BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
GENERAL TEAMSTERS UNION LOCAL NO. 662	:	Case 75 No. 46783 MA-7068
and	:	
POLK COUNTY (GOLDEN AGE MANOR)	:	

Appearances:
General Teamsters Union Local 662, P.O. Box 86, Eau Claire, Wisconsin 54702, by Ms. Christel Jorgensen, Business Agent, appearing on behalf of the Union.
Mr. Joseph P. Guidote, Jr., Corporation Counsel, P.O. Box 386, Balsam Lake, Wisconsin 5481O, appearing on behalf of the Employer.

ARBITRATION AWARD

The Nurses Association of Golden Age Manor, hereafter the Union, and Golden Age Manor Board of Directors, hereafter the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On February 7, 1992, the Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on March 19, 1992, at Amery, Wisconsin. The hearing was not transcribed and the record was closed on May 1, 1992, upon receipt of posthearing written argument.

ISSUE

The parties were unable to stipulate to a statement of the issue. The Union frames the issue as follows:

> Did the Employer violate the collective bargaining agreement when he denied step increases to certain parttime employes? If so, what is the appropriate remedy?

The Employer frames the issue as follows:

> Whether bargaining unit members who are paid for less than 1,020 hours may progress through the wage scale set forth in the 1990-91 collective bargaining agreement?

The undersigned adopts the Employers' statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE V - SENIORITY

Section 5.01. Seniority shall accrue from the last date of hire. The employee's earned seniority shall not be diminished because of paid absence, an authorized unpaid leave of absence of less than thirty (30) days, or maternity leave of ninety (90) days. Seniority shall not accrue during period of time employees under this contract are laid off.

. . .

ARTICLE VI - PROBATION

Section 6.01. All new employees shall serve a probationary period of six months. During this initial probationary period, employees may be discharged by the Employer without just cause or without recourse to the grievance procedure or any other legal recourse. Probationary employees are eligible to belong to NAGAM during their probationary period of employment.

Section 6.02. During the initial period of probation, employees will not be allowed any fringe benefits granted by this Agreement, however, upon completion of probation, employees will be allowed all of this Agreement's fringe benefits retroactive to the date of their employment. If leave of absence is taken during probation, probation shall be extended for the length of the leave taken. The 6-month pay step increases shall be withheld until probation is ended, and the 12-month and all succeeding paystep raises shall be postponed accordingly.

ARTICLE XII - EMPLOYEE DEFINITIONS

Section 12.01. Regular or Full-Time Employees: Any employee who is scheduled to work the full hourly work day and work week in a permanent position. At no time will part-time or casual employees be employed to avoid hiring regular full-time employees.

Section 12.02. Regular Part-time Employees: Any employee who is paid for 1,020 hours annually or more, in a permanent position, and who is not a regular full-time Employee shall be entitled to receive the fringe benefits granted by this Agreement and prorated to actual number of hours worked. Any employee who is paid for less than 1,020 annual hours in a permanent position

shall not be entitled to any fringe benefits granted by this Agreement except for participation in the Wisconsin Retirement Fund if they work a minimum of 600 annually scheduled hours. At no time will casual employees or temporary part-time employees be employed to avoid hiring regular part-time employees.

ARTICLE XXVII - ENTIRE MEMORANDUM OF AGREEMENT

Section 27.01. This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and than the understandings and agreements arrived at by the parties after the exercise of that right and that opportunity are set forth in this Agreement.

NAGAM WAGE SCHEDULE - EFFECTIVE JANUARY 1, 1990

	Start	6 mo.	1yr.	2yrs.	3yrs.	4yrs.	5yrs.	6yrs.
R.N.								
1990 & 1991	11.00	11.54	11.81	12.07	12.34	12.61	12.87	LONGEVITY
	11.50	12.06	12.34	12.61	12.90	13.18	13.45	
L.P.N.								
1990 & 1991	8.85		9.12	9.38	9.66	9.93	10.20	
	9.25		9.53	9.80	10.09	10.38	10.66	

Differential Schedule

$.40 more per hour - evenings

.60 more per hour - nights

BACKGROUND

In 1990, the Nurses Association of Golden Age Manor (NAGAM) was certified as the collective bargaining representative of the Employer's Registered Nurses and Licensed Practical Nurses. NAGAM, which was not affiliated with any other labor organization, established a bargaining committee consisting of Gerry Cardinal and Arlyss Christianson and retained Attorney Terry Moore to assist in negotiating the initial collective bargaining agreement with the Employer. The

initial collective bargaining agreement was settled on or about June 6, 1991 and was executed on August 22, 1991. By its terms, this agreement was effective January 1, 1990 through December 31, 1991.

On September 24, 1991, employes Jill Barsokine, Kathryn Ryan, Madeline Mickelson, Jacqueline Hughes and Miriam Gustafson filed individual grievances claiming that the Employer violated Article V, Section 5.01 and Article XII, Section 12.02, by not recognizing date of hire for purposes of pay adjustments. The grievances were denied at all steps of the grievance procedure and, thereafter, submitted to grievance arbitration.

On or about November 1991, the members of NAGAM, through an affiliation vote, became members of Teamsters Local 662 and all contract administration and negotiations became the responsibility of Local 662.

POSITIONS OF THE PARTIES

Union

Article V, Section 5. 01 establishes seniority " from the last date of hire." The Section does not express, nor imply, an intent that seniority for part-time employes is based on the number of hours worked per year.

Under the provisions of Section 6.01 and 6.02, which address the probationary period, all full-time and part-time employes are treated the same. Article VI recognizes that, in the event of an extension of the probationary period, the six-month pay step increases shall be withheld until probation is ended and the 12-month and all succeeding pay step raises shall be postponed accordingly. This provision defines the only conditions under which bargaining unit employes do not move through the salary schedule. It also clearly creates a differentiation between fringe benefits and wages.

Article XII, Employe Definitions, which establishes categories of employes, does not include the category of "Limited Part-Time Employees". The only reference to employes working less than 1,020 hours in a calendar year addresses the issue of eligibility for fringe benefits. This Article is supplemented by the Addendum agreed to by the parties after a tentative agreement had been reached and before the contract was signed, which Addendum refers only to eligibility for fringe benefits and does not address movement through the wage schedule.

The record does not establish that the Employer, at any time, proposed a provision that would limit movement through the wage schedule for any group of bargaining unit employes. Had the Employer wished to limit the movement of employes who worked less than 1,020 hours, then the Employer should have negotiated a provision such as the one contained in the AFSCME contract.

According to Mr. Taxdahl, the Union did not propose to do anything different from the way things had been done in the past and, therefore, he assumed that everything would just go on as in the past. To uphold such an assumption would provide the Employer with a built-in maintenance of standards clause and apply Article XXVII to the Union only. The Union's proposals were,

and the language contained in the contract is, clear. The fact that the language agreed to by the parties may have consequences the Employer does not like is not sufficient cause to set it aside.

When the final draft of the labor agreement was prepared, Mr. Taxdahl issued an 18 point objection to provisions in the labor agreement. Point No. 5 requests "verbatim" inclusion of the AFSCME language (13.01 and 13.02 and Article XII, Section 12.01 and 12.02 of the labor agreement). Mr. Taxdahl did not request any additions or correction to Point No. 18 regarding movement through the wage schedule. The grievances must be sustained.

Employer

Prior to the existence of the agreement at issue, employes who worked less than 1,020 hours, referred to by NAGAM as Limited Part-Time Employees, did not progress through the wage schedule. In essence, this class of employe was frozen after successfully passing probation. The wage freeze stayed in effect unless or until the employe reached the 1,020 hour threshold in any given 12-month period. Aside from participating in the Wisconsin Retirement Fund Plan, the Limited Part-Time Employee received no fringe benefits. This pay schedule was parallel to the AFSCME salary schedule then in effect.

During the most recent contract negotiations, the term "Limited Part-Time Employee" was struck from the contract, but the definition attached to that term remained. The Employer was informed that it could use any term it wanted for record keeping purposes and that the definition attached to Limited Part-Time Employee would remain in the contract under the definition "Regular Part-Time Employee," as a sub-category. NAGAM never proposed, or bargained, any change in the wage structure relative to the group of employes who worked less than 1,020 hours. Although the group was now referred to as "Regular Part-Time Employees", they were treated as they were pre-contract and, thus, received no benefits, other than participation in the retirement plan.

As Mr. Taxdahl's testimony establishes, the salary schedule set forth in Jt. Exhibit 1 is the same as the pre-contract salary schedule except for the percentage increase which was specifically negotiated and agreed upon by the parties. If the Nurses Association wished to invoke a change in the manner in which employes who worked less than 1,020 hours were to be paid, it should have specifically proposed such a change during the negotiation process. Instead, the Association chose the back-door approach of insisting that a nominal change in the classification designation be made without stating the true reason for the change. The Employer agreed to the nominal change because it understood, and was assured by the Nurses Association, that no substantive changes were made.

In summary, the collective bargaining agreement incorporated the wage schedule and payment methods in existence prior to the execution and ratification of the agreement. The only change negotiated through mediation was the percentage wage adjustment which was paid to all members of the bargaining unit. Since no change in the method of payment for employes who work less than 1,020 hours was ever proposed, the previous method of payment was incorporated into

the ratified agreement. The proper forum for a change in the payment of the class of employes at issue is through contract negotiations or interest arbitration. The grievance must be denied.

DISCUSSION

At the time that the parties negotiated their initial collective bargaining agreement, the Union's bargaining unit members were subject to a wage schedule which recognized three classifications of employe, i.e., Registered Nurses (R.N.), Licensed Practical Nurses (L.P.N.), and Inservice Coordinator. The R.N. and Inservice Coordinator wage schedule had the following steps: Starting Wage, 6 months, First Year, Second Year, Third Year, Fourth Year, Fifth Year and Longevity. The L.P.N. wage schedule had the following steps: First Year, Second, Third, Fourth, Fifth, Sixth & Above Longevity. After reaching the First Year step, full-time employes and part-time employes who worked at least 1,020 hours per year advanced one step on the wage schedule for each year of service. The advancement occurred on the employe's anniversary date.

Part-time Employes who worked less than 1,020 hours per year were classified as Limited Part-Time Employees. Unlike full-time employes and part-time employes who worked at least 1,020 hours per year, Limited Part-Time Employees did not receive fringe benefits and did not advance across the salary schedule after each year of service. Limited Part-Time Employees were frozen at the one year rate until they worked more than 1,020 hours per year, at which time they would advance to the next step on the wage schedule.

The wage schedule incorporated into the initial collective bargaining agreement recognizes two classifications of employe, i.e., R.N. and L.P.N., and contains wage rates for 1990 and 1991. The wage schedule of each classification of employe contains the following steps: Start, 6 mo., 1 yr., 2 yrs., 3 yrs., 4 yrs., 5 yrs., and 6 yrs. 1/ The 6 yrs. step is the longevity step.

The Employer placed each bargaining unit employe on the step of the contractual wage schedule which corresponded to the employe's placement on the wage schedule which was in effect prior to the ratification of the collective bargaining agreement. Thus, an employe who was at the Third Year step of the Employer's schedule at the time of the ratification of the collective bargaining agreement was placed at the Third Year step of the contractual wage schedule. The Union does not take issue with this placement except with respect to the Grievants.

The Grievants are R.N.'s and L.P.N.'s who have worked less than 1,020 hours per year. The Grievants allege that the Employer violated the collective bargaining agreement by not placing the Grievants on the step of the wage schedule which corresponds with their seniority, i.e., years of service since

1/ However, the 6 mo. step on the LPN schedule does not contain any wage rate.

the Grievants' date of hire. 2/ The Employer maintains that the Grievants' placement and movement on the new schedule is the same as on the prior schedule.

Acceptance of the Union's position has a two-fold effect. First, it affects the Grievants' initial placement on the contractual wage schedule because it credits the Grievants with years of service which were not previously credited for the purpose of movement on the wage schedule. Second, it affects the Grievants' future placement on the wage schedule by advancing the Grievants on the basis of a year of service, rather than on the basis of hours worked in a year.

Union President Gerry Cardinal and Administrator Gary Taxdahl were present during all of the bargaining sessions which lead to the parties' initial agreement. According to Cardinal, the Union proposed to incorporate the existing wage schedule into the collective bargaining agreement. With one exception, the wage schedule incorporated into the collective bargaining agreement contains the same steps as the old wage schedule. The exception being that the new schedule has a Start step for the L.P.N. classification.

Cardinal and Taxdahl agree that, when the parties negotiated the wage schedule, they did not discuss the specific placement of employes on the steps of the wage schedule or the manner in which employes would move through the steps on the wage schedule. The Employer argues that, given this silence, the Employer is entitled to administer the wage schedule in accordance with its prior practice.

The Union does not dispute the Employer's contention that the Grievants placement on the contractual wage schedule is consistent with the Employer's prior practice. The Union does, however, dispute the Employer's claim that it is entitled to administer the wage schedule in accordance with the Employer's prior practice.

Evidence of past practice may be used to establish an implied term of contract. To be given effect, however, the evidence must demonstrate that the practice, inter alia, was mutually accepted by the parties to a contract. In the present case, the past practice relied upon by the Employer was instituted by the Employer prior to the negotiation of the parties' initial contract, during a period of time in which the bargaining unit employes were not represented by the Union. Since the Union was not a party to the practice relied upon by the Employer, it must be concluded that the past practice relied upon by the Employer was a unilateral, rather than a mutually accepted past practice. A unilateral past practice is not entitled to be given effect as an implied term of contract. Moreover, as the Union argues, to give such effect to the practice relied upon by the Employer would be contrary to the language of Article XXVII, Entire Memorandum of Agreement.

2/ Grievant Barsokine, an LPN, claims a date of hire of 7/1/85; Grievant Ryan, an RN, claims a date of hire of 8/28/89; Grievant Mickelson, an RN, claims a date of hire of 9/28/89; Grievant Hughes, an RN, claims a date of hire of 4/1/86; and Grievant Gustafson, an RN, claims a date of hire of 11/8/89.

While the evidence of a unilateral practice, per se, may not be relied upon to establish an implied term of contract, the parties conduct during the negotiation of their initial collective bargaining agreement may evidence an intent to adopt such a practice. In the present case, the Union proposed to incorporate the existing wage schedule into the new collective bargaining agreement. At the time that the Union made this proposal, the Union was not aware of the exact placement of bargaining unit employes on the existing wage schedule, but did know that Limited Part-Time Employees were frozen at the one year rate until they worked at least 1,020 annual hours.

The undersigned is persuaded that, by proposing to incorporate the existing wage schedule into the labor contract without discussing the placement or movement of employes on that schedule, the Union evidenced an intent to also incorporate into the labor contract the procedure by which that existing wage schedule had been administered. The undersigned turns to the issue of whether the other record evidence demonstrates a contrary intent.

Article XII, EMPLOYEE DEFINITIONS, categorizes employes on the basis of hours worked. The Article XII categories are Regular or Full-Time Employees, Regular Part-Time Employees, Casual Employees, and Temporary Part-Time Employees. As the Union argues, Section 12.02 provides only one basis for distinguishing Regular Part-Time Employees who work less than 1,020 hours, i.e., entitlement to fringe benefits. Specifically, Section 12. 02 provides that "Any employee who is paid for less than 1,020 annual hours in a permanent position shall not be entitled to any fringe benefits granted by this Agreement except for participation in the Wisconsin Retirement Fund if they work a minimum of 600 annually scheduled hours." As the Union argues, wages are not fringe benefits. Thus, the plain language of Section 12.02 does not provide the Employer with any right to distinguish progression through the wage schedule on the basis of whether or not a Regular Part-Time Employee works, or is paid for, less than 1,020 annual hours.

When the parties negotiated their initial contract, they worked off the written proposals submitted to the Employer by the Union. As initially presented to the Employer, Article XII contained three categories of employe, i.e., fulltime, part-time, and casual. Part-time employes were defined as "an employee who works for an hourly wage rate, as shown by the attached schedule and who works at least one scheduled hour each pay period and less than 80 hours/pay period (2 weeks). Part-Time employees shall receive fringe benefits granted by this Agreement on pro-rated basis."

Taxdahl and Cardinal agree that employe definitions were an important issue during contract negotiations. They further agree that, when the parties discussed the Union's proposed Article XII, the Employer sought to include the category of Limited Part-Time Employee in Article XII and the Union refused to include such a category of employe in Article XII. When the Employer consistently maintained that it could not provide fringe benefits on a pro-rata basis, the Union agreed that part-time employes who were paid less than 1,020 annual hours would not receive pro-rata benefits. Taxdahl and Cardinal acknowledge that, when the parties agreed that part-time employes who were paid less than 1,020 annual hours would not receive fringe benefits, the Union told the Employer that, for bookkeeping purposes, the Employer could refer to part-

time employes who worked less than 1,020 hours as Limited Part-Time Employees, but that the Union would not recognize the category of Limited Part-Time Employee. Contrary to the argument of the Employer, the record does not establish that the Union assured the Employer that the elimination of the category of Limited Part-Time Employee would not have any substantive effect.

The language of Article XII, as well as the evidence of the negotiation history of Article XII, demonstrates that the category of Limited Part-Time Employee was eliminated when the parties negotiated their initial agreement and that employes who were previously categorized as Limited Part-Time Employees were now categorized as Regular Part-Time Employees. By adopting the language of Section 12.02, which denies fringe benefits to Regular Part-Time Employees who are paid for less than 1,020 annual hours, the parties demonstrated that, when they intend to distinguish the contractual benefits of Regular Part-Time Employees on the basis of paid annual hours, the parties express such an intent in the contract language.

Section 6.02 of Article VI, PROBATION, provides, inter alia, that "The 6-month pay step increases shall be withheld until probation is ended, and the 12-month and all succeeding paystep raises shall be postponed accordingly." By adopting this language, the parties have shown that, when they intend to restrict movement across the steps of the wage schedule, they express such an intent in the contract. Since this provision is the only contractual provision which expressly restricts movement across the steps of the wage schedule, it is reasonable to conclude that the parties did not intend any other restriction.

The parties' collective bargaining agreement contains an ADDENDUM which describes a procedure by which part-time employes are evaluated to determine whether or not they have achieved or maintained 1,020 hours. This Addendum recognizes that 1,020 hours are used to accrue benefits, but makes no reference to wages or the wage schedule. The language of the ADDENDUM confirms the conclusion that, when the parties intend to distinguish contractual benefits on the basis of whether or not an employe has been paid for, or worked, 1,020 annual hours, they express such an intent in the contract.

For the reasons discussed above, the undersigned is persuaded that the contract language, as well as the evidence of the negotiation history of Article XII, warrants the conclusion that the Employer has a contractual obligation to advance Regular Part-Time Employees who are paid for less than 1,020 annual hours across the wage schedule in the same manner as Regular Part-Time Employees who are paid at least 1,020 annual hours, unless the contract provides otherwise Having concluded that the contract does not provide otherwise, the undersigned is persuaded that Regular Part-Time employees who are paid for less than 1,020 annual hours are contractually entitled to advance across the steps of the contractual wage schedule in the same manner as Regular Part-Time Employees who are paid at least 1,020 annual hours.

In summary, as discussed above, by proposing to incorporate the existing wage schedule into the labor contract without discussing the placement or movement of employes on that schedule, the Union evidenced an intent to also incorporate the procedures by which the existing wage schedule had been administered by the Employer, including the procedure by which Limited Part-Time

employees were frozen at the first year rate until such time as the employes worked at least 1,020 annual hours. The undersigned is persuaded, however, that the inference that the parties' intended to continue this procedure during the term of the parties' 1990-91 collective bargaining agreement is rebutted by the language of the agreement, as well as the other evidence of contract negotiation history.

The Section of the contract entitled "PURPOSE-INTENTION" states, inter alia, that "It is the purpose of this Agreement to establish rates of pay and conditions of employment for the covered employees during the term hereof." Although the parties executed the collective bargaining agreement on August 22, 1991, the term of the "Agreement" is January 1, 1990 through December, 1991. The language of the Section of the contract entitled "PURPOSE-INTENTION" supports the conclusion that the Employers' contractual obligation to a advance Regular Part-Time Employees who are paid less than 1,020 hours per year across the wage schedule in the same manner as other Regular Part-Time Employees is retroactive to January 1, 1990.

As the Union argues, Section 5.01, establishes that seniority "shall accrue from the last date of hire". However, Section 5.01 does not state that employes are entitled to be placed on the wage schedule in accordance with this seniority. Rather, Section 5.01 is silent on the issue of the administration of the wage schedule.

Neither Section 5.01, nor any other contract provision relied upon by the Union, requires the Employer to place the Grievants on the step of the contractual wage schedule that corresponds to their years of seniority, nor is the Employer otherwise required to retroactively credit the Grievants for the years in which they were frozen on the wage schedule. Rather, the Grievants' contractual right to move on the wage schedule in the same manner as other Regular Part-Time Employees is prospective from January 1, 1990. To wit, on her anniversary date in 1990, each Grievant was contractually entitled to advance one step from her placement on the 1989 wage schedule and, on her anniversary date in 1991, each Grievant was contractually entitled to advance one step from her placement on the 1990 wage schedule.

Based upon the above and foregoing, and the record as a whole, the undersigned adopts the following

AWARD

1. Bargaining unit members who are paid for less than 1,020 hours may progress through the wage scale set forth in the 1990-91 collective bargaining agreement.

2. The Employer is to immediately make the Grievants whole for all wages and benefits lost as a result of the Employer's failure to advance the Grievants through the wage scale set forth in the 1990-91 collective bargaining agreement.

3. The Arbitrator will retain jurisdiction for at least forty-five (45) days from the date of this Award for the sole purpose of resolving any issues as to the application of the remedy.

Dated at Madison, Wisconsin this 21st day of July, 1992.

By _____
Coleen A. Burns, Arbitrator

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