BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WINNEBAGO COUNTY (PARK VIEW REHABILITATION PAVILION and PLEASANT ACRES)

and

PARK VIEW REHABILITATION PAVIILION and PLEASANT ACRES EMPLOYEES UNION, LOCAL 1280, AFSCME, AFL-CIO

November 3, 1989 grievance re reduction of scheduled hours of part-time employes

Case 184
No. 43883
MA-6093

Appearances:

Mr. John A. Bodnar, Corporation Counsel, 415 Jackson Street, PO Box 2808, Oshkosh, WI 54903-2808, appearing on behalf of the County.

Mr. Gregory N. Spring, Staff Representative, AFSCME Council 40, 1121 Winnebago Avenue, Oshkosh, WI 54901, appearing on behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned to hear and determine a dispute concerning the above-noted grievance arising pursuant to the grievance arbitration provisions of the parties' 1988-89 collective bargaining agreement (herein Agreement). The Commission designated the undersigned as Arbitrator in the matter on May 4, 1990.

Pursuant to notice, a hearing was conducted by the Arbitrator on July 17, 1990 at the County's Park View Health Center, Oshkosh, Wisconsin. No stenographic record was maintained, but the parties agreed that the Arbitrator could maintain a cassette tape record of the testimony and arguments for his exclusive use in award preparation.

When they were unable to agree on a statement of the issues, the parties mutually authorized the Arbitrator to frame the issues for determination. The Arbitrator thereupon advised the parties that the issues for determination were as follows:

ISSUES

1. Is the November 3, 1989, grievance procedurally arbitrable?

2. If 1 is so, did the Employer violate the Agreement by its scheduling of hours of part-time employes in November of 1989?

3. If 2 is so, what is the appropriate remedy?

4. If 1 is so, did the Employer violate the Agreement by any failure to give any required notice of change of scheduled hours of part-time employes in November of 1989?

5. If 4 is so, what is the appropriate remedy?

The merits of the grievance were heard first due to time commitments of Union witnesses and then testimony was taken concerning Issue 1, procedural arbitrability. That latter issue was separately briefed and separately ruled upon by the Arbitrator in an award dated August 22, 1990, in which it was concluded that "the November 3, 1989 grievance is procedurally arbitrable."

The parties then submitted briefs on the remaining ISSUES 2-5, with the last of those briefs having been received by the Arbitrator on October 12, 1990, marking the close of the record regarding those issues.

This Award addresses the remaining ISSUES, 2-5, above.

PORTIONS OF THE AGREEMENT

ARTICLE I
RECOGNITION AND UNIT OF REPRESENTATION

The Employer [Park View Rehabilitation Pavilion and Pleasant Acres, Winnebago County, Wisconsin] recognizes the Union as the exclusive bargaining representative . . . of all employees excluding the administrator, assistant administrator, medical director, psychiatrists, physicians, registered records librarian, chaplain, psychologist, director of nursing, assistant director of nursing, social services director, business manager, occupational therapist, reg., dietician, maintenance engineer, nursing supervisors, personnel coordinator, social workers,

registered nurses, maintenance supervisor, in-service educator, purchasing agent, food service supervisors, patient work activity supervisors, laundry supervisor, housekeeping supervisor, volunteer coordinator, occupational therapy supervisors, assistant laundry supervisor, statf development technician, medical records supervisor, assistant housekeeping supervisor, confidential secretaries and personnel clerks.

. . .

ARTICLE II
PROBATIONARY PERIOD

Any new full-time employee shall be considered probationary until he has worked 1040 hours. Any new part-time employee shall be considered probationary until he has worked 520 hours but not less than six (6) months. A probationary employee may be discharged without recourse to the grievance procedure. Continued employment after completing 1040 hours (520 hours and six months for part-time employees).

. . .

ARTICLE II
SENIORITY

The Employer agrees to the seniority principle. Seniority shall consist of the total calendar time elapsed since the date of original employment with the Employer provided however that no time prior to a discharge for just cause or a quit shall be included, and provided that seniority shall not be diminished by temporary layoffs or leaves of absence or contingencies beyond the control of the parties to this Agreement, except as specifically provided elsewhere in this Agreement. (AUTHORIZED LEAVE OF ABSENCE WITHOUT PAY, ARTICLE XIX.)

The Employer agrees to keep posted on the bulletin boards an up-to-date seniority roster. Up-to-date shall mean at least once a year. Employees who voluntarily quit shall be deemed to have lost all seniority rights and shall be considered as new employees if re-hired.

Employees who go from full-time to part-time with no break in service will retain their seniority as part-time employees. employees who go from part-time to full-time with no break in service will be given credit for their part-time service in establishing a new seniority date.

ARTICLE IX
LAYOFF

Whenever it becomes necessary to lay off employees in any given position, any temporary, seasonal or casual employees in that position shall be laid off first, then any probationary employees in that position shall be laid off, and then permanent employees in that position shall be laid off in the inverse order of their seniority.

A permanent employee may bump (induce layoff of and replace) the least senior employee in another position provided that he has greater seniority than the employee being bumped and provided that he is qualified to perform the duties of the position as defined in the job description.

A permanent employee who is bumped may bump the least senior employee in another position provided that he has greater seniority than the employee being bumped and provided that he is qualified to perform the duties of the position as defined in the job description.

Recall from layoff will be in the order of seniority meaning the last permanent employee laid off in the position shall be the first recalled.

Whenever it becomes necessary to employ additional employees, either in vacancies or in new positions, subject to the provisions of this Agreement, former employees who have been laid off within one (1) year prior thereto shall be entitled to be re-employed in such vacancies unless they have quit.

. . .

ARTICLE XXIII
SHIFTS AND WORK WEEK

Employees shall work a normal day of eight (8) hours and a normal work week of forty (40) hours (2,080 hours per year). Any change by Employer in hours of work or days of work will be preceded by a fifteen (15) day notice to the Union. The Union may discuss with the Employer any change or changes after receipt of proper notice.

Employees will be on duty eight (8) hours each day with a twenty (20) minute lunch break and a ten (10) minute coffee break during this eight (8) hour shift. Employees will take these breaks at the direction of the employer. Employer will provide a provide an eating area. Receptionists will take their breaks in the vicinity of their work area and will be expected to handle necessary work during this period.

The employee will be provided a meal or food from the vending machine by the supervisor if the employee is not scheduled for overtime before the start of the employee's work shift but employee works twelve (12) or more consecutive hours.

All employees shall be paid time and one-half (11/2) their regular hourly rate for all hours worked over forty (40) hours per week. All paid leaves except for sick leave shall be considered as time worked for the purposes of computing overtime.

. . .

ARTICLE XVIX [XXIX?]
MANAGEMENT RIGHTS

Except as specifically restricted or limited by this Agreement, the management of Park View Rehabilitation Pavilion and Pleasant Acres and the direction of the working forces is vested exclusively in the Employer which rights will not be used to discriminate against any employee covered by this Agreement.

. . .

BACKGROUND

The instant grievance was filed on November 3, 1989. In it, Union Steward Sandy Polzin asserts, "Arbitrary change of hours for part-time nursing assistants," cites the Agreement Preamble

and Articles VIII, III and XXIII, and requests "Any change of hours to be by seniority and notification to the Union."

The grievance was submitted in the same form at the various prearbitral steps and denied at each as follows:

> [Step 1 response:] Your contention is that any change in hours for Nursing Assistants should be done by seniority with notification to the union. . . . Parttime employees are on staff to provide flexibility in scheduling and it has always been the right of management to schedule part-time employees based on staffing needs. Scheduling of hours has never been done based on seniority.
>
> [Step 2 response:] I reviewed the scheduling of hours (and schedule changes) with Nursing Service for the five part-time employees you identified. The results are as follows:
>
> 1. Eberhardt - (who specifically does not want hours at Pleasant Acres) ended up with more hours during the period of time in question, than she is normally scheduled.
>
> 2. Proctor - worked almost full-time the first couple weeks of the time period and consequently made up the days cut.
>
> 3. Hanna - expressed gratitude that her hours were cut so she had more time with her baby. She also hoped to have less hours on the next schedule too. She would like float status and is the only employee of the five who is on the a.m. shift. On the schedule you are questioning, she ended up working additional hours too that made up for the cuts.
>
> 4. Arnold - lost 2 days in the six week schedule, not 4 as you indicated. She picked up other extra days (4) so consequently made up the cuts during the time period also.
>
> 5. Minaker - who only works weekends and Mondays is readily available to fill in on short notice and often works double shifts when needed. During the time period there was one Monday she possibly could have been cut - but it wasn't noticed. She was not singled out as an

exception to the cuts.

> I found no evidence to indicate an intention by management to either circumvent or acknowledge the seniority principle in cutting hours. There was, however, a conscientious attempt to make staffing levels on all shifts more equitable and to be financially prudent without compromising quality care. In addition, none of the five individuals you named suffered any harm due to the cuts. Part-time workers offer flexibility to meet the needs of Park View and its patients.
>
> [Step 3 response:] In reviewing the grievance materials and the scheduling practices of the Nursing Service Department of Park View Health Center, I find that no violation of the Collective Bargaining Agreement has occurred in regard to the scheduling of part-time hours. Article XXIII of the Agreement, in fact, makes no mention of scheduling practices for part-time positions. As such, past practice governs. In the case of reducing hours for part-time positions by reverse seniority, there is no clear contractual provision or past practice which would require that such a procedure be followed. As such the grievance is denied.

The grievance was then submitted to arbitration as noted above.

At the hearing, the Union presented case-in-chief testimony regarding the merits of the grievance from Karen Hanna and Janice Eberhardt who were part-time Nursing Assistants at the time the disputed schedule change occurred, and from Sandy Polzin the Union steward who filed and processed the grievance. The County's case-in-chief consisted of the testimony of the Scheduling Clerk, Daniel Beyerl, who administers scheduling and who made the change at issue, and from Personnel Coordinator Jean Blahnik who handles the facility's personnel matters and who gave the Step 1 response to the instant grievance. The Union then presented rebuttal including testimony concerning bargaining history from Union President Behnke and Union Staff Representative Gregory Spring. Various aspects of the testimony and documentary evidence submitted are referred to in the following summaries of the parties' POSITIONS and in the DISCUSSION which follows.

POSITION OF THE UNION

The Agreement covers both full- and part-time employes and hence covers the Employer's several part-time Nursing Assistants. The evidence establishes that regular part-time employes are hired and routinely scheduled to work at least 40 hours in a two week period. Thus, all of the part-time employes noted on the Exhibit 10 schedule for September 24-November 4 were

scheduled to work 15 days in the six week schedule period. In uncontested testimony, Union's witnesses Hanna and Eberhardt stated that they were told when they went part-time that they would be scheduled to work on a half-time basis further stated that that had in fact been the way they were scheduled until the Employer issued the schedule taking effect November 5. The evidence further shows that there have been cases in which part-time employes have worked fewer hours than half-time, but that such has been pursuant to the employe's individual agreement to that effect. The evidence also shows that part-time employes desiring to work hours in addition to their scheduled hours would notify the scheduler so that if the need arose, they would be called in to work additional hours. Thus, while regular part-time employes were all hired and scheduled to work half-time, several would often work more than that.

The schedule posted in October of 1989 and becoming effective no November 5 scheduled the following employes (in descending seniority order on the Part-Time Employees seniority list, Exhibit 9) as follows: Hanna for 10 days, Arnold for 13, Eberhardt for 9, Minaker for 15, Proctor for 12 and temporary employee Young for 6 days. Some of the employes affected by that reduction complained to the Union Steward. Following an investigation, the instant grievance was filed.

The Employer violated Art. VIII by its scheduling of hours of part-time employes on that schedule. The Employer's agreement "to the seniority principle" in that Article means that good things happen to you by seniority and bad things happen to you by reverse seniority. The Union so informed the Employer during a prior round of bargaining when the Employer asked what the Union thought that sentence meant and during which the Employer sought unsuccessfully to limit the seniority language. Hanna and Eberhardt testified that they did not want their scheduled hours reduced, and Steward Polzin testified that the same was true of Arnold and Proctor. The reductions were obviously not in inverse seniority order.

The reductions also constituted a violation of Art. IX since they amounted to a partial layoff out of seniority order. Citing, City of Prairie du Chien, WERC Case 37, No. 3981, MA-4912 (Honeyman, 1988). The reductions were also not in the order specified in Art. IX.

Under both the Art. VIII seniority and the Art. IX layoff provisions, the employes are entitled to be scheduled for their normal number of hours unless a seniority-based reduction is imposed or unless the employe(s) have requested fewer hours. Otherwise, the Employer could defeat hours-based benefit eligibility by altogether replacing nonprobationary regular parttime employes with lower-cost probationary employes. In the past, when the employer found itself overstaffed, it sought volunteers for hours-reductions, and when insufficient volunteers came forward, the Employer sent home probationary employes involuntarily. That is what should have been done in this case, with appropriate and timely notice to the Union.

The Employer also violated Agreement Art. XXIII by failing to provide the Union with notice of the change in the part-time Employes' workdays. That provision requires the 15 day

notice in advance of "Any change by Employer in hours of work or days of work. . . . " The parties' subsequent modification of that provision is irrelevant to this dispute since the change took effect in the successor agreement to the Agreement whereas it is the Agreement itself that applies in this dispute.

By way of remedy for the above violations, the Arbitrator should order monetary relief for employes Hanna, Arnold, Eberhardt and Proctor. That relief should be either "that each employe who lost scheduled days be made whole for all such days lost", or "that the employes who did not work on their normally scheduled days (defining the 'normally scheduled' days as those scheduled to work on the September 24th through November 4th schedule) be made whole for such days." Hanna and Eberhardt testified that they often worked in addition to their regularly scheduled days before those days were reduced, and that it is inconvenient for them to be called in on short notice rather than scheduled because of the arrangements which must be made for child care, etc. The testimony shows that the Employer is simply not correct when it asserts that the affected employes did not want to work the full number of hours that they had historically been scheduled to work.

POSITION OF THE EMPLOYER

While the Agreement establishes a 40 hour workweek for full-time employes, there has never been any similar specification in the labor agreement or in communications with employes at hire or at any other time, providing a similar specified work week for part-time employes. How much and when part-time nursing assistants have worked has been a function of how much and when they have been individually available to work. The only hours arrangement established with them at the time of hiring has been that they are required to work at least two weekend shifts every two weeks. Both full- and part-time employes are given the opportunity to sign a posting if they desire to work any hours in addition to the shifts for which they are scheduled, and employes wishing to work additional hours have traditionally notified the Scheduling Clerk of such a desire.

In general, the Employer's problem has been too many unfilled shift vacancies, rather than overstaffing. However, in October of 1989, due to closure of a unit, there was a recurring problem of too many Nursing Assistants scheduled to work relative to the need, such that management sought out Nursing Assistants who were willing to volunteer to go home early on a number of dates.

As a consequence of this problem, which turned out to be short-lived, in the six-week schedule to take effect November 5, 1989, Scheduling Clerk Beyerl changed and partially curtailed the number of hours of scheduled work for some part-time Nursing Aassistants. The subject grievance was then filed as a "class action" by the Union.

The Employer did not violate the Agreement by its scheduling of hours of part time employes in November of 1989. The first paragraph of Article XXIII of the Agreement does not apply to part-time employes. It was for that reason that the parties specifically modified it to

include special and differentiated references to part-time employes in the 1990-91 agreement. The changes negotiated in the 1990-91 agreement also show that the parties recognize that part-time employes have been employed, at times, on shifts of less than 8-hours length and, at times, on an as-needed basis.

Given the absence of any specific hours language concerning the number or scheduling of hours of part-time employes, those matters are controlled by Art. XXIX (Management Rights) which gives the Employer the right to direct the working forces. The Union's reliance on the general principle of seniority is misplaced. Seniority does not automatically carry with it any particular substantive claims. The substantive dimensions of seniority take shape not from recognizing an employe's seniority status but from spelling out what role that status has in dealing with particular benefits or situations. Citing, Food Marketing Corp., Div. of Super Valu Stores, Inc., 87-1 ARB 8025 (Goldman, 1986).

Since Arts. VIII and XXIII provide no clear or direct application of seniority to the scheduling of hours of part-time employes, it is appropriate to rely on past practice. The past practice evidence shows that the Employer, with the Union's acquiescence, has taken an extremely casual approach to the assignment of hours to part time employes. Part-time employes frequently requested that the Scheduling Clerk work around their personal schedules as students or parents of young children, and the scheduling clerk attempted as well as he could to comply with those requests, consistent only with a requirement that all the employes work at least two weekend shifts every two weeks. Thus, the past practice evidence shows that the number of hours any part-time employe was scheduled to work was usually based on the willingness and availability of the part-time employe to work as opposed to any assignment of hours on the basis of seniority. It is clear that it has been employes' indications of willingness and availability to work additional hours at particular times, and not inverse seniority, that has been the basis on which the Employer has sought to fill shift vacancies as they developed, as well.

Moreover, if the seniority principle were to govern scheduling the Employer would be effectively forced to abandon its past practice of scheduling hours to meet the personal needs of the part-time employes (which the Union does not want the Employer to abandon) because it would be almost impossible to meet the employes' personal preferences in seniority order. It would also impose an undue operational hardship and threaten the Employer's ability to fulfill its State-mandated staffing levels to require the Employer to contact part-time employes in seniority order in attempting to fill each shift vacancy that develops, in turn. Neither the Agreement language nor past practice warrants such an interference with the Employer's ability to pursue its mission and to meet its part-time employes' personal scheduling needs.

If the layoff provisions of Art. IX had been invoked to adjust to the overstaffing situation, while those provisions first require layoffs of temporary, seasonal and casual and then of probationary employes, they do not specify that such layoffs among those groups must be by inverse seniority.

The timing of the posting did not violate Article XXIII of the Agreement. Scheduling Clerk Beyerl testified that he believed he posted the schedule on the afternoon of October 20, 1989, which would have been eighteen days before the new schedule went into effect. Such was the customary lead time of his schedule posting for some three and one-half years. Although some of the employes testified that they did not see the posting until less than 15 days prior its effective date of November 5, the Union's evidence does not establish that it was not in fact posted in accordance with Beyerl's usual practice. The posting of the schedule on October 20 gave sufficient notice to all employes, including officers of the Union, of the contents of the new work schedule.

If the Arbitrator finds a violation in this matter, there should be no retroactive award of back pay. The actual schedules of days worked by employes showed no clear loss of hours by any part-time employes affected by what proved to be a temporary cutback in their hours. Only Hanna and Eberhardt testified on their own behalf that they lost hours, yet both also testified that they had desired a cut in their hours at the time their hours were in fact being cut by the schedule that took effect on November 5. Beyerl also testified that any employe affected by the temporary cutback in part-time hours had ample opportunity to work additional hours since that time, if they so desired. None of the employes for whom the Union seeks back pay herein has expressed any desire to the Employer to be assigned additional hours. Finally, if additional scheduled hours are deemed warranted for any affected employes, the County should be directed to provide them to the affected employes in the form of future work opportunities rather than in the form of back pay. In any event, the Award in this case should not be made applicable to any issue other than reduction of hours of part-time employes, which is the only issue addressed in the grievance.

DISCUSSION

It should be noted at the outset that the context in which this award is being rendered is the disputed change in the total number of scheduled hours of work of part-time Nursing Assistants that occurred in the October-December, 1989 time period during the term of the Agreement (i.e., the parties' 1988-89 Agreement.) Accordingly, this is an interpretation of the 1988-89 Agreement, and not of the parties' 1990-91 agreement.

It can also be noted at the outset that the bargaining history evidence brought forth by the parties does not provide the Arbitrator with reliable guidance regarding the mutually intended meaning of the provisions requiring interetation herein. No comment need be made regarding the bargaining history evidence relating to Art. VIII since the Arbitrator finds below that it is unnecessary to interpret that provision herein. The fact that the County sought unsuccessfully to eliminate the 15 day notice requirement in the 1990-91 negotiations sheds no light whatever on whether or not that provision applies to changes in the number of hours for which part-time employes are scheduled to work. In addition, the nature of proposals unsuccessfully advanced by the Union in the parties' bargaining about a successor to the Agreement is of no significance given

the undisputed testimony that the Union's 1990-91 proposals that were not agreed upon were all withdrawn without prejudice. Finally, the fact that the parties agreed that the successor to the Agreement will specifically differentiate full-time and part-time employes in various respects does not, alone, persuasively establish that the parties mutually understood either that that is what the predecessor Agreement meant all along or that the predecessor Agreement meant something different than the modified language specifies.

Failure to Give 15 Days Notice

The Arbitrator is persuaded from a reading of the language of Art. XXIII that the 15 day notice requirement in the second sentence of the first paragraph of that Article is appropriately to be read in the context of the first sentence thereof. Specifically, the Arbitrator finds the second sentence to be applicable only to "any change by the Employer in the number of hours of work or days of work" from the "normal day of eight (8) hours" or from the "normal workweek of forty (40) hours" referred to in the first sentence of that paragraph, or from the days of work of employes working that "normal workweek of forty (40) hours." Because the normal workweek of the part-time Nursing Assistants at issue herein is other than 40 hours and because there was no change in this case from an eight-hour workday, the changes in scheduled hours of part-time Nursing Assistants in this case did not fall within the scope of the 15 day notice requirement.

Accordingly, the answer to ISSUE 4, above, is "No."

Change in Number of Scheduled Hours of Part-Time Nursing Assistants

Employes Eberhardt and Hanna testified that ever since each had requested and been granted a change from full to part time, in 1987 and June of 1988, respectively, each has been scheduled half-time, i.e., for 15 eight hour shifts in each six week schedule period. Those assertions were corroborated by Scheduling Clerk Beyerl's testimony to the effect that the schedule in dispute herein was the first time the Employer had, during Beyerl's three years as Scheduling Clerk, reduced the number of scheduled hours of a part-time employe except in those instances in which the employe had requested such a reduction. Further support for the Union's claim that one-half time has been the norm for part-time Nursing Assistants came in Blahnik's testimony that when part-time employes are hired, their benefit levels are pegged at a level based on the portion of a full-time work schedule that it is anticipated they will be working and that in most instances that level has been at 50%. While there is no express reference to one-half time as the normal part-time work schedule in either the Agreement or the individual employment offer letters issued to and signed by newly hired part-time employes, there is also no language in either document specifically dealing with the subject of part-time workweek at all. There is no evidence in the record disputing Eberhardt and Hanna' testimony that they were told by Management upon being changed from full-time to part-time that they would be scheduled to work hours constituting half-time. Blahnik testified only about the contents of offer letters, not about any verbal statements to employes beginning to work part-time. Moreover, she acknowledged that individual offer letters

may not have been issued to employes such as Eberhardt and Hanna who were originally hired on a full-time basis and later asked to work part-time, instead. Last, but by no means least, the Arbitrator notes that all eleven of the part-time employes listed on the schedule posted for the period September 29-November 4 were scheduled for precisely 15 days of work in that six-week schedule period.

The Arbitrator therefore finds the evidence to establish a practice-of sufficiently longstanding, uniform and mutually-recognized nature to be binding--of scheduling part-time Nursing Assistants to work a total number of hours constituting half-time unless the employe previously individually agreed to be scheduled for a lesser number of hours.

That practice is sufficient, in the Arbitrator's opinion, to make an involuntary reduction in schedule of a part-time Nursing Assistant below half-time (or below such lower level of scheduled hours as the employe may theretofore have agreed to) a "lay off" within the meaning of Art. IX. As such, absent sufficient voluntary hours reductions to conform to its needs, the Employer is required to eliminate the scheduled hours of work of temporary, seasonal or casual employes in the position involved and then eliminate the scheduled hours of work of probationary employes in that position before reducing or eliminating the scheduled hours of work of any permanent part-time employe. It is also required to eliminate the hours of the least senior permanent part-time employe in that position before reducing or eliminating the hours of the next least senior permanent parttime employe in that position.

It appears that the Employer acted consistent with these requirements when it initially responded to the overstaffing in October of 1989 by eliminating the scheduled hours of probationary part-time Nursing Assistants after the voluntary reductions of hours it was able to solicit did not reduce the staff to the levels it then needed. However, Beyerl admitted that he changed his approach in preparing the schedule taking effect November 5, such that he reduced the number of scheduled shifts of several of the permanent part-time Nursing Assistants below one-half time (or below whatever lower level of scheduled hours had been in effect for those employes in preceding schedules by individual agreement) without the consent of those employes, and without eliminating the hours of temporary part-time Nursing Assistant H. Young. The Arbitrator concludes that the Employer thereby violated Art. IX of the Agreement. Because that Article expressly makes seniority (which is defined in Art. VIII) applicable to layoffs, this is not a situation in which the applicability of the more general agreement "to the seniority principle" in Art. VIII needs to be determined, differentiating the instant situation from that in the Food Marketing Corp., Div. of Super Valu Stores award cited by the Employer.

Accordingly, the answer to ISSUE 2, above, is "yes."

The foregoing interpretation and application of the Agreement no doubt makes the Employer's complex task of scheduling part-time Nursing Assistants more difficult at times of overstaffing than would be the case if the Employer were free to decide the number of hours for

which it would be scheduling each part-time Nursing Assistant based solely on the Employer's needs and the employes' availability, and without regard to Art. IX. However, as noted at the outset, this award focuses only on the parties' rights and responsibilities regarding reductions of the total number of scheduled hours of the part-time Nursing Assistants. Many of the Employer's expressed concerns expressed in its brief, including those about the operational implications involved it were required to schedule part-time Nursing Assistants for preferred days of the schedule period by seniority and/or required to offer each shift vacancy (coverage for absentee) to Nursing Assistants by seniority, involve subject areas beyond the scope of this dispute and not dealt with in this Award.

Remedy

The Arbitrator is satisfied that the appropriate remedy in this case is to declare that the Employer's scheduling of part-time Nursing Assistants in November of 1989 violated Agreement Art. IX, and to state, as the Arbitrator has done above, the general nature of the requirements of Art. IX as regards reductions of the numbers of scheduled hours of part-time Nursing Assistants.

With regard to the Union's request for a cease and desist order, the evidence regarding the Employer's posted schedules since the disputed one suggests that this was a one-time occurrence rather than an on-going pattern of conduct on the Employer's part. In addition, the Employer's actions were not intended to and did not in fact result in a reduction in fringe benefit eligibility for any of the employes affected. Rather this appears to have been a good faith difference of opinion as regards the extent, if any, to which the Agreement limits the Employer's rights to reduce part-time Nursing Assistants' scheduled hours. In these circumstances, there is no demonstrated need for relief in the form of a specific cease and desist order.

With regard to the Union's request for make whole relief, the Arbitrator notes that the grievance initiation form and the identical forms used to advance the grievance step to step in the grievance procedure do not include any request for back pay or other make whole remedies. While that does not preclude make whole relief, it at least suggests that retrospective relief may not have been the central focus of the parties' pre-arbitral discussions. In any event, the evidence indicates that the affected employes had opportunities to obtain work that would make up for the reductions in scheduled hours they experienced. The harm experienced therefore, appears to have been the difference between knowing well in advance when they were scheduled to work, and learning of available shifts with less lead time. The Arbitrator recognizes that difference, in terms of the employes' ability to rearrange schedules or to obtain child care services, etc. Nevertheless, the inconvenience involved in the instant circumstances is not sufficient--given the seemingly isolated nature of the instant violations, the availability of opportunities during the period and thereafter to make up the hours reduced, and the Employer's longstanding and continuing willingness to accommodate part-time Nursing Assistants' personal needs and preferences in scheduling their hours of work--to require or warrant an order of back pay or other make whole relief for any of the employes involved.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the remaining ISSUES 2-5, that:

a. The Employer did violate Agreement Art. IX by its scheduling of hours of part-time employes in November of 1989.

b. The appropriate remedy for the violation noted in a., above, is the Arbitrator's declaration in this Award that the Employer's conduct violated Art. IX of the Agreement and the Arbitrator's statement (under DISCUSSION, above) of the reasons why the Employer's conduct violated that provision and of the requirements of that provision as regards reductions in the numbers of schuleded hours of work of part-time Nursing Assistants. The Union's requests for a cease and desist order and for make whole relief are denied.

c. The Employer did not violate the Agreement by any failure to give any required notice of change of scheduled hours of part-time employes in November of 1989, such that no consideration of remedy for any such violation is called for herein.

Dated at Shorewood, Wisconsin this 16th day of November, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator