BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| OUTAGAMIE COUNTY | |
| and | Case 171 No. 41920 MA-5501 |
| OUTAGAMIE COUNTY HEALTH CENTER EMPLOYEES' UNION LOCAL 980, AFSCME, AFL-CIO | |

Appearances:
Lindner and Marsack, S.C., by Mr. Roger E. Walsh, on behalf of the County.
Mr. Gregory N. Spring, Staff Representative, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the County and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on August 21, 1989 in Appleton, Wisconsin. The hearing was not transcribed and both parties filed briefs and reply briefs which were received by December 5, 1989.

Based upon the entire record, I issue the following Award.

ISSUE:

Since the parties were unable to agree upon the issue, I have framed it as follows:

> Did the County violate the contract by scheduling more senior employes to work on weekends and, if so, what is the appropriate remedy?

DISCUSSION:

This case boils down to whether the Union--or more precisely, some of its chief officers--did or did not agree in August, 1987 to a scheduling plan implemented by the County at that time which requires more senior regular employes to work one weekend a month so that less senior part-time Nursing Assistants would not have to work more than three (3) consecutive weekends in a row. The County implemented said plan because it was experiencing considerable difficulty in retaining part-time Nursing Assistants who objected to working every weekend for the first four (4) months or so of their employment.

The Union on September 2, 1988 filed a "class action" grievance over the plan claiming that it violated the contractual seniority provisions. It primarily argues that the new policy was never properly adopted and that the prior slotting procedure established in 1984 cannot be changed absent mutual consent of the parties in writing which did not happen here. As a remedy, the Union seeks a cease and desist order which prohibits the County from adhering to the 1987 procedures.

The County, on the other hand, maintains that its policy and plan represents a legitimate exercise of its contractual rights because the contract is "completely silent with respect to the role of seniority in scheduling"; because the Union agreed to it in 1987; and because it waited nearly a full year before grieving over it.

In resolving this issue, it first must be noted that there is no general contractual language which prohibits the County from slotting regular full-time employes for weekend work and that the only limitation is found in Section 8-02 of the contract which provides:

> "All full-time permanent employees shall receive every other weekend off. The work schedule shall be made two (2) pay periods in advance and posted on the respective units."

This language therefore expressly recognizes that the County can schedule regular employes for weekend work, provided only that said employes cannot be forced to work two (2) consecutive weeks. Since the 1987 plan only requires regular employes to work one (1) weekend a month, said plan obviously is not violative of this part of the contract.

The Union's case therefore is based entirely on the claim that the County cannot unilaterally change the scheduling procedures established in 1984 which

provided that only part-time employes could be forced to work weekends and that more senior regular employes would work weekends on a volunteer basis. To be sure, the record does show that the County discussed these procedures with the Union in 1984 before they were implemented.

But these procedures were never formalized in either the contract or in any side letter and they were never formally ratified by either party, hence indicating, as the County contends, that they were never considered to be an "agreement" which could not be changed absent mutual agreement. Rather, those procedures--which were adopted in response to a 1983 grievance involving alleged understaffing--appear to be but a proper exercise of the County's right to promulgate reasonable work rules and regulations pursuant to Article 1.02 of the contract.

Assuming arguendo, however, that said procedures were binding, the record nevertheless shows that the Union agreed to change them on August 17, 1987 when it accepted in principle the County's plan to make regular employes work one (1) weekend per month so that the part-time Nursing Assistants would not have to work more than three (3) weekends in a row.

Prior thereto, the parties had met and discussed this issue on April 20 and May 18, 1987, thereby giving the Union sufficient advance notice of the impending change. The minutes of the August 17, 1987 meeting state:

> "David Rothman began the discussion by briefly explaining the policies and procedures that were attached to this meeting's agenda. (Union president) Steve Buck responded on behalf of the Bargaining Unit that their officers do not have any specific problems with the policies and procedures that are attached to the agenda."

Union vice president Mark Sipple, Union treasurer Pat Kelly, and Union steward Sherry Gillette were also present at that meeting.

Thereafter, the County implemented its plan and there were about 26 instances over the next year of where employes were slotted for weekend work without any regard for seniority.

The Union argues that there is no evidence that "by listening to the proposal that the Union was waiving its rights under Section 1.03 to review and possibly to grieve the amended procedure when it was reduced to its final form."

To the contrary, the only reasonable conclusion that can be drawn from the August 17, 1987 meeting is that the Union--through its chief officers--was waiving its right to grieve over the proposed plan. Indeed, evidence of said waiver could be seen from the fact that the Union for the next year or so never grieved over the approximately 26 instances of where seniority was not followed in slotting employees for weekend work. While the Union asserts that it had no knowledge of this practice, the record shows that it in fact knew, or should

have known, about it. Its failure to object thus can only be attributed to the fact that the Union at that time recognized the validity of the County's newly adopted plan. 1/

In this connection, the Union also argues that said plan has never been formally promulgated and that, as a result, the 1984 policy should be reinstated because it "is the only one which can be considered as valid." Again, there is no merit to this claim, as the record shows that the County on August 17, 1987 converted its proposed plan to an actual plan, after the Union agreed to it, one which the County has followed ever since.

In light of the above, it is my

AWARD

That the County did not violate the contract by scheduling more senior employes to work on weekends; the grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 5th day of March, 1990.

By _____
Amedeo Greco, Arbitrator

1/ The County asserts that the Union decided to challenge the plan in 1988 only because it by that time had a new set of officers who did not agree with the prior administration's policy.