BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BROWN COUNTY EMPLOYEES' UNION,
LOCAL 1901, AFSCME AFL-CIO

and

BROWN COUNTY

Bernard Corbeille
Back pay due under
10-30-90 Award

Case 412
No. 43062
MA-5885

Appearances:

Mr. John C. Jacques, Assistant Corporation Counsel, PO Box 1600, Green Bay, WI 54305-5600, appearing on behalf of the County.

Mr. Bruce F. Ehlke, Lawton & Cates SC, 214 West Mifflin Street, Madison, WI 53207-2594, appearing on behalf of the Union.

SUPPLEMENTAL ARBITRATION AWARD

By designation of the Wisconsin Employment Relations Commission, the undersigned Arbitrator issued a grievance arbitration award dated October 30, 1990 ordering the County, among other things, in paragraph 2.b. ". . . to make Bernard Corbielle whole, without interest, for the loss of wages and benefits he experienced by reason of the County's October 30, 1989 termination of his employment in violation of the Agreement (with a set-off for interim earnings that Grievant would not have received had he not been terminated." [As shown in this quotation, the Arbitrator evidently misspelled Grievant's last name in the original Award.]

The parties jointly requested that the Arbitrator take jurisdiction of a dispute that arose between them as to the amount of money referred to in the above-quoted portion of the Award. The parties presented evidence and arguments to the Arbitrator on that dispute at the Mental Health Center in Green Bay, Wisconsin on January 22, 1991. A transcript of that hearing was prepared and distributed and the parties submitted briefs and reply briefs. Briefing was completed on February 23, 1991, marking the close of the hearing.

STIPULATED ISSUES

At the hearing the parties authorized the Arbitrator to hear and decide the following issues:

1. What is the amount of money referred to in paragraph 2.b. of the October 30, 1990 Award?

2. What interest, if any, from what date (on or after the date of the Award) is due Grievant from the County in the circumstances?

Discussions at the hearing revealed that the dispute focused solely on the amounts of lost base wages, lost overtime and interest. Both parties' calculations included full payment of holidays. The parties expressed the mutual expectation that the amounts the County was prepared to pay for medical expenses was satisfactory; that the amounts of back pension contributions would follow directly from the determination of the wage and overtime loss determinations; and that there were no other fringe benefits in dispute.

FACTUAL BACKGROUND

Grievant was discharged from his employment as a Nursing Assistant at the County's Mental Health Center as of October 30, 1989, following a period of time on suspension with pay. He resumed employment on November 5, 1990 pursuant to the Arbitrator's reinstatement order. No back pay has been paid him to date.

During the period from discharge to reinstatement, Grievant was employed by three employers:

--as a Nursing Assistant at Roseville De Pere Nursing Home where his sister was in charge of hiring and scheduling. Grievant had applied for part-time work at Roseville during the calendar month preceding the discharge and had been employed there at $4.75 per hour on highly flexible hours for a month or so preceding discharge, working 10 and 12.75 hours during the two week pay periods ending September 24 and October 8, 1989, respectively. After the discharge, Grievant: worked no hours there in the pay periods ending October 22 and November 5, 1989; worked between 13.5 and 28.5 hours in the pay periods ending between November 19, 1989 and February 25, 1990; worked between 40 and 57 hours at an hourly rate of $4.90 in the pay periods ending between March 11 and April 22, 1990; and worked 15.75 hours in his last pay period at Roseville which ended on May 6, 1990, during which he secured full-time employment as noted below.

--as a laborer at Metro Plastering, where he worked some 204 hours at $5.00 per hour on an "on call" basis part-time over the period

January through April of 1990;

--as a full-time long distance truck driver for Schneider National Carriers, Inc. where he worked full-time as a long distance truck driver from the beginning of May until his reinstatement by the County.

With regard to overtime, County established that overtime had been non-mandatory at all material times and calculated that during the period January, 1988 through date of discharge, Grievant had averaged eight hours of overtime. The Union presented evidence to the effect that Grievant had been working an average of 32 hours of overtime per pay period after being reinstated; that the overall level of overtime available to the bargaining unit had increased substantially from 1989 to 1990; that Grievant had posted for a day shift position just prior to the discharge; that day shift employes enjoy more overtime opportunities than those on the night shift that Grievant had previously been working; that Grievant had greater seniority after the reinstatement than he had during the period measured by the County; and that the County's measuring period included approximately six months when Grievant had been working part-time and one month when Grievant had been on paid suspension. The Union also presented evidence that a PM shift Nursing Assistant less senior than Grievant had averaged 25 overtime hours per pay period during 1990 and that the County had not provided the Union with additional overtime information requested by the Union in writing on December 31, 1989 and January 11, 1990.

POSITION OF THE UNION

The back pay due under the Award should consist of the Grievant's base pay lost ($19,525.12) plus holiday pay lost ($556.80) plus overtime lost calculated at the 32 hours per two week pay period rate at which he has been working overtime since his reinstatement ($11,804.16) less the pay Grievant received for working in excess of the 12.75 hour level at which he worked at Roseville Nursing Home in the two week period ending October 8, 1989 ($1,079.03) and less the amount of pay Grievant received for his full-time employment as a long distance truck driver from May of 1990 and his reinstatement ($11,182.26). That comes to a net of $19,624.79.

No claim is made for shift differential because Grievant has been reinstated to the day shift consistent with his having posted for a change to that shift during his suspension with pay prior to the discharge. The Metro Plastering income was odd job income earned on an on call basis which could have been earned by Grievant while employed full-time with the County, such that it should not be offset.

The Union further argues that interest should be added at the rate of 12% (citing Sec. 815.05(8), Wis. Stats) from at least the date of Grievant's reinstatement if not from the date of the termination in order to make Grievant whole and especially in light of the County's intentional and unreasonable withholding of information and of undisputed back pay amounts so as to prolong

Grievant's non-use of the monies to which he is entitled and to cause Grievant to experience increased income taxation in calendar 1991 when it is ultimately paid all at once.

The evidence shows that Grievant made diligent efforts to find employment and to work long hours away from his daughter in order to provide for the child's support. The record does not support the County's contentions that Grievant chose not to work full-time prior to May of 1990 in order to care for his daughter.

The arbitrator should be as specific as possible concerning how and when the County is being ordered to pay Grievant what it owes him in this matter.

POSITION OF THE EMPLOYER

During the period from the date of discharge through the beginning of May, 1990, Grievant failed to reasonably seek full-time employment such that his back pay during that period should focus solely on the number of hours he actually chose to work for Roseville and Metro Plastering and should consist of the difference between what Grievant would have been paid for those hours under the Agreement and what he in fact was paid for working those hours ($2,441.37) plus holiday pay lost during that period ($331.77). Grievant should not be compensated for any overtime as regards that period because he failed to reasonably seek and obtain available full-time work as a nursing assistant or any other full-time work during that period. The net back pay amount for the period from the discharge through April of 1990 therefore should be limited to $2,773.13.

During the period from the beginning of May, 1990 until reinstatement on November 5, 1990, Grievant did mitigate by accepting full-time employment with Schneider. His back pay for that period should therefore consist of the difference between what he would have earned under the Agreement including base earnings ($10,022.40) plus overtime calculated at the 8 hours per two week pay period rate which he averaged from January 1, 1988 through the date of discharge ($1,503.36) plus holiday pay lost during that period ($222.72) less the pay Grievant received from Schneider ($11,182.26). That nets to an additional $566.22.

Taken together the two net back pay amounts above total $3,339.35. [The County identifies the total of the sums on its Exhibits 7 and 8 as $3,239.35 in its reply brief which the Arbitrator takes as a typographical error.] Interest is not applicable by the express language of the Arbitrator's award. To order interest would therefore exceed the Arbitrator's Award interpretation authority in this supplemental proceeding.

The evidence shows that Grievant failed to make diligent efforts to find employment and instead chose to work part-time in order to care for his daughter. Grievant was able to name only five employers (three of which were nursing homes) at which he claims to have applied, and he has not documented the dates on which he applied anywhere or the identities of the other

employers involved in the 25 or so applications he claims to have made during the period when he was not employed on a full-time basis. Grievant possessed job skills as a certified Nursing Assistant, and his discharge did not strip him of that certification. He was physically fit to work throughout the period. The evidence shows there were plentiful Nursing Assistant jobs advertised in the Green Bay area newspaper at all material times. Grievant's explanations his inability to find full-time work for several months--that one cannot expect to find work at a nursing home when one has been accused of patient abuse and that he took into account his need to care for his daughter in determining his schedule of available hours to work--are not consistent with his obligation to make reasonable efforts to mitigate his loss of full-time County work.

DISCUSSION

Back Pay Due Under Award Paragraph 2.b.

Resolution of ISSUE 1 involves several sub-issues. Primary among them is whether Grievant has met his obligation--well recognized in grievance arbitration--to mitigate his economic loss by taking reasonable steps to find and keep suitable alternate employment during the period between his discharge and reinstatement.

A careful review of the evidence persuades the Arbitrator that the Grievant did not meet that obligation during November and December of 1989 but that he did meet that obligation from the beginning January of 1990 until he was reinstated by the County.

Accordingly, the Arbitrator adopts the County's proposal to limit Grievant's back pay during November and December of 1990 to the difference between what Grievant was paid by Roseville and what he would have been paid by the County for the straight-time hours he actually worked for Roseville during those two months, plus full holiday pay for the period which the County has conceded Grievant is due.

It is true that, after working no hours at all at Roseville in the two pay periods following the discharge, Grievant increased the hours he was working there compared with the hours he had been working there prior to the discharge. Nevertheless, the Arbitrator finds that the record as a whole to support the County's contention that Grievant did not meet his mitigation obligation during November and December of 1989. Among the considerations leading the Arbitrator to conclude that Grievant failed to mitigate during November and December of 1989 are the facts: that Grievant was unable to name a single employer to whom he had directly submitted an application during November or December of 1989 or to specify any step he took to find work during those months other than submitting a Job Service statement of availability for factory, construction and nursing assistant work and orally informing his sister of his availability for additional hours at Roseville; that he kept no record of the dates on which he submitted the 25 applications he estimates he submitted to various employers between his discharge and his reinstatement; that he worked no hours at Roseville in the two-week pay periods ending on

October 22 and November 5, 1989; that he was in Arizona for some portion of that four week period; that when asked on cross-examination whether he looked in the newspaper for nursing assistant positions in November and December of 1989, Grievant replied that he could not recall [tr.65]; that the Union's rehabilitation of Grievant in that respect on re-direct examination was vague and unconvincing [tr.87-88]; and that Grievant's sister testified on the one hand that she was sure Grievant could not have been hired at Roseville on a full-time basis because more senior part-time employes working there were offered and accepted all full-time nursing assistant vacancies arising [tr.115], but on the other hand that she could not recall whether Roseville had hired any Nursing Assistants new to the facility during that period [tr.115].

Beginning in January of 1990, Grievant was working part-time for two different employers during the early months of that year, and he showed another significant increase in hours worked at Roseville beginning with the pay period ending March 11. Moreover, in his testimony he was at least able to recall submitting applications during January and the months following to a few employers whom he was able to name. The fact that the nursing homes at which Grievant recalled applying in this period did not call him back is not surprising given his having been discharged by the County for patient abuse. On those bases and the record as a whole, the Arbitrator concludes that Grievant did meet his obligation to mitigate from January through April of 1990. It is undisputed that once Grievant accepted full-time employment with Schneider National from about the beginning of May until his reinstatement, he was meeting his mitigation obligation.

The Arbitrator finds that County is entitled to offset the full amount of Grievant's 1990 earnings at Metro Plastering. While it is true that this work was sporadic and that Grievant could have performed perhaps half of it even if he had been working a regular day shift at the MHC during the early months of 1990, there is no evidence that Grievant had ever sought or held employment of this kind since he was first hired as a County employe in 1986, and Grievant testified that he did not know anyone at Metro prior to his becoming employed there beginning in January of 1990.

The Arbitrator also finds it appropriate in this case to allow the County to set off the entire amount of his Roseville earnings against Grievant's loss. While this is arguably inconsistent with the conventional treatment of at least that portion of his Roseville employment that had begun in the month or so prior to the discharge, the Arbitrator finds that such an exception is appropriate in the circumstances of this case. Grievant is being deemed to have met his obligation to mitigate his loss of full-time employment during the period January through May, 1990 in material part by reason of his increased employment at Roseville. Moreover, the Roseville work began only a month or so before the discharge, so that there is relatively little evidence from which to reliably predict how much Grievant would have worked there had he not been discharged. Finally, Grievant would surely have chosen to work County overtime instead of Roseville hours whenever there was an overlap, so it stands to reason that Grievant's hours at Roseville would have likely diminished as his overtime opportunities at the County grew.

There remains the question of the appropriate calculation of lost overtime opportunities. Because Grievant has been found to have failed to adequately seek employment November and December of 1989, the extent to which he would have worked overtime had he worked for the County during those two months need not be determined. There remains, however, the question of how much overtime Grievant would have worked January through October of 1990.

The positions taken by both of the parties as regards the overtime Grievant would have worked appear extreme and unpersuasive. The County's approach fails to take account of the fact that bargaining unit overtime opportunities increased significantly in 1990 over 1989 levels; and that Grievant was a part-time employe during the first six months and nine days of 1988 and not at all during October of 1989. Under the Union's approach, the Arbitrator would be calculating overtime based on Grievant's choices immediately after reinstatement, which was a time when was without the financial cushion of working highly flexible hours at Roseville, and at a time when he had not received any back pay pursuant to the Award. Moreover, the Union's 32 hours per pay period figure appears well in excess of anything the Grievant's actual historical overtime earnings would support even when the flaws in the County's approach are taken into account.

When all of the record evidence bearing on the question is considered, the Arbitrator finds it appropriate to deem Grievant to have lost on average 14.7 hours of overtime per pay period January through October, 1990. The Arbitrator has come to this figure by roughly approximating the number of pay periods in the County's January 1988 through October 1989 measuring period (47 pay periods), eliminating 13 of those in 1988 and two of those in 1989 as improperly averaged in, and working back from the County's 8 overtime hours per pay period average to an adjusted figure (when averaged over 32 rather than 47 pay periods) of 11.75 overtime hours per pay period. The Arbitrator further finds it appropriate to increase the resultant 11.75 overtime hours per pay period by a factor of 25%. The 25% factor constitutes a designedly conservative combined estimate of the effects on Grievant's likely overtime loss of: the overall increase in bargaining unit overtime opportunities from the time of the County's measuring period to 1990; Grievant's increasing seniority; and Grievant's change from night to day shift.

Based on the foregoing, and with certain estimating and adjustments in the time periods to facilitate calculation from information available in the record, Grievant's back pay entitlement under paragraph 2.b. of the Award is to be as follows:

Wages for November 1 -- December 31, 1989

90.5 hrs.	Roseville hours 11-1-89 -- 12-23-89 (includes one-half of last 1989 pay period)
x	
$4.24	difference in wage rates ($8.99-$4.75)
=	
$383.72	wage difference for 11-1-89 -- 12-23-89

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11 hrs. Roseville hours 12-24-89 -- 12-31-89
(one-half of last 1989 pay period)
x
$4.24 difference in wage rates ($8.99-$4.75)
=
$46.64 wage difference for 12-24-89 -- 12-31-89

- - - -

$383.72 wage difference for 1-1-89 -- 12-23-89
+
$46.64 wage difference for 12-24-89 -- 12-31-89
=
$430.36 wages lost November 1 -- December 31, 1989

Wages and Overtime for January 1 -- April 30, 1990

$6,310.40 base wages lost (80 x 8.5 pay periods x $9.28)
+
$1,739.30 overtime deemed lost
(14.7 x 8.5 pay periods x $9.28 x 1.5)
-
$1,483.13 Roseville earnings
-
$1,020.00 Metro Plastering earnings
=
$5,546.57 wages and overtime lost January 1 -- April 30, 1990

Wages and Overtime for May 1, 1990 -- November 4, 1990

$10,022.40 base wages lost (80 x 13.5 pay periods x $9.28)
+
$2,762.42 overtime deemed lost
(14.7 x 13.5 pay per x $9.28 x 1.5)
-
$11,182.26 Schneider earnings
=
$1,602.56 wages and overtime lost May 1 -- November 4, 1990

Totals for Full Period November 1, 1989 -- November 4, 1990

$430.36	wages lost November 1 -- December 31, 1989
+	
$5,546.57	wages and overtime lost January 1 -- April 30, 1990
+	
$1,602.56	wages and overtime lost May 1 -- November 4, 1990
+	
$554.48	holidays lost November 1, 1989 -- November 4, 1990 ($259.84 + $71.92 + $222.72)
=	
$8,133.97	Back pay total for full period

The Arbitrator emphasizes, as he did at the hearing, that no consideration has been given to settlement positions taken by anyone during pre-arbitral discussions of possible resolution of this dispute. While certain documents used in those discussions provide useful summaries of the facts regarding what Grievant would have earned from continued County employment during the roughly one year period following the discharge, it is only those facts (as clarified and amplified by the sworn testimony and other exhibits) that the Arbitrator has considered, not the willingness or unwillingness of any individuals to propose or accept a settlement involving of any or all of those numbers.

Union Request for Interest

There was no showing that there exists a provision for interest on back pay in the parties' Agreement or that the parties otherwise have a mutual understanding that such a remedy is an appropriate element in back pay awards issued under the Agreement. Accordingly, the Award expressly provided that the County's obligation is to pay the amount of money described in paragraph 2.b., "without interest."

This supplemental proceeding is for the purpose of interpreting and applying that Award language. The above-quoted Award language clearly and unambiguously precludes an interpretation and application of the Award by the Arbitrator in this proceeding that would add interest.

Whether interest would have been an appropriate element of relief in award enforcement proceedings in some other forum does not shape or control the Arbitrator's jurisdiction herein to interpret and apply the language of the Award as written.

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 ISSUES noted above that:

1. The amount of money referred to in paragraph 2.b. of the October 30, 1990 Award is eight thousand, one hundred thirty-three dollars and ninety-seven cents ($8,133.97).

2. No interest is due Grievant from the County in the circumstances of this supplemental grievance arbitration proceeding.

3. The Arbitrator reserves jurisdiction to correct calculation errors that may be called to his attention by either of the parties if but only if such error is brought to the Arbitrator's attention in writing within 20 days after the date of this Supplemental Award.

4. Within the later of 30 calendar days after the date of this Supplemental Award or 10 days after the Arbitrator's resolution of any claimed calculation error, the County shall pay the ordered amount of back pay to Grievant Bernard Corbeille in a separate check with the customary FICA deduction and income tax withholding, and the County shall make the applicable Wisconsin Retirement Fund contributions relating to the back pay amount.

Dated at Shorewood, Wisconsin this 23rd day of May, 1991.

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