and regulations of the Employer and/or any of its Boards or agencies which may be in conflict therewith.

"SECTION 2.

"This Agreement is subject to the laws of the State of Michigan with respect to the powers, rights, duties, and obligations of the Employer, the Union and the employees in the bargaining unit, and in the event that any provision of this Agreement shall at any time be held to be contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided therefore, such

provision shall be void and inoperative. However, all other provisions of this Agreement shall, insofar as possible, continue in full force and effect."

The Union argues that the Employer violated Article 30 - Maintenance of Standards, when it unilaterally terminated the longstanding consistent prior practice of fire dispatchers watching TV/VCR for personal entertainment. It maintains that Article 30 expressly protects and preserves, inter alia, general working conditions. It maintains that dispatchers' right to use the TV/VCR for personal entertainment during their limited duty hours is a significant general working condition. It points out that dispatchers have enjoyed the right to watch TV for 26 years and the right to use the VCR for at least the last eight years. It maintains that the practice has been codified in the new policy book. It argues that the change has nothing whatsoever to do with dispatch duties and, thus, management's rights to assign duties and determine how work is to be performed doesn't apply. The Union argues that there is no reason why the same working condition cannot continue at the new location. It points out that since the new location is two to three times larger than the old, the police dispatchers are much further away from the fire dispatchers and the public has virtually no access to the interior of the dispatch area, continuation of the prior working conditions is even more practical than it was before. Further, it points out that when the policy handbook was altered in February of 2001 codifying the prior practice, it was known at that time that the fire dispatch office would be moving. The Union maintains that the only reason articulated at the hearing was that personal use of the TV and the VCR was inconsistent with emergency work and was a possible distraction. It argues that during the 26 years the practice had continued, there is not even a scintilla of evidence to show that it was a distraction. Additionally, it points out that the Employer continues to allow dispatchers to engage in other personal activities, such as reading, watching the computer screen, having visitors, etc.

Further, the Union argues that assuming the Police Chief did not appreciate the prior fire dispatcher practice regarding TV or VCR, that nonetheless is not a justification for the Employer to breach its contract. Additionally, the Union argues that it was never given appropriate notice that the practice would change, but even if it did, it didn't matter because the practice was protected by Article 30 of the Collective Bargaining Agreement and could not be changed pursuant to mere notice that a change was going to be implemented.

The Employer argues that the issue in this case is not whether a past practice existed which permitted the fire dispatch employees to use a TV and VCR equipment for recreational or entertainment purposes. It clearly states that such a practice is readily admitted. It does maintain, however, that it has the right to end the practice with adequate notice to the Union and it is not obligated to restore a practice that did not survive into the new contract. The Employer maintains that it had the right to end the practice since the Union had reasonable notice of its decision to do so and the Employer was not obligated to extend the practice into the new labor agreement. The Employer argues that the authority, i.e., the Fire Chief's policy which created the practice, is the same authority that allowed the Fire Chief to discontinue the practice. It argues that the practice continued because the work rules allowed it to do so and there is no evidence establishing that the rules were subject to negotiations with the Union. Further, the Employer argues that the conditions surrounding the fire dispatch operations have sufficiently changed to warrant a termination of the practice. It points out that there are several aspects to be considered. First, it maintains that there was a relocation of the fire dispatch operation into a new building which houses the headquarters for the police department. Second, the new Police Chief did not support the installation of the equipment for personal use. Third, it points out that the cable network was charging for the entertainment usage of the equipment which previously was free of charge to the

fire department. The Employer argues that the prior Fire Chief approved of the practice and the new Fire Chief disapproved of the continuation of the practice upon the relocation of dispatch into the new building. It maintains that the dispatch center has changed substantially and the restoration for recreational use of the TV and VCR by the fire dispatchers would significantly impact the police dispatch operations since police officers would now be exposed to such usage. Additionally, it argues that since the Police Chief was opposed to the practice and the movement of the dispatch area was into a building that the Chief was responsible for, it makes sense that the new Police Chief's views and questions regarding the activities should carry some weight. Further, it argues that the prior practice cannot be continued because now there is a financial burden and ongoing expense which did not exist previously. The Employer argues that the practice ended only after the Union was given adequate notice. It maintains that its decision to end the practice was not arbitrary or unreasonable. Further, it points out that even though the event took place after the practice was discontinued, there was a publicized incident involving the handling of an emergency 9-1-1 call on November 25, 2001, which increased public scrutiny and lack of trust because of the delay in meeting the public's needs.

In cases of this nature it is the arbitrator's, and hence my responsibility, to interpret the parties' agreement, hopefully establishing their mutual intent, and applying that interpretation to the factual scenario.

Initially it must be recognized that the parties agree that the historical use of the TV and VCR, as explained above, was a past practice. As a result, and in recognition of judicial economy, I will not extensively discuss or analyze aspects of past practice beyond those elements which are necessary to resolve specific issues in this dispute.

Provisions of the Collective Bargaining Agreement define much of the relationship

between the parties. It is important to understand that those provisions are in essence the law controlling many aspects of the parties' relationship. In this regard I note that Article 4 - Management Rights, contains language recognizing the Employer's right to direct the work force, establish rules of conduct, etc. However, it is also important to recognize that the first sentence in Section 1 of Article 4 begins by indicating "Except as otherwise specifically provided herein," the management of Grand Rapids is vested exclusively in management. That language specifically recognizes that the Management Rights provision regarding directing the work force is subject to the application of other specific contract language. The same conclusion must be reached in dealing with the language in Section 2 of Article 4 which relates to rules of conduct. The first sentence in that provision begins "Rules of conduct not inconsistent herewith ..." shall continue. Again, it is recognized by the parties that rules of conduct must be consistent with the provisions of the Collective Bargaining Agreement.

Furthermore, Section 1 of Article 33 clearly recognizes that the parties agreed that the provisions of their agreement supersede any conflicting existing rules and regulations of the Employer and/or of its boards or agencies.

This brings us to the language in Article 30 - Maintenance of Standards, Section 1. The language clearly and unequivocally indicates, inter alia, that general working conditions shall be maintained with the standards in effect at the time of the signing of the agreement. In that regard since the parties have agreed that the TV/VCR usage was a past practice, I need not determine whether a practice existed. Furthermore, I am convinced that the ability of members of the bargaining unit to view the TV and utilize the TV and VCR within the parameters outlined by the practice is a general working condition. Additionally, that working condition was in effect at the time of the signing of "this Agreement" which references the 1997 through 2001 agreement

with the identical language appearing in the July 1, 2001 through June 30, 2003 agreement.

Thus, the historical practice of bargaining unit members using the TV and VCR, as outlined above, is a general working condition which, by the language in Article 30, should be maintained since it existed at the time the agreement was signed. However, the real question presented in this dispute is whether the Employer has established reasons which allow it to terminate the practice in question.

Aspects of this case involve an issue of whether notice was given to the Union regarding elimination of the practice and the impact of the possible termination of the July 1, 1997 through June 30, 2001 agreement subsequent to the time notice was given. In analyzing these issues, I note that the parties entered into a Letter of Agreement which extended the 1997 through 2001 Collective Bargaining Agreement until a new agreement was executed, either by voluntary negotiations or by Act 312 arbitration. A portion of that Letter of Agreement reads as follows:

> "The Employer and the Union, hereby agree that, in the event that negotiations and/or mediation extend past the June 30, 2001 contract expiration date, all terms and provisions of the 1997-2001 contract shall remain in full force and effect, pending a successor contract being reached through voluntary agreement or through Act 312 arbitration. It is understood that this Letter of Agreement shall not preclude the retroactivity of any provision of the successor contract as the parties may agree or as may be awarded through Act 312 arbitration. Retroactivity issue will be negotiated during bargaining."

Given the evidence that Article 30, Section 1 continued on with full force and effect, there is no necessity to discuss and analyze the potential impact of a contract termination, even if there could be one under the provisions of Act 312, Public Acts of 1969, as amended. Article 30, Section 1 was in effect at all times relevant hereto.

It must also be recognized that the practice in question existed not only because it was a practice, but also because it was agreed by the parties in specific contract language that general working conditions established by a practice should be maintained. Thus, the practice continued

not only by reason of the general principles of a binding past practice, but also because of the language in Article 30 - Maintenance of Standards. The language in Article 30 in essence gives negotiated express contract legitimacy to the practice. While that language exists, it is doubtful, and I find it impossible, to conclude that the practice can be terminated merely upon the Employer giving notice that it will no longer recognize the practice. While there are reasons which would allow the practice to be terminated, given the language in Article 30, the Employer cannot terminate the practice which establishes a general working condition merely by giving notice that it no longer wishes to follow the practice. If that were the case, then the language in Article 30 would be meaningless.

It has also been suggested that the practice was established pursuant to rules and policies instituted by the Chief and, as a result, the Chief could institute rules and policies eliminating the practice. I agree with the Employer that rules and regulations established pursuant to the provisions of the Collective Bargaining Agreement, and even absent that authority pursuant to the Chief's managerial authority, can be altered and changed as long as the changes are in accord with the language in the Collective Bargaining Agreement. To state it in another fashion, management's utilization of its rule-making power, even if it creates situations similar to a practice, does not necessarily become a condition of employment preserved by Article 30. If that were the case, management's rule making would become perverted and management would lose the ability to change rules and regulations as is expressly provided for in the Collective Bargaining Agreement. So certainly to that degree, I agree with the Employer that what is made by policy can generally be changed by policy. Normally the institution of policy does not create a binding past practice.

Nonetheless, in order for the principle to apply, the evidence must establish that the

practice in question was developed as a result of fire department policies and regulations. This is distinct from a scenario wherein a practice exists, but aspects of its administration are affected by policies and regulations. In this case the evidence does not establish that the use of the TV and VCR described above came about as a result of the institution of a fire department policy or regulation. I understand that policies #805 and #807 were submitted into evidence, but each has an effective date of February 1, 2001 and there is no indication that the policies supplemented, superseded or affected any prior existing policy. Furthermore, given the fact that aspects of the practice in question go back over 25 years, one would expect to see additional written policies and regulations if the practice had been developed through that route. There was none. Thus, the existence of #805 and #807 does not support the Employer's position that the practice was developed as a result of a policy and thus can be changed by a policy. As I indicated, policy can on occasion be used to fine-tune the implementation of a practice. In this case the Union concluded that the content of the policies in question was entirely appropriate in relation to all elements of the existing practice. Thus, there were no grievances or complaints filed.

As a result, I cannot conclude that the practice in question was developed as a result of the institution of policy and regulation and thus can be changed by policy and regulation. The record also establishes that the practice is opposed by both the Police Chief and the Fire Chief. I realize both may have concerns about the continuation of the practice and, thus, from their point of view the practice should be discontinued.

Nonetheless, the practice is recognized and preserved by the Collective Bargaining Agreement. While I am sure that there are many aspects of the relationship between the parties which the Fire Chief and Police Chief would like to change, the relationship is defined by the agreement, and absent a showing that the Fire Chief's non-support or the Police Chief's

opposition rises to the level of reasons accepted by the agreement for eliminating the practice, their opposition cannot be utilized to eliminate a general condition of employment preserved by Article 30.

Notwithstanding the above, there are reasons which would allow the Employer to terminate the practice of allowing dispatch personnel to view the TV and utilize the TV and VCR during limited duty time. However, those reasons must be of a magnitude which allow a contractually recognized general condition of employment to be altered. Often those reasons are found in issues of impossibility or the impact of actions by third parties over which the contracting parties have no control.

Movement to a new facility could very well provide the reason for eliminating or altering the practice in question. Yet, before that conclusion can be reached, it must be established that there are characteristics and features of the new facility which make it objectively inappropriate or impossible to continue the practice. One of the reasons indicated by the Employer is that the new facility makes the area in which the TV/VCR is located more visible and since the facility is more susceptible to public tours, the public would be exposed to dispatchers' utilization of the TV/VCR to a much greater degree than in the past. While I agree that the general proposition is important and must be analyzed, I am not persuaded that the fundamental allegation that the new facility would make the TV/VCR more visible to the public and that the area is more susceptible to public tours should be adopted. The photographs presented into evidence, along with the testimony, suggests that, if anything, the location of the TV/VCR is more remote from public eyes and less susceptible to view by the public on tours than it was in the old facility. The evidence persuasively establishes that the characteristics of the new facility do not provide an objective basis for eliminating the practice in question.

It was also suggested that the November 25, 2001 event, which involved a delayed handling of an emergency 9-1-1 call, provides additional reason for not reinstituting the practice in question. To recall, there was a delay in handling an emergency which the Employer attributes to the fact that dispatchers were distracted by viewing a computer, but which the Union indicates was caused, or at least substantially influenced, by a new computer system which was subsequently discarded with the old system being reinstituted.

Certainly we can all recognize the Employer's concern regarding public scrutiny of the operation and the need to quickly and effectively deal with emergency calls. Yet, given the nature of the evidence, it is impossible to specifically define the reasons for the November 25, 2001 event. I would be speculating if I concluded that it was caused by inattention, failure of the computer system or some other reason. What is clear, however, is that the event took place after the practice in question was eliminated. To recall, testimony from Union witnesses supported the proposition that bargaining unit members' ability to use a TV/VCR kept them alert and kept the operation running smoothly. While I will not conclude that the November 25, 2001 episode would have been altered had the prior practice been in effect, I also cannot conclude that the November 25, 2001 event has any probative value in the resolution of the current grievance. The evidence is void of any suggestion that events of this nature took place prior to the elimination of the practice or that the practice of allowing dispatchers to view the TV or utilize the TV and VCR during limited duty time had any deleterious impact on the delivery of dispatch services.

The evidence suggests that prior to September 9, 2001 the delivery of services by the cable company was free of charge. Thus, it would be fair to characterize the practice as including whatever cost arrangements existed and whatever expenses were absorbed by the Employer. The evidence isn't entirely clear, but it appears that aside from providing the VCR, the Employer did

not absorb any additional costs because the service from the cable company was provided free of charge. Whatever costs were absorbed by the Employer to facilitate the existence of the practice is an element of the practice. So as a result, I agree with the Employer that if it now must expend funds to continue the practice, then the practice has changed as a result of the intervention of a third party and the Employer has a right to alter or eliminate the practice. However, it must be understood that I am not stating that the mere fact the cable company is now charging for services allows the Employer to eliminate the practice. What I am stating is that if the Employer must incur the costs, then the Employer may eliminate the practice. Even if the cable company now charges for services, the practice must continue if the bargaining unit determines that it will absorb the costs. To require the Employer to absorb the additional costs would alter the practice and arguably be construed as changing a general condition of employment.

In summary, I note that there is no objective substantial change as I have outlined above, and thus, the Employer was not free to unilaterally alter the practice in question even after giving notice, but had the burden of negotiating a change before eliminating dispatchers' access to the TV/VCR for personal entertainment use during limited duty hours. That condition of employment existed in a practice which was preserved by the language in Article 30 - Maintenance of Standards, which existed during all relevant portions of this dispute. As a result, I must order that the practice, as it existed prior to September 9, 2001, be forthwith reinstituted. However, as I have indicated above, the practice includes the element of the Employer not being responsible for charges for the service provided by the cable company beyond whatever charges it incurred prior to September 9, 2001 to provide the service utilized in the practice. In other words, the practice as it specifically existed prior to September 9, 2001 shall forthwith be reinstituted, including all relevant aspects of the practice which encompass issues of cost of

service incurred by the Employer to provide the practice before the date of change.

AWARD

The grievance is granted. The practice in question must be reinstituted forthwith. Given the complexity of the remedy and the potential for subsequent issues regarding imposition of expenses, as outlined above, I will retain jurisdiction for a period of ninety (90) days in order to aid the parties in the implementation of the remedy.

MARIO CHIESA

Dated: July 24, 2003