BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SHEBOYGAN COUNTY	:	Case 130 No. 44766 MA-6411
and	:	
SHEBOYGAN FEDERATION OF NURSES AND HEALTH PROFESSIONALS LOCAL 5011, AFT, AFL-CIO	:	

Appearances:

Mr. Bob Russell, Field Representative, Wisconsin Federation of Nurses and Health Professionals, AFT, AFL-CIO, 7700 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of the Union.

Mr. John Bowen, Personnel Director, Sheboygan County, 615 North Sixth Street, Sheboygan, Wisconsin 53081, appearing on behalf of the County.

ARBITRATION AWARD

Sheboygan Federation of Nurses and Health Professionals, Local 5011, AFT, AFL-CIO, hereinafter referred to as the Union, and Sheboygan County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for final and binding arbitration. The undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the payment of overtime. Hearing on the matter was held in Sheboygan, Wisconsin on January 15, 1991. Post-hearing arguments were received by the undersigned on February 20, 1991. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE:

During the course of the hearing, the parties agree to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

> "Did the County violate the collective bargaining agreement when it failed to compensate the grievant at overtime rates for work performed during the week of December 10, 1989 through December 16, 1989? If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

. . .

ARTICLE 7
HOURS, OVERTIME, SCHEDULES

. . .

B. OVERTIME

1. Employees shall be paid at the rate of time and one-half (1-1/2) for all hours worked in excess of the workday (eight (8) hours) or the work week (forty (40) hours).

2. When additional hours, which includes overtime, are needed it will be done on a voluntary basis among employes in the facility having the additional hours. Unplanned overtime will be first offered to the employees on duty at the time of availability. The unplanned overtime will be first offered to the most senior employee on duty and if not accepted, will be offered in descending order to the less senior employees.

. . .

BACKGROUND:

The County operates amongst its various governmental functions three institutions to provide health care. Among these three is Sunny Ridge whereat the County employs Louella Justinger, hereinafter referred to as the grievant, as a Registered Nurse. During the workweek of December 10, 1989 through

December 16, 1989, the grievant had scheduled Thursday, December 14, and Friday, December 15, as vacation days. The grievant was scheduled to work Monday through Wednesday. The grievant accepted a work offer and worked Sunday, December 10. She then worked Monday, Tuesday and Wednesday, took vacation for Thursday and Friday, and accepted a work offer and worked Saturday, December 16. The grievant did not receive any overtime pay for the week and filed a grievance. Thereafter, it was processed to arbitration in accordance with the parties' grievance procedure.

The record demonstrates that on three occasions prior to the filing of the instant grievance, Union President Joyce Heinemann contacted the County's Personnel Director, John Bowen, concerning the County's interpretation of Article 7, Paragraph B1 and its application. On each occasion Heinemann was informed of the County's practice that overtime was paid only for hours actually worked in excess of forty (40) hours per week. Heinemann neither disputed Bowen's interpretation nor did the Union file a grievance over this matter.

The record also demonstrates that on at least two previous occasions, one involving employe Marilee Dillenberg (October 8 through October 11, 1988) and one involving Betty Carofli (November 19 through November 30, 1989). Employes had a combination of worked hours and vacation hours in excess of forty (40) hours. Payroll records demonstrated each employe had been paid straight time for the combination of vacation and hours worked which exceeded forty (40) hours in one week. Further, Staffing Coordinator Barbara Gruenke testified that since at least 1987 this had been the practice at all three (3) County Institutions. In addition, Gruenke testified in cross-examination that the County's interpretation of Article 7, paragraph B1 has been the same for since at least 1984.

The record also demonstrates that during negotiations which culminated in the 1985 collective bargaining agreement, the County proposed specific definitions for productive and non-productive time. 1/ Further, that the County withdrew such proposals prior to reaching an agreement on the 1985 collective bargaining agreement.

Union's Position

The Union argues that the collective bargaining agreement defines the workweek as forty (40) hours, Sunday through Saturday. In the instant matter, vacation was assigned to December 14 and 15, 1989, therefore the grievant never received two (2) off days in a seven (7) day period an employe would normally receive. The Union asserts that it is clear the grievant worked in excess of the work week if vacation time is considered as time worked or as part of the work week. The Union contends that vacation time is a part of the work week and argues the parties have normally, except in this case, treated a vacation day as a normal work day.

In support of its position, the Union points to Heinemann's testimony. The Union argues that Heinemann's testimony demonstrates paid time off such as vacation was previously treated and considered as time worked. Further, that nurses were treated this way since at least 1981 and that Heinemann was unaware of any change in this application until the grievant's December 1989 denial. The Union further argues the County offered no testimony refuting Heinemann's testimony concerning the parties' bargaining history or the application of the language prior to 1988. The Union also argues that Heinemann's testimony demonstrates the County agreed to consider all paid time as time worked when, in 1985, the County withdrew proposals concerning productive time during the negotiations which culminated in the 1985 collective bargaining agreement. Further, that the County's actions in denying the grievant overtime is a unilateral action by the County altering the parties' agreed-upon interpretation of Article 7. The Union also asserts that since 1985 the County has not attempted to clarify the language nor did it repudiate the application of the language.

The Union also asserts that the collective bargaining agreement between the County and another bargaining unit contains the same contract language. Further, that the County has, since at least 1984, counted vacation time as time worked with the other bargaining unit. The Union argues the actions of the County with the other bargaining unit are a confirmation of the Union's position in this matter.

1/ 2.Article VII - Overtime. Add additional language:

3.Productive time is defined as time spent by an employee in the completion of the functions outlined in his/her job description.

4.Non-productive time will be all other time to include, but not limited to, sick time, meeting time, inservice time, vacation time, holiday time, mandatory meeting time.

The Union would have the undersigned sustain the grievance and make the grievant whole.

County's Position

The County contends that it has correctly and appropriately followed Article 7, paragraph B1. The County points out the Union President has raised this issue at least three (3) times prior to the filing of the instant grievance. On each occasion, the County's Personnel Director has informed the Union President that vacation time is not considered time worked. Yet, the County points out, no grievances were filed nor did the Union President indicate any Union position on the matter. Further, the County argues, the Union witnesses could not shed any light on any instance as applied to their local union. The County points to two previous incidents, Carolfli and Dillenberg, where only straight time was paid. The County also argues Guenke's testimony supports the position that overtime is paid only when over forty (40) hours are worked. The County contends its withdrawal of language proposals in 1985 is irrelevant to the instant matter.

The County concludes the Union has failed to demonstrate a violation of the collective bargaining agreement.

DISCUSSION

The record herein demonstrates at a minimum that since at least 1987 the County has not taken paid vacation time into calculation in determining whether an employe has worked more than forty (40) hours during a normal work week. The County presented evidence concerning two previous incidents, one in 1988 and one in 1989, where employes were paid straight time for more than forty (40) hours because they took paid vacation, yet they received no overtime pay in accordance with Article 7, paragraph B1. No grievances were filed by either the Union or the employe involved. Further, on at least three (3) occasions prior to the instant grievance the Union President was informed by the County's Personnel Director of the County's interpretation of Article 7, paragraph B1.

The Union has alleged that the County's actions involving the grievant was a unilateral change in the parties' agreed-upon interpretation of the overtime provision. To support this claim, the Union presented evidence concerning proposals made by the County concerning productive time during the negotiations which culminated in the 1985 collective bargaining agreement. However, the burden herein is on the Union to demonstrate that the County did at one time calculate paid vacation time as time worked for purposes of determining overtime payments. The proposal made by the County in 1985 included in addition to vacation time as time not worked the following: sick time, meeting time, inservice time, holiday time and mandatory meeting time. The parties in reaching agreement on the 1985 collective bargaining agreement agreed to retain the status quo concerning calculation of overtime. Such a proposal the undersigned finds, does not demonstrate the unilateral change alleged by the Union. While the County clearly included vacation time in the proposal, other items were also included. Thus, the undersigned cannot conclude, based upon the proposal made by the County in 1985, that the status quo has been unilaterally changed by the County.

The undersigned finds that for the Union to meet its burden it must demonstrate by specific evidence that employes it represents have in the past received overtime pay which included in the calculation paid vacation time. The undersigned cannot conclude time worked includes paid vacation time absent clear contract language or a past practice demonstrating such a process. The fact such a practice may exist between the County and other unions it bargains with does not establish such a practice in the instant matter. Herein the Union has not presented any evidence which would clearly demonstrate that in the past the County has used paid vacation time as part of the calculation for determining when overtime rates commence for employes represented by the Union. Absent such a determination, the undersigned cannot conclude time "worked" includes paid vacation time.

The undersigned finds the Union, based upon the above and foregoing and the testimony, evidence and arguments presented by the parties, has failed to meet its burden of demonstrating that the actions of the County have violated the collective bargaining agreement. The grievance is therefore denied.

AWARD

The County did not violate the collective bargaining agreement when it failed to compensate the grievant at overtime rates for work performed during the week of December 10, 1989 through December 16, 1989.

Dated at Madison, Wisconsin this 1st day of July, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator