BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BROWN COUNTY (SHELTER CARE)	
	Case 463
	No. 45917
and	MA-6803
BROWN COUNTY SHELTER CARE EMPLOYEES UNION, LOCAL 1901-F, AFSCME, AFL-CIO	

Appearances:
Mr. James W. Miller, Staff Representative, Wisconsin Council 40, 2785 Whippo
Mr. John C. Jacques, Assistant Corporation Counsel, Brown County, 305 E. Walnut

ARBITRATION AWARD

According to the terms of the 1989-90 collective bargaining agreement between Brown County (Shelter Care) (hereafter the County) and Brown County Shelter Care Employees Union, Local 1901-F, AFSCME, AFL-CIO (hereafter the Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving Stephen Felter's request that the full-time position he posted into revert to a Monday through Friday shift from the posted Wednesday through Sunday shift. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held on October 10, 1991 at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by October 31, 1991. The parties filed their initial briefs by November 14, 1991 which were thereafter exchanged by the undersigned. The parties agreed to and filed their reply briefs with the undersigned by December 16, 1991, which she thereafter exchanged for them.

ISSUES:

The parties were unable to stipulate to the issues for determination in this case but they agreed to allow the undersigned to frame the issues here. The Union suggested that the issues be framed as follows:

> Did the Employer violate the collective bargaining agreement when it failed to revert the 12:00 p.m. to 8:00 a.m. Wednesday through Sunday shift back to the original Monday through Friday shift?
> If so, what is the appropriate remedy?

The County suggested the issues herein be framed as follows:

> Did the Employer violate the collective bargaining agreement by refusing the grievant's request to change the existing work schedule of the position he posted into?
>
> If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein the issues for determination shall be as follows:

Did the County violate the collective bargaining agreement when it refused Stephen Felter's request to change his full-time work shift from Wednesday through Sunday to Monday through Friday?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

This Agreement is to be effective on January 1, 1989. The parties to this agreement are Brown County, Wisconsin, hereinafter the Employer, and Brown County Shelter Care Employees Union, Local 1901F, AFSCME, AFL-CIO, affiliated with the Wisconsin Council of County and Municipal Employees, hereinafter, the Union.

Whereas, in order to increase general efficiency; to maintain existing harmonious relations; to promote the morale, well-being and security of said employees; to maintain a minimum scale of wages, hours and conditions of employment; to promote orderly procedures for the processing of any grievances; to insure proper and ethical conduct of business and relations between the Employer and the Union; to that end we have reached this agreement.

The parties hereto agree as follows: S/he shall designate "she" or "he"; H/er shall designate "him, his or her".

Article 1. MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

The Employer shall adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directive from the State of Wisconsin and other governmental agencies having jurisdiction over the institutions; however, such rules shall be subject to the grievance procedure.

It is the duty and responsibility of management to determine if "qualified help is available" wherever stated in the labor agreement; however, the Union has the right to challenge such determination.

Article 2. RECOGNITION AND UNIT REPRESENTATION

. . .

The Employer agrees not to discharge nor discriminate against any employee for membership in the Union or because of Union activities.

The parties agree that at all times during the period in which the Union is certified as the bargaining agent for employees described above, the parties shall not:

(a) Refuse to bargain in good faith with each other regarding mandatory subjects of bargaining at any time during the period the Union is certified nor change nor threaten to change any wages, benefits, or terms or conditions of employment which are mandatory subjects of bargaining at any time during the period the Union is certified.

(b) The provisions of this Article which are mandatory subjects of bargaining shall remain in effect at all times this Agreement is in effect and during any period of negotiations whether or not this Agreement has been terminated.

. . .

Article 6. MAINTENANCE OF BENEFITS

The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining not specifically referred to in this Agreement.

Any benefits which are mandatory subjects of bargaining presently in effect, but not specifically referred to in this Agreement, shall remain in effect for the life of this Agreement.

Personal effects such as glasses, watches, etc., damaged or destroyed by clients, shall be replaced by the Employer.

Employees shall be given a copy of their evaluations whenever taken by the State.

The Employer shall pay up to twenty-five dollars ($25.00) for required physical examinations.

The Employer will make available tax sheltered annuities to all represented employees. Only one carrier will be selected.

BACKGROUND 1/

Until July 15, 1983, Brown County operated what was then known as the

1/ Facts above were gleaned from Brown County v. WERC, Dec. No. 20857-C (Ct. of Appeals, 3/24/87). The County objected to the admission of evidence regarding the Youth Home on the basis of relevance. These facts are generally based on public record and are relevant here concerning past practice and background.

County Youth Home which provided temporary Shelter to neglected, abused and runaway juveniles. In this operation, the County employed eight full-time child care employes and four part-time child care employes to provide 24 hour-a-day supervision for up to 26 juveniles in a rented facility, the St. Norbert Abbey in DePere, Wisconsin. Prior to July of 1983, the Union herein had represented the full-time and part-time child care workers at the Youth Home, following some bargaining with the Union. Effective July 14, 1983, the County laid off all its Union-represented child care employes. The County's subcontractor reopened the Youth Home at a different location employing a smaller child care staff all of whom had applied for work with the subcontractor. Only one of the former Union-represented County child care workers had applied to work for the subcontractor. That person was hired by the subcontractor. The remaining Union-represented child care workers remained on layoff. Following this subcontract, the Union filed a lawsuit alleging that the subcontracting and the employe layoffs had been unlawfully done. This lawsuit made its way through the WERC and the Courts, to the State Supreme Court. As a result of this litigation (which is apparently still on-going), the County was ordered to terminate the subcontract, recall its Union-represented child care workers to their former shifts (which had been Monday through Friday for full-time workers) and to reopen the operation as a County-run operation. The County thereafter reopened the Youth Home as the Brown County Shelter Care, effective January 1, 1988.

FACTS:

Prior to reopening the Shelter Care, Administrator Debra Bowman drafted a work schedule for six full-time and six part-time child care workers 2/ which schedule Bowman and the County showed to Union Representative Jim Miller on or about December 22, 1987. No discussions occurred regarding full-time employe shifts at this time. Bowman's proposed schedule became the final schedule as of January 1, 1988. It showed five full-time employes would work Monday through Friday shifts and that Dan Fournier would work Wednesday through Sunday. The six part-time employes were listed as having varying schedules which occurred generally on the weekends. 3/ No mention was made between the parties of the Fournier shift prior to the work schedule becoming final.

In this regard, prior to December 22, in drafting the schedule for full-time child care workers, Bowman had spoken with Dan Fournier. Fournier had previously worked for the subcontractor for approximately 4 years and when the Union-represented employe who had previously held his job declined to return to work for the County, Fournier took one of the six full-time positions at the Shelter Care when it was offered to him. When he worked for the subcontractor, Fournier had worked on Wednesday through Sunday, 12 midnight to 8 a.m. shift. When asked by Bowman if that shift was satisfactory, Fournier told Bowman that he wished to continue to work those days for the County to accommodate his personal schedule. Bowman agreed but she implied that if the shift later became unsatisfactory, Fournier could discuss this with Bowman. Fournier then became the only full-time County child care worker who worked other than a Monday through Friday shift for the Shelter Care. At the time the Shelter Care was opened by the County, Union Steward Jean Elliott was aware of the deal that Bowman and Fournier had struck regarding his workdays. Although Bowman never offered to bargain with Elliott or the Union regarding her deal with Fournier, it is also clear that neither Elliott nor the Union objected to the continuation of Fournier's Wednesday through Sunday work week after January 1, 1988.

After late December, 1987, Fournier never spoke to Bowman about his workdays until he changed full-time shifts when he posted into and received the 4 p.m. to 12 midnight shift vacated by Lee Grondin in February, 1991. It should be noted that apparently after the Shelter Care had opened in January 1988, Grondin requested that Shelter Care Administrator Bowman change his Monday through Friday shift to a Wednesday through Sunday shift so that Grondin could keep his bowling schedule in place. Bowman agreed to do this. However, at the instant hearing, Bowman admitted that she never notified the Union of her agreement to accommodate Grondin's personal schedule. When Grondin terminated his employment, Bowman posted his position as a 4 p.m. to 12 midnight full-time shift Wednesday through Sunday. Dan Fournier signed the posting as it was, received the job but later requested that the shift revert back to a Monday through Friday shift (as it had been originally at the time the County opened the Shelter Care in 1988). Bowman granted Fournier's request.

In mid-February the County posted Fournier's old position, Wednesday through Sunday 12 midnight to 8 a.m. The grievant, Stephen Felter previously a

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2/ The full-time and part-time child care workers have the same job description, are paid the same rate of pay and all of them are qualified to admit residents.

3/ The County also employs a number of on-call child care workers (not in issue here) at the Shelter Care who have no regularly scheduled hours.

part-time employe who worked on Thursdays and Fridays from 4 p.m. to 12 midnight, signed the posting of Fournier's old job. Felter was found qualified and he accepted the position but Felter then requested that this shift revert back to a Monday through Friday shift. Bowman denied this request before Felter signed the posting as described above. Bowman had explained to Felter that having a full-time employe covering the weekends (as had been the case during Dan Fournier's approximately three year tenure in the 12 midnight to 8 a.m. Wednesday through Sunday shift) was important for continuity of staff over the weekends when there are often difficult resident placements. Bowman also indicated that reverting the Fournier shift back to Monday through Friday would mean that Mark Kowaleski, a part-time employe, would lose two shifts per week on Mondays and Tuesdays from 12 midnight to 8 a.m. Significantly, when Fournier formally took the 4 p.m. to 12 midnight Monday through Friday shift, Stephen Felter lost his part-time shift hours on Thursdays and Fridays from 4 p.m. to 12 midnight. 4/ To date of hearing, Felter has remained in the position as posted, working Wednesday through Sunday 12 midnight to 8 a.m.

The dispute here is over the fact that the County granted Fournier's reversion request while the County has refused to grant Felter's request to revert Fournier's shift back to Monday through Friday from the posted Wednesday through Sunday. If the grievance is sustained, Kowaleski could post into a part-time Saturday and Sunday shift left open by the reversion of Felter's present shift to a Monday through Friday shift, and this would result in Kowaleski being treated as Felter had been treated when Bowman granted Fournier's reversion request.

POSITIONS OF THE PARTIES:

Union

The Union asserted that it was never notified and the County never offered to bargain with the Union regarding the County's decisions to deviate from the Monday through Friday shift for full-time child care workers in the cases of Grondin, Fournier and Felter. The Union urged that such notification and good faith bargaining is required by Article 2 of the Labor Agreement which states that ". . . the parties shall not: refuse to bargain in good faith with each other regarding mandatory subjects of bargaining . . . nor change nor threaten to change any wages, benefits, or terms or conditions of employment which are mandatory subjects of bargaining. . . ." The Union noted that as a part of the remedy ordered by the WERC to cure the County's prohibited practices in subcontracting out the Shelter Care operation, the WERC ordered that the County return to a County-run operation with a workweek of Monday through Friday for regular full-time child care workers recalled/hired for work.

Because the County never negotiated a change in the work week for either Grondin or Fournier, the Union contended, the County should have reverted the Fournier shift back to Monday through Friday at Felter's request just as the County had done for Fournier at his request, regarding the Grondin shift. The Union also indicated that the Monday through Friday shifts for full-time employes was supported by past practice. The Union implied that the County's reasons for denying Felter's reversion request (preserving Kowaleski's part-time shifts and maintaining full-time coverage on the weekends) were not sound or based on rational fact. Therefore, the Union sought that the grievance be

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4/ The parties stipulated that Felter did not lose any money or work time due to Fournier's shift being reverted back.

sustained and that the County be ordered to honor Mr. Felter's request to revert his shift back to a Monday through Friday shift.

County

The County asserted that the grievant has no contractual right to require a change in the workdays of the established shift he posted into. The County pointed to Article 1 as supporting this view. There, the County has reserved the right to direct the work forces and manage the County's work. The County also noted that other provisions of the labor agreement place no limitations on the rights listed in Article 1. Specifically, the County urged that the Article 6 "Maintenance of Benefits" clause does not reference the scheduling of work so that Article 6 does not limit the County's management rights, in the County's view.

The County contended that it properly refused Mr. Felter's request to change his workweek. In this regard, the County noted that it posted the position as a Wednesday through Sunday shift and that Felter signed the posting knowing this; that Dan Fournier had previously held this position on a Wednesday through Sunday basis from January 1988, until February, 1991, when he posted out of it; and that Fournier's work schedule had been Wednesday through Friday for some years even prior to January 1, 1988 when the County "opened" the Shelter Care operation.

In addition, the County emphasized that Union failed to prove entitlement to the maintenance of any "benefit" in this case. The County indicated that the Union and the County met in December, 1987 to "confer as to a work schedule" at the Shelter Care and that no objection was raised by the Union at that time to Dan Fournier's working a Wednesday through Sunday full-time shift. The County also argued that its management reasons for denying Felter's reversion request were reasonable and related to the existing operation of the Shelter Care facility: continuity of weekend care and Kowaleski's loss of his Monday and Tuesday part-time shift. The County asserted that a decision to allow Felter's reversion request would have a "severe adverse impact" on Kowaleski and that Felter was aware of this when he made his request. 5/

In sum and for the reasons it stated in its brief, the County sought denial and dismissal of the grievance in its entirety.

Reply Briefs

The parties submitted their reply briefs by December 16, 1991 and the undersigned thereafter exchanged them for the parties.

Union

The Union contended that the County's assertions that Felter's reversion request constituted an employe request for a shift change was not factual. Rather, the Union argued that the evidence showed that the WERC's order that the County return to the status quo ante required it to work full-time employes Monday through Fridays; and that individual employe requests for workday changes due to their personal schedule had been done without the knowledge or approval of the Union. The Union also asserted that the County's reason for denying Felter's request -- to accommodate part-time employe Kowaleski -- was "ludicrous" given the fact that this accommodation had never been offered to Felter when the County granted Fournier's request to revert his new shift to

5/ It should be noted that the County offered no evidence on this point.

Monday through Friday. The Union therefore, emphasized that both past practice and the language of Article 2 require that the grievance be sustained.

County

The County emphasized that nothing in Article 2 or any other contract provision limits its right to schedule shifts. The County noted that both before and after January 1988 the Fournier shift had been Wednesday through Sunday so that no "shift change" had ever occurred. The County urged that the time for the Union to object to Fournier's shift had been in December 1987, but, that the Union had not done this. Therefore, the County asserted, no violation of Article 2 could have occurred or did occur here since the County never made a non-bargained change in Fournier's shift. The County observed that since the Union is really seeking to change not preserve an existing schedule, the County contended the case should be dismissed.

DISCUSSION:

Generally, an employer has a statutory duty to bargaining collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on a matter has been clearly and unmistakably waived. 6/ Where a collective bargaining agreement expressly addresses a mandatory subject, the language of the agreement determines the rights of the parties. 7/ The determination of whether the language constitutes a waiver must be determined on a case by case basis. 8/

In the instant case, the Union is correct that under the effective collective bargaining agreement, the County has the contractual duty to " . . . bargain in good faith . . . regarding mandatory subjects of bargaining . . ." (Article 2 (a)) both mid-term of the Agreement as well as during any hiatus periods (Article 2 (b)). The Agreement also guarantees that "(a)ny benefits which are mandatory subjects of bargaining presently in effect, but not specifically referred to in the Agreement, shall remain in effect for the life of the Agreement" (Article 6, para. 2). Thus, the initial question which must be addressed in this case is whether the full-time child care employe work week is a mandatory subject of bargaining under the Municipal Employment Relations Act. The law on this point is relatively clear that the employes' work week at the Shelter Care affects wages, benefits and/or terms or conditions of employment - - especially given the 24-hour-a-day nature of the operation of the facility. As such, the employe work week here is a mandatory subject of bargaining both under the Municipal Employment Relations Act as well as pursuant to the labor agreement.

At this juncture, I note that the labor agreement is completely silent regarding the duration of the employe work week and employes' hours of work. In these circumstances, generally, arbitrators have recognized that unless

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6/ See, e.g., City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), affirmed Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

7/ Racine Unified School District, supra; Janesville School District, Dec. No. 15590-A (Davis, 1/78), aff'd by operation of law, Dec. No. 15590-B (WERC, 2/78).

8/ Racine Unified School District, Dec. No. 19357-D (WERC, 1/83).

restricted by the labor agreement, the right to schedule work remains with management, and the employer may change the work schedule of shifts so long as the employer does so reasonably. 9/ However, it is also a well-established arbitral principle that where a labor agreement is silent, evidence of a clear, consistent and mutually agreeable past practice can fill in the blanks.

Although the County contested the relevancy of information regarding its subcontract of the Shelter Care operation and the County's later resumption of the Shelter Care operation as a County operation, the County did not contest the basic facts relating to how and under what circumstances the County Shelter Care began operating on January 1, 1988. In this regard, I note that there is no dispute that the final employe work schedule was drafted by the County and was approved by the Union and the County in late December, 1987. This schedule clearly showed five full-time child care employes working Mondays through Fridays and one full-time child care worker (Dan Fournier) working Wednesday through Sunday.

It is significant that Local Union President Jean Elliott admitted at the instant hearing that she was aware of the specifics of Fournier's Wednesday through Sunday work week both while he worked for the private contractor as well as of the specifics of the work week "deal" that Shelter Care Administrator Bowman struck with Dan Fournier for the period on and after January 1, 1988. Whatever might have been the "practice" or the agreement between the parties regarding the full-time employes' work week prior to January 1, 1988, such practice/ agreement was apparently never written down by the parties, except as reflected on the final, approved work schedule which became effective on January 1, 1988. Although the record demonstrates the subject of Fournier's work week was never discussed by the parties on December 22, 1987 or any other time, the fact that the Union President was aware of the "personal accommodation" made to Fournier and the fact that the Union approved of the final work schedule on December 22, 1987 put the burden on the Union to object to the accommodation made to Fournier or to clarify the affect of this accommodation vis a vis the Union contract either at the December 22, 1987 meeting or thereafter. The Union never indicated to the County that it objected to Fournier's schedule at any time from January, 1988 until the instant grievance was filed. Thus, the overall evidence here supports a conclusion that the established past practice was that Fournier's shift became set as a Wednesday through Sunday shift from January 1, 1988 forward.

The evidence regarding the treatment of Lee Grondin does not require a different conclusion. There, the deal was made between Grondin and Bowman after January 1, 1988, when the final work schedule had already been set and approved by the parties. Thus, Grondin's work week was altered by Grondin and Bowman from its original mutually approved form of Monday through Friday to a Wednesday through Sunday shift. Following the parties' approval of the final work schedule, the County was obliged to notify and bargain with the Union before it changed Grondin's approved work schedule. The County never did this. Thus, the County was clearly obligated to revert Grondin's shift back to its original, approved form - Monday through Friday - at Fournier's request.

Felter's case however is different. As the County argued, the original approved shift for Fournier was Wednesday through Sunday. Fournier's Wednesday through Sunday shift became the established work schedule, as described above. Thus, the evidence here demonstrates that the Union's knowing acquiescence in

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9/ Elkouri and Elkouri, How Arbitration Works (BNA, 4th Ed., 1985) at pp. 519-524.

Fournier's schedule along with the Union's approval of the Shelter Care work schedule prior to January 1, 1988, amounted to a waiver of the Union's Article 2 rights to negotiate regarding Fournier's work schedule. Notably, there was no change in Fournier's work week after January 1, 1988. Thus, as the County argued, the County properly posted Fournier's shift when it opened up, as a Wednesday through Sunday shift based upon the waiver and practice found here. Also, as the County asserted, the County was under no obligation to bargain, pursuant to Article 2 (b) or any other provision of the agreement to revert or change Fournier's shift to a Monday through Friday shift at Felter's request.

In all the circumstances of this case, 10/ the grievance must be denied and dismissed in its entirety.

AWARD

The County did not violate the collective bargaining agreement when it refused Stephen Felter's request to change his full-time work shift from Wednesday through Sunday to Monday through Friday.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of January, 1992.

By _____
Sharon Gallagher Dobish, Arbitrator

10/ Shelter Care Administrator Bowman testified that due to the 24-hour-a-day nature of the Shelter Care operation, the County preferred to have one full-time child care employe work on weekends to provide continuity of care and assist part-time employes with difficult weekend placements. Although the Union's arguments on this point were very well-taken, this does not detract from Bowman's statements and reasonable judgment on the point.