BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
DOUGLAS COUNTY FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5034, AFT, AFL-CIO,		Case 177 No. 44909
and	MA-6453	
DOUGLAS COUNTY		

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 Douglas County Federation of Nurses and Health Professionals, Local 5034, AFT, AFL-CIO.

Mr. Frederic P. Felker, Corporation Counsel, Douglas County, 1313 Belknap Street, Superior, Wisconsin 54880, appearing on behalf of Douglas County.

ARBITRATION AWARD

Douglas County Federation of Nurses and Health Professionals, Local 5035, AFT, AFL-CIO (hereinafter Federation or Union), and Douglas County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by a member of the staff of the Wisconsin Employment Relations Commission (hereinafter Commission). On December 7, 1990, the Federation filed a request to initiate grievance arbitration with the Commission. The County concurred in said request. On January 16, 1991, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on February 26, 1991, in Superior, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties submitted briefs, the last of which was received on March 29, 1991, and they waived the submission of reply briefs on May 10, 1991. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

During the initial collective bargaining agreement between the parties, the Union and the County agreed that employes would be paid overtime for all time worked in excess of the normal work day or work week. They also agreed that the normal payroll period consisted of 80 hours in a 14 day period.

Prior to the 1989-90 collective bargaining agreement, time worked for purposes of determination of overtime included paid time off. Thus, if an employe took 40 hours of vacation and worked 48 hour during a 14 day period, the employe was paid overtime for the eight hours over 80 hours in the 14 day period.

During negotiations for the 1989-90 collective bargaining agreement, the County made a proposal to the Union dated October 6, 1988, which stated as follows:

8. Purging Past Practice at Middle River Regarding the application of Overtime in Article VII, Hours and Overtime, Section B-1a.

"Notice is given that for the next contract term, the County intends to interpret Article VII, Section B.1a regarding the phrase "time worked" to mean time actually worked at the facility. The computation of overtime relating to hours worked will not include time spent away from the job (e.g. vacations, sick leave, personal leave days, etc. . .)."

The Union neither agreed to the County's proposal stated above nor did it negotiate a different interpretation of "time worked" into the agreement. The parties were unable to come to terms on the 1989-90 agreement and so said agreement was determined by arbitration. In a letter dated August 31, 1989, the Administrator of the Middle River Health Facility, Marvin L. Benedict (hereinafter Administrator), wrote to the President of Local 5035 in relevant part as follows:

> Purging of the past practice regarding the application of overtime in Article VII, Hours and Overtime will be started during the payroll period beginning September 10, 1989 since the arbitration of the contract is now completed. This purging means that computation of overtime relating to hours worked will mean time actually worked at the facility and not include time spent away from the job (e.g. vacations, sick leave, personal days, etc. . .).

During the pay period of August 12-25, 1990, Karmyn Brown (hereinafter Grievant) worked 76.75 hours. She was also paid eight hours of holiday and 1.25 hours of vacation. She therefore had a total of 86 paid hours during that pay period. Prior to the 1989-90 agreement, the Grievant would have been paid at the overtime rate for the additional 5.75 hours over 80. (The Grievant worked 8.25 hours on August 21, 1990. She was paid at the overtime rate for the .25 hour over 8 hours. This overtime is not in dispute.) In this case, she was not. Therefore, the parties agree that the amount of overtime in dispute is 5.75 hours.

On or about September 10, 1990, the Grievant filed the grievance in this matter, stating that it was not the intent of this contract or previous contracts to discriminate against receiving overtime if sick leave, personal leave and vacation time are used in a pay period. She sought to be paid the overtime rate for the overtime worked.

On or about October 2, 1990, the Administrator denied the grievance, stating in relevant part as follows:

> The grievance is denied on the basis of it's (sic) untimeliness. The grievance was first submitted by bargaining unit to the director of nursing on September 9, 1990. The issue of how payment of overtime is to be paid was purged from the contract as of August 31, 1989. . . .Such purging was completed during contract negotiations prior to August 31, 1989. The purging of the past practice was also formalized in a letter to the president of the bargaining (sic) in a letter dated August 31, 1989. . . .
>
> Under Article IV, Section C notes "Grievances must be raised within twenty-one (21) days of the incident giving rise to the

grievance or from the time the grievant first became aware of the grievance." This grievance is almost one year too late. Furthermore, Article IV, Section B notes "The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a settlement and waiver of the grievance."

The grievance is also denied due to the fact that the payment of overtime was purged during the previous negotiation session (prior to August 31, 1989). The bargaining unit failed to negotiate language into the contract to allow payment of overtime which would have included time spent away from the job (i.e. vacations, sick leave, personal days, etc.). As per the letter of August 31, 1989, "computation of overtime relating to hours worked will mean time actually worked at the facility and not included time spent away form (sic) the job".

(Emphasis in original). The grievance proceeded through the procedure and is now before this Arbitrator. Other facts as necessary will be included in the Discussion section.

PERTINENT CONTRACT LANGUAGE

ARTICLE IV
GRIEVANCES

. . .

B. Time Limitations: The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a settlement and waiver of the grievance. . . .

. . .

Step One The grievant shall present and discuss the grievance orally with the nursing director. The Director shall respond orally within 24 hours. Grievances must be raised within twenty-one (21) days of the incident giving rise to the grievance or from the time the grievant first became aware of the grievance. In no case will a grievance be timely if filed more than six (6) months from the time of the incident.

. . .

ARTICLE VII
HOURS AND OVERTIME

A. Hours

1. Work Day. The normal work day consists of eight (8) hours in an eight and one-half (8-1/2) hours period, except the night shift at Middle River which shall be in an eight (8) hour period.

2.Work Week. The normal payroll period consists of eighty (80) hours in a fourteen day period from Sunday through the second Saturday. Employees' normal days off will be scheduled consecutively unless otherwise requested by the employee and approved by the appropriate Director of Nursing.

. . .

B.Overtime

1.(a)Employees shall be paid at the rate of time and one-half (1-1/2) including applicable differentials, for all time worked in excess of the normal work day or work week.

ISSUE

The parties stipulated to framing the issue as follows:

Was the contract violated when the Employer denied overtime for the pay period in question?

If so, what shall the remedy be?

POSITION OF THE PARTIES

Union

As to timeliness, the Union argues that the County never questioned the appropriate timeliness of the grievance before the arbitration hearing; that since the grievance was filed, all time lines have been met; that the County's conduct during the contract term is inconsistent with its position at the bargaining table; that the grievance addresses a continuing violation; that a grievance is appropriate each time the County violates the contract; that the County's arguments regarding timeliness are not substantive; and that the Arbitrator should not be barred from deciding the substantive issue.

As to the merits, the Union argues that, until the August 1989 memo, paid time off, such as vacation, holiday and sick time, was always considered the same as time worked; that during the 1988 bargaining for the 1989-90 contract, the County attempted to change the interpretation of the overtime language in dispute by simply announcing a new interpretation; that the interpretation is rooted deeply in the contract language and prior bargaining history; that a simple announcement cannot remove a benefit which the County agreed to several years earlier; that the parties discussed and accepted the definition of overtime as written the in County Personnel Policies; that the policy states in part, "Work in excess of the normally scheduled work week is considered overtime"; that this policy language has not changed since the contract was negotiated; that this reinforces the original intent of the parties; that a simple announcement during bargaining does not wipe out the intent of the original language and the written policy; that the consistent application of the language coupled with the parties intent over many years confirms the Union's position; and that the County's position on this matter is obviously inconsistent with its published written policies.

The Union also argues that if the Arbitrator finds the contract language ambiguous, the policy addressing the same issue must serve as guidance; that the many years of consistent application of the disputed language is a strong confirmation of the parties' intent and understanding of what constitutes overtime; that the criterion of interpretation is considered to be the intent of the parties, not the intent that can be possibly read into provisions, citing Autocar, Co., 10 LA 63; that the Union does not rely solely on the intent of the language; that its position is further supported by the County's written policy and other provisions of the labor agreement; that all relevant provisions must be considered to determine when overtime must be paid; that the County uses all paid time to determine pro-rata benefits for part time employes; that for all other purposes, all paid time is considered and treated as time worked; that the County's attempt to nullify a benefit by making an announcement is insufficient to overcome the bargaining history and the intent of the unchanged language; that the County's attempt is contrary to its written policy and other provision of the contract; and that the Arbitrator should sustain the grievance.

County

The County argues that the inclusion of hours away from the job towards the overtime computation was a past practice which was effectively purged by the County; that the practice in question had never been specifically negotiated or covered by contract language; that by placing the Union upon notice of its intention to purge the practice, the burden fell upon the union to negotiate language which would support its current position; that a literal interpretation of "time worked" excludes vacation, sick and personal time; that the County agrees that the practice of considering vacation time, etc., as time worked was well established and could be considered part of the contractual term "time worked" as that term came to be understood by the parties; and that this interpretation arose out of a unilateral interpretation as applied by the County and not as a result of mutual bargaining.

The County also argues that the Union's position is flawed in two ways; that, first, the literal language would require no specific change in the contract to support the County's position; that, second, the Union would place the burden upon the county to bargain something out of the contract which would not have otherwise existed but for the County's unilateral action; that even if the practice is not subject to unilateral termination, it may be terminated at the end of the contract period by giving notice not to continue the practice beyond the termination date, citing Elkouri and Elkouri, How Arbitration Works, 3rd Ed; that the County placed the Union on notice that the past practice would be purged; and that the Union failed to respond by having the practice written into the agreement to prevent its discontinuance.

DISCUSSION

Timeliness

The Union offers several arguments on brief in support of its position that the grievance herein was timely filed. As to the argument that the County never raised the timeliness issue prior to the arbitration hearing, the Union is dead wrong. The Statement of Facts shows that the Administrator raised the issue in his response to the grievance dated October 2, 1990.

Although the County argued at hearing that the grievance was untimely, the County does not offer any further argument on brief. Basically, the County's argument is that the contract requires that a grievance be raised within 21 days of the incident giving rise to the grievance; that the County advised the Union on or about August 31, 1989, that it was purging the past practice regarding the determination of overtime; that the grievance was dated September 10, 1990; that this was over a year after the purging of the practice, the incident giving rise to the grievance; and that, therefore, the grievance is time barred.

While on first blush the County's argument has much appeal, one needs to look closely at the contract. As noted by the County, grievances must be raised within 21 days of the incident giving rise to the grievance. The County argues that the incident giving rise to the grievance was its announced purging of the overtime past practice. But until the Grievant was denied overtime pay, the Union had no factual basis on which to challenge how the County was interpreting and applying the contract. Thus, the incident giving rise to the grievance was the denial of overtime pay, not the announced purging of the past practice. Since the grievance was filed within 21 days of the County's denial of overtime payment to her, I find that the grievance is timely filed and that the grievance is properly before me.

Merits

The County argues that the inclusion of hours away from the job toward overtime computation was a past practice which was effectively purged by the County. Specifically, the County argues that the County placed the Union on notice of its intention to purge the practice of including paid time-off for purposes of computing overtime, that the burden fell upon the Union to negotiate language into the contract to include said hours, and that the Union did not negotiate any change in the contract language.

In so arguing, the County relies on a long list of arbitral decisions which state, in essence, that a past practice is subject to termination at the end of the contract by giving due notice of intent not to carry the practice over to the next agreement and that, after being so notified, the other party must have the practice written into the agreement to prevent it discontinuance.

The Union asserts that basing overtime computation on all paid time dates back to the initial contract, that the parties discussed and accepted the basis for overtime computation found in the County's personnel manual, that said manual includes all paid hours for the computation of overtime, and that, therefore, this definition is more than a past practice because it is rooted deeply in the contract language and bargaining history.

The parties have contractually agreed that overtime shall be paid "for all time worked in excess of the normal. . .work week." The County argues that a literal interpretation of "time worked" excludes vacation, sick and personal time as not involving actual work. But the language in dispute involves more than the phrase "time worked" and said language is not nearly as clear as the County argues. While the County focuses on the definition of "time worked", it ignores the definition of "normal work week", a phrase which is referred to but not defined in the agreement; instead, under "Work Week", the agreement states that the "normal payroll period consists of eighty (80) hours in a 14 day period from Sunday through the second Saturday." Even if the words "time worked" are clear on their face, the phrase "time worked in excess of the normal. . .work week" is ambiguous as there is no definition of normal work week.

For example, if the employe's normal workweek is eight hours a day Monday through Friday and the employe worked eight hours a day Monday through Saturday, are the eight hours worked on Saturday in excess of the normal workweek? It would seem that the County would agree that they are. But are the eight hours on Saturday in excess of the normal workweek if the employe was on vacation on Monday? In this case, the employe would have actually worked only 40 hours, so, according to the County's argument, the Saturday hours would not qualify for overtime. Yet work on Saturday is clearly in excess of the employes' normal

workweek of Monday through Friday. All this is to show that the language in dispute, "for all time worked in excess of the normal. . .work week" is ambiguous.

The County cites How Arbitration Works, Elkouri & Elkouri, 3rd Edition, at pages 401-402 for the proposition that following a timely repudiation of a past practice by one party, the other party must have the practice written into the agreement if it is to continue to be binding. This proposition, however, relate to past practices not covered by the contract.

> In contrast, repudiation of a practice which gives meaning to ambiguous language in the written agreement would not be significant--the effect of this kind of practice can be terminated only by rewriting the language. 1/

Such is the case here. The past practice at issue is one that gives meaning to ambiguous language in the agreement, one that has been present since the collective bargaining agreement was first negotiated. Since the past practice is connected to the language of the contract as it clarifies ambiguous language, repudiation of the practice by the County was not significant; instead, the effect of this kind of practice can be terminated only by rewriting the language. As the County did not rewrite the language to change the meaning of the phrase in dispute, the past practice continues. Therefore, the County violated the collective bargaining agreement when it unilaterally determined not to pay overtime to the Grievant in a manner consistent with the past practice of the parties.

The County further argues that the literal language of the collective bargaining agreement would require no specific change in contractual language to support the County's position. Yet, reading the language as argued by the County does not support the County's position under the facts in this case. The agreement states that employes shall be paid overtime "for all time worked in excess of the normal work day or work week." The phrase "work week" is not defined in the agreement; instead, the agreement states that the "normal payroll period consists of eighty (80) hours in a 14 day period from Sunday through the second Saturday."

From that language, it appears that the parties agreed that the normal workweek runs from Sunday to Saturday. The payroll period in dispute covers the weeks of August 12-18 and August 19-25, 1990. During the payroll period in dispute, the Grievant worked as follows:

1/ How Arbitration Works, Elkouri and Elkouri, 3rd Edition, at 402 n. 59, citing Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Arbitration and Public Policy 30, 56 (BNA Incorporated, 1961).

	August 12-18 (Worked--Paid Off)	August 19-25 (Worked--Paid Off)
Sunday	0 hours	8 hours
Monday	8 hours	5.75 hours--0.25 hours
Tuesday	8 hours	8.25 hours
Wednesday	7 hours--1 hour	8 hours
Thursday	0 hours--8 hours	8 hours
Friday	0 hours	7.75 hours
Saturday	8 hours	0 hours

The total hours paid in the workweek August 12-18 is 40 hours, including 9 hours of vacation and holiday. The total hours paid in the workweek August 19-25 is 46 hours, including 0.25 hours of vacation. Even under the interpretation argued by the County, the Grievant would be entitled to 5.5 hours at the overtime rate for the work week of August 19-25. 2/

But even if the facts were in line with the County's argument, the burden of changing this past practice was not shifted to the Union by the repudiation of the past practice at the bargaining table; instead, it remained with the County which is required to negotiate any change it may want to make regarding the past practice.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

1. That the grievance is timely filed and properly before this Arbitrator.

2. That the contract was violated when the Employer denied overtime to the Grievant for the pay period in question.

3. That the Employer make the Grievant whole for 5.75 hours of overtime, consistent with the past practice.

Dated at Madison, Wisconsin, this 7th day of August, 1991.

By _____
James W. Engmann, Arbitrator

2/ The .25 hour in excess of the normal workday on Tuesday, August 24, was paid as overtime and is not a part of this dispute. Therefore, during the week of August 19-25 the Grievant would be entitled, under the County's argument, to 5.5 hours paid at the overtime rate, determined by taking the total of 46 hours and subtracting the 40 hours of a normal workweek, the .25 hour overtime paid for Tuesday, August 24, and the .25 hour of vacation.