BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GREEN COUNTY HUMAN SERVICES EMPLOYEES LOCAL 1162-A, AFSCME, AFL-CIO	
and	Case 117 No. 47198
GREEN COUNTY (HUMAN SERVICES)	MA-7197

Appearances:
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. James A. Wyss, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1988-90 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties agreed to apply the terms of this agreement to the instant dispute. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by Betsy Slatter as President of the Union on behalf of Pam Young and other employes, concerning denial of overtime.

The undersigned was appointed and held a hearing on August 26, 1992 in Monroe, Wisconsin at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on October 23, 1992.

ISSUES:

1. The Employer raised procedural issues, in the following form:

Was the grievance timely filed and filed at Step 1?

The parties agree on the remaining issues:

2. Did the Employer violate the collective bargaining agreement by ordering employes to work flexible hours?

3. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

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ARTICLE V
GRIEVANCE PROCEDURE

5.01 In case any dispute or misunderstanding relative to the meaning or application of the provisions of this Agreement arise, it shall be handled in the following manner. Time periods shall be deemed to be of the essence, and failure by grievant to follow them shall render the grievance null and void. Failure to follow time limits by Employer automatically moves the grievance to the next step. The following time periods may be waived by mutual consent of the parties.

A) The employee, Union steward, officer or representative, shall present a written grievance to the most immediate supervisor within ten (10) workdays of the alleged grievance or knowledge thereof. The supervisor shall prepare a response within ten (10) workdays of receipt of the grievance.

B) If the initial response is unsatisfactory to the grievant, the grievance shall be submitted to the department head within ten (10) workdays of the date of response or expected response. The department head will submit a written response to the grievance within ten (10) workdays of its submittal.

C) If the Union does not find the department head's response to be satisfactory, it shall within twenty (20) workdays of said response request that the Wisconsin Employment Relations Commission (WERC) appoint a member of its staff as an arbitrator of the dispute. The parties shall share the expense of the arbitrator so appointed and of the statutory filing fee. The decision of the arbitrator shall be final and binding on both parties.

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ARTICLE XX
HOURS OF WORK

20.01 Hours of Work. The normal hours of work are eight (8) hours per day and forty (40) hours per week, one hundred seventy-three (173) hours per month. The normal hours of work are 8:00 a.m. to 5:00 p.m. with one (1) hour off, without pay, for lunch. Employees in the unit may request one-half (1/2) hour lunch hours with appropriate adjustment to the beginning or ending hours of work. The decision to grant (or rescind) such request shall be at the sole option of the Director of Human Services, or his/her designee, which shall not be unreasonably withheld. It may be necessary for certain employees to have a regular schedule outside of the previously-mentioned hours. A flexible schedule of hours

other than that set forth above shall be mutually agreed to by the Employer and the Union on the condition that it is regular and is not used to avoid payment of overtime. The parties agree that the Employer shall have the right to establish at least one night time clinic for the benefit of the public, and employees may be directed to work at such clinic in lieu of working during the normal hours of work. Pay for such work shall be at the regular rate. Hours that are given herein do not represent either minimum or maximum, but rather the normal hours of work.

20.02 Overtime. All hours worked outside of the regular hours of work and/or that are after forty (40) hours per week are paid at the rate of one and one-half (1 1/2) times their normal rate of pay. In lieu of overtime pay, employees may receive compensatory time off at a rate of one and one-half (1 1/2) hours for each hour of overtime worked up to a maximum accumulation of forty (40) hours of compensatory time; all overtime hours worked beyond forty (40) hours of compensatory time shall be paid.

. . .

DISCUSSION:

This grievance was filed on January 27, 1992, after Betsy Slatter, President of the Union, learned that employe Pam Young, a secretary, was expected to alter her hours of work once a month, on the third Tuesday of each month. On that day, the Department's Long-Term Support Committee normally meets from about 4:00 p.m. till about 5:30 p.m., and Young attends the meeting to take notes. Young's normal hours are from 8:00 a.m. to 5:00 p.m. with a one hour unpaid lunch, and Young had been instructed to vary those hours so as to accommodate this meeting within the normal length of a work day. The Union alleged that this matter was a "class action", contending that a number of other employes had been instructed to "flex" their hours in order to avoid the payment of overtime, and at the hearing presented Slatter's testimony to that effect. The Employer contended that all of the other instances were out of time within the meaning of Article 5.01 of the Agreement, and that in any event no class action existed. The Employer offered testimony by Dani Maculan, the County's Director of Human Services, in opposition to each of these instances separately. The County also presented Maculan's unrebutted testimony that Pam Young had been advised of the requirements to flex her hours as early as June, 1991, and had not protested this requirement until January, 1992 even though she had been employed by the Department for five years and was familiar with the contract.

I find that it is unnecessary to recount the details of the other alleged instances of required flex time, because I agree with the Employer that all of these instances are clearly untimely under the terms of the grievance procedure. The most recent of them occurred some 44 days before the grievance in this matter was filed, and the grievance procedure is unambiguous and indeed sharp in its injunction that grievances not filed on time are "null and void". To drag in the remaining instances under the heading of a class action would render this contract language meaningless. While there is therefore no point to recounting the details of each of these incidents, I will note that a review of them convinces me that one to another they are also dissimilar in nature,

and therefore do not constitute a clear grouping.

This leaves the sole instance actually cited in the grievance, namely the January 21, 1992 monthly meeting involving Pam Young. With respect to this allegation, I note that the Union disclaimed any remedy extending prior to ten days before the date of the grievance, admitting that the grievant had knowledge of this requirement long before. The Employer contends that the grievance is still untimely; but I disagree. Limited as it is to the repetitive requirement that Pam Young attend the Long-Term Support Committee meetings without overtime pay, the grievance raises a type of issue often recognized in arbitration as a "continuing" violation. In this line of cases, a fresh alleged violation of the collective bargaining agreement is deemed to arise with each new occasion upon which a paycheck, for example, is paid, even though it may be based on a long-ago miscalculation. The fact that Young's work assignment repeatedly affects her paycheck brings it squarely within this exception to the usual interpretation of a timeliness clause. Still, under that clause a single instance is all that can be considered here.

The facts of this type of meeting are not in dispute. The committee involved meets once a month, except in December, to discuss and make decisions concerning the best treatment of various clients of the Department who are at risk of being placed in nursing home care. The committee members are not all employed by the Department, but include volunteers from the community. The time of the meeting is set largely for their convenience.

Dani Maculan testified that this committee meeting was "clinical" in nature because all of the Department's work is clinical, as it has to do with the treatment of clients. There is no dispute, however, that clients do not themselves attend the Long-Term Committee meeting. Maculan testified that the purpose of these meetings is the diagnosis and treatment of the clients, and referred to a Webster's Dictionary definition of a "clinic":

> 1. A class of medical instruction in which patients are examined and discussed.
>
> 2. A group meeting devoted to the analysis and solution of concrete problems or to the acquiring of specific skills or knowledge in a particular field (such as) writing (or) golf. 1/

Maculan also testified that the meeting was a group meeting devoted to the analysis and solution of concrete problems.

In its brief, the Union in turn referred to "Webster" - but in this instance to the New Webster's Dictionary and Thesaurus and Medical Dictionary. 2/ This document defines "clinic" in slightly different terms:

> The teaching of medical subjects at the bedside; an institution where non-resident patients attend for treatment.

In essence, the Union contends that the Long-Term Support Committee meeting is not a clinic, because a meeting with clients was intended by Article 20.01, and

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1/ Webster's 9th New Collegiate Dictionary, Merriam Webster, Inc., 1983.

2/ Only sections were submitted and the date of issuance is unclear.

the meeting does not meet the "mutually agreed" alternative for flexible time in that clause either.

The Employer contends that the Long-term Support Committee is a clinical service because it requires the expertise of social workers, psychiatrists, psychologists and support staff to operate efficiently, and that Maculan, the only person to testify concerning the nature of the meeting, is a psychologist of 20 years' experience whose testimony that the meeting was clinical should be credited.

Neither party offered testimony concerning the bargaining history of the disputed language. The Employer contends, in addition, that the grievance is improperly filed because it was filed with the Department Director rather than with Pam Young's immediate supervisor. Where the person responsible for an action is higher in the hierarchy than the immediate supervisor, however, many arbitrators have refused to enforce to the letter the normal sequence of grievance processing, because it is obviously an act of futility for a union to file a grievance with a lower-level supervisor protesting a superior's action. Here, the facts persuade me that the Union filed the grievance believing it to be a "class" grievance on behalf of numerous employes, citing Young only as an example and contending that the Department was causing employes to flex their hours as a matter of general policy initiated by Maculan herself. Slatter's testimony makes clear that the Union's concern was with a pattern of activity and not solely with the Pam Young example of it; and though I find that the time limits in the contract prevent consideration of the other incidents and that the pattern is less clear than the Union believed, to find that the Union was unable to bring the grievance even as to the Pam Young instance because it wrongly alleged a class in the first place would be the kind of excessively technical reading of contract language which is generally frowned upon in arbitration. Furthermore, there is no evidence here that the Employer was in any significant way deprived of its rights by the course the Union followed.

The merits of this matter therefore turn on the interpretation of the sentence in Article 20.01 that states "The parties agree that the Employer shall have the right to establish at least one night time clinic for the benefit of the public, and employes may be directed to work at such clinic in lieu of working during the normal hours of work." It is clear that this sentence is an exception to the same Article's requirement that a flexible schedule of hours, (with an exception for certain employes which does not include Young) must otherwise be mutually agreed to by the Employer and Union, and not used to avoid payment of overtime. The Employer concedes here that the requirement that Young flex her hours to attend the Long-term Support Committee is done to avoid payment of overtime. Therefore the matter turns on whether this committee meeting constitutes a "night time clinic". In this connection, I find Maculan's testimony to be so broad a claim as to render the applicable sentence of the contract meaningless. If Maculan's definition of "clinic" or "clinical" were followed, virtually all of the activities of this Department would fit within the exception, and nothing would be left of the rule.

I have considered carefully the implications of both dictionary definitions offered by the parties. It would be possible to cite additional, slightly different dictionary definitions of "clinic", but neither party has offered other than self-serving testimony as to the parties' intent in negotiating this language. The commonly accepted notion of the word "clinic", however, connotes the idea that in some way the person who is being treated or taught is present. Even in the "golf clinic" cited in the dictionary the Employer would have me rely on, the golfer himself or herself is expected to be present. Thus I find that the key distinction here is that the clients are not present for the Long-term Support Committee meetings. I find that that renders these meetings administrative, and not a clinic, within the meaning of

Article 20.01 read as a whole. I therefore conclude that the grievance has merit with respect to the single instance timely contained within it.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievance is untimely as to all instances alleged but for the January, 1992 meeting of the Long-term Support Committee.

2. That the Employer violated the collective bargaining agreement by requiring Pam Young to flex her hours in order to attend that meeting.

3. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, make Pam Young whole for any monetary losses suffered as a result of the Employer's refusal to treat the time spent at said meeting as subject to overtime pay.

Dated at Madison, Wisconsin this 11th day of January, 1993.

By _____
Christopher Honeyman, Arbitrator