BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE COUNTY (MEDICAL COMPLEX)	Case 336 No. 47978 MA-7456
and	
FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO	

Appearances:
Ms. Carol Beckerleg, Field Representative, Wisconsin Federation of Nurses & Health Professionals, AFT, AFL-CIO, on behalf of Local 5001.
Mr. Timothy R. Schoewe, Deputy Corporation Counsel for Milwaukee County, on beh

ARBITRATION AWARD

According to the terms of the 1991-92 collective bargaining agreement, relating to the County's Medical Complex (hereafter County or MCMC), between Milwaukee County (hereafter Employer) and the Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO (hereafter 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 the Employer's denial of voluntary overtime work to Lisa Sanders due to her absenteeism record. The undersigned was designated arbitrator. Hearing was held on December 14, 1992. No stenographic transcript of the proceedings was made. The parties submitted their post-hearing briefs by February 16, 1993 which the undersigned exchanged thereafter. The parties waived their right to file reply briefs.

ISSUES:

The parties were unable to stipulate to the issue(s) to be determined herein. The Union suggested that the issues be framed as follows:

(1) Did the County violate the collective bargaining agreement when it denied the Grievant the opportunity to work extra shifts?

(2) If so, what is the appropriate remedy?

The County objected to the Union's suggested issues on the ground that the portions of the contract allegedly violated were not identified and because the potential remedy was not identified or described. The County therefore, suggested the following issues:

(1) Did the County violate Sections 1.05, 2.03(4) and 3.01 of the Memorandum of Agreement when it placed certain restrictions on the grievant Lisa Sanders?

(2) If so, what is the appropriate remedy?

The parties stipulated that the undersigned could frame the issues. Based upon the relevant evidence and argument herein, I find that the issues

are properly stated as follows:

(1) Did the County violate the collective bargaining agreement when it denied Lisa Sanders voluntary overtime on March, 1993 due to her attendance/tardiness rate?

(2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

1.05 **MANAGEMENT RIGHTS.** The County of Milwaukee retains and reserves the sole right to mange its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the workforce; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Federation.

. . .

2.02 **OVERTIME**

(1) Overtime shall be defined as hours credited in excess of 8 per day or 40 per week for all

bargaining unit employes except for Nursing Instructors, who accrue overtime for all hours credited in excess of 80 per pay period. Overtime shall be compensated or liquidated at time and one-half unless otherwise specified in this Contract.

. . .

(4) Every reasonable effort shall be made to meet overtime needs on a voluntary basis. Such overtime will be offered to the most senior qualified employe on a rotating basis.

. . .

PART 3

3.01 **ROLE OF THE REGISTERED NURSE.**

. . .

(5) The parties further **agree that** it is the County's responsibility to attempt to provide adequate numbers of registered nurses and auxiliary nursing personnel on all shifts as necessary, consistent with sound practices, and to fill approved vacancies as soon as possible in order to provide safe and adequate nursing care and to make maximum utilization of the training and competencies of all nursing personnel.

BACKGROUND:

The Employer has had written guidelines for employe attendance and attendance monitoring since at least 1987. On the latter subject, a 1987 memo (reviewed in 1990) states guidelines for monitoring attendance, as follows:

. . .

Procedure:

1. Each supervisor collects attendance data on each employee (form A-Version desired).

2. Each supervisor completes an attendance review of each employee quarterly for the past 12 months. They compile the data and submit to Director of Nursing. (Form B-Version desired).

Quarterly reviews to be conducted as follows:

January 1st	Covering	January 1st previous year to December 31st.
April 1st	Covering	April 1st previous year to March 31st current year.

July 1st	Covering	July 1st previous year to June 30th current year.
October 1st	Covering	October 1st previous year and September 30th current year.

3. Every employee gets a letter notifying them of their attendance. Form C.

4. Those employees falling at a greater than 5% level of absenteeism without extenuating circumstances begin the progressive disciplinary process as established by policy and procedure.

. . .

The County's Attendance Guidelines and Policy (in place at MCMC since 1983) indicate that an "absence" shall constitute "four (4) hours of more of used sick allowance" or "unpaid absence of four hours or more." Certain items are to be "disregarded when determining absence":

A. Jury duty.
B. Line-of duty injuries.
C. Educational leave.
D. Military leave.
E. Excused time for funerals.
F. Child rearing or parenting leaves.
G. Leaves for union business.
H. Voluntary time off (VTO) when approved by management.
I. Time taken during declared severe weather procedures.

Notably, the Employer's 1983 Attendance Guidelines and Policy do not state that the Employer will deny employes with attendance problems voluntary overtime or extra shifts. Rather, the document lists the following:

. . .

10. Guidelines for Progressive Discipline - Attendance Program

Absenteeism: For previous 12 months period based on 1868 available hours.

Percentage	Number of Hours	Number of Days*	Possible action to be taken**
5%	93.4	11.7	Conference*** (Use attendance record review)
7 1/2%	140.1	17.5	Formal*** reprimand
10%	186.8	23.4	Suspension or Discharge

* For full time employee.

** Extenuating circumstances such as extended leaves due to hospitalization, etc., will be dealt with on an individual basis, with the department head recommended action to be taken, if any.

*** Repeated conference or reprimands may result in the need to request a disciplinary hearing.

In addition, a Memo dated July 26, 1991 regarding "scheduling guidelines", made no mention of restricting voluntary overtime and extra shifts given to employes with absenteeism problems. This memo reads in relevant part as follows:

. . .

1. A four-week schedule is posted 2 weeks prior to the start date of the schedule.

2. Unfilled shifts ("holes") are posted on the unit for one (1) week (Sunday through Saturday). Anyone may sign up, but halftime staff have priority, provided it's not overtime. On the Monday following this week, halftime shall consider themselves confirmed unless otherwise notified by their clinical supervisor.

3. Remaining unfilled shifts are sent to the staffing office for the second week (Sunday through Saturday). Anyone may sign up, but pool nurses have priority before overtime. On the Monday following this week, pool nurses shall consider themselves confirmed unless otherwise notified by the clinical supervisor/staffing office coordinator. Overtime will be confirmed after pool on the first Monday of the schedule.

4. Remaining unfilled shifts at the start date of the schedule are available in the staffing office on a first-come first-serve (sic) basis regardless of status. There is no bumping once shift is filled by another staff person. As always overtime, pool, and extra halftime shifts may be cancelled if workload warrants in this order.

5. A seniority list is maintained on each unit in a format that accommodates documentation by staff nurses of overtime and extra shifts. This list will be considered the official record to determine mandatory overtime assessment status.

. . .

The Employer has also had a Tardiness Policy for sometime, although it is not embodied in a formal, written policy. Associate Administrator, Paula Lucey stated that tardiness has been dealt with on a case-by-case basis; that tardiness and attendance have traditionally been looked at together; and that the Employer's normal progressive discipline procedures (oral and written warnings and a disciplinary hearing) are applicable.

FACTS:

The Grievant, Lisa Sanders has been employed at MCMC since January 7, 1991. She became a full-time R.N. on or about January 14, 1991. Lisa Sanders stated that at her employe orientation, she received a copy of the Employer's Absenteeism Guidelines and Policy, as quoted herein. Sanders stated that she did not recall these documents were discussed verbatim at her employe orientation, but she admitted that Employer representatives went over the concepts contained therein. During her tenure, Sanders has worked mostly day shifts on Floor 5M of the MCMC in the Physical Rehabilitation unit, but she has also rotated on PM shifts.

On or about April 29, 1991, Sanders received an "Attendance Review" from RN supervisor JoAnn Lenz covering her attendance record from her date of hire, January 7, 1991, to March 31, 1991. This review stated that Sanders had been absent for a total of 16 hours or 3.4% of the total number of hours generally worked in one year by a full-time employe (1868 hours). Lenz had checked this form on the line which stated "(a) record of 2% to 3.5% is a good record and I recognize your efforts."

On July 15, 1991, Lenz again issued Sanders an "Attendance Review", covering the period December 31, 1990 1/ to June 30, 1991. This form showed that Sanders had been absent for a total of 40 hours which equaled 4.3% of the total number of hours normally worked in the year by a full-time employe (1868). Lenz also checked the line on the form which stated, "(a) record of 3.5% to 5% is approaching the mark at which the disciplinary process will begin. Please consider the hardship your absence places on your co-workers and patient care." In the area of the form where comments could be made, Lenz noted, "12 late days". Sanders did not question or contest this Review.

On October 14, 1991, Lenz issued Sanders an "Attendance Record Review" form. The period of time covered was from January 14, 1991 to October 14, 1991. Lenz noted on the form that Sanders had been absent from work a total of 72 hours, equating to a 5% rate. Lenz also noted that the period covered was "10 months - 1401 hours and that there had been "17 late days." Sanders signed and dated the form on October 14, 1991. The form used for this attendance review had the following standard language typed thereon:

. . .

> Continued absence at the degree noted will be cause for further review and possible disciplinary action. The seriousness of this matter should have your immediate attention to ensure prompt improvement in your attendance.
>
> Please consider the hardship your absence imposes on your co-workers and services to be provided. Your assignments are vital to fellow workers in your immediate area and the patients within this institution.
>
> We also want to be certain that you understand the important effect your attendance record has on promotion, merit increases, and job assignment. While

1/ No objection or explanation was offered by either party regarding why this form purported to cover a period of time prior to Sanders' hire.

> good attendance is not the only characteristic considered, it is a consideration when assessing your performance.
>
> You are an important person within this institution. We are concerned, and are available to assist you in achieving good attendance.
>
> . . .

On February 15, 1992, 2/ Lenz issued Sanders another "Attendance Record Review" form covering the period February 15, 1991 to February 15, 1992. Lenz stated on this form that Sanders had been absent a total of 128 hours, equal to a 6.8% rate over the year. Lenz also noted on the form that Sanders had been late on 20 days during this period of time. This form contained the same standardized language quoted above. Lenz also wrote on the bottom of the form:

> No overtime until this has been under 5% for at least 6 months and a review of tardiness.

(Sanders signed the form, acknowledging receipt of it on March 9, 1992).

On March 9, 1992, supervisor JoAnn Lenz, held a conference with Sanders to explain and discuss her February 15, 1992 Attendance Record Review. At this time, Lenz explained that Sanders would not receive any overtime or extra hours due to her attendance problems. Lenz stated that it was not until March 18, 1992 that Sanders requested voluntary overtime, which the Employer denied. Prior to this, Lenz had not received any requests from Sanders for overtime or extra shifts.

Sanders stated the nursing office had regularly sought her out and offered her extra hours prior to October, 1991. However, at some time during October, 1991, an employe named Marcia employed in the nursing office, informed Sanders that she would no longer receive voluntary overtime or extra shift

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2/ It is undisputed between the parties that Sanders did not receive the following memo, dated January 15, 1992, at the time it was placed in her personnel file and that she first saw it when she looked at her personnel file in early February, 1992.

> . . .
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> TO:Lisa Sanders RN
>
> FROM:JoAnn Lenz RN, Clinical Supervisor 5M
>
> SUBJECT: Assignment of Extra Hours at MCMC
>
> This is to inform you that Staffing Office has been requested to not schedule you for any extra hours at MCMC until further notice.
>
> Your attendance has not been acceptable.
>
> This restriction will apply until your absenteeism rate has decreased to an acceptable level.

work. Sanders took no action on this information and she made no written requests for extra hours until March 18, 1992.

According to the Employer's records, Sanders did work two 8 hour voluntary overtime shifts on December 22, 1991 and February 28, 1992. During the period in which Sanders' absenteeism was increasing, Lenz confirmed that Sanders worked frequently at the Employer's request in the more responsible position of Charge Nurse. Ms. Lenz indicated attendance and tardiness are not factors to be considered in assigning an RN to be a Charge Nurse.

Sanders filed the instant grievance on April 14, 1992. Sanders took a line-of-duty injury leave from May 18, 1992 through the date of the instant hearing.

Evidence was proffered by both the Union and the Employer, regarding employes who had or had not been denied overtime in the past due to attendance problems. That evidence showed that RN Ruth Holz was issued an "Attendance Review" for the period October 15, 1990 to October 15, 1991 which showed that she had a 7.7% absenteeism rate. A note at the bottom of the Review stated "No O.T. until January 15, 1992 and improvement shown."

Another Attendance Review was performed on Yvette Johnson covering the period April 1, 1991 to March 31, 1992. 3/ This review showed that Johnson had a 6.0% absenteeism rate for the period. A note on the bottom of the Review stated, "Yvette, this is an improvement from last quarter. I will lift your overtime restriction as of now if you do not have one more day of absence from now until June . . . ."

RN Lisa Uribe received an Attendance Review covering the period April 1, 1990 to March 31, 1991 indicating that her absenteeism rate was 12.4%. However, no notation was made thereon (as on Johnson and Holz' Attendance Reviews) that overtime and extra hours would be denied to Uribe. In fact, Uribe testified that such a restriction was never placed on her overtime/extra shift work. Uribe, who has been Vice President of the Union for fifteen years and Chief Steward for one year, stated that the only knowledge she had of employes being denied overtime or extra hours had occurred in instances where the employe had been subjected to a disciplinary hearing due to absenteeism.

POSITIONS OF THE PARTIES:

Union:

The Union contended that the main issue in this case is the meaning that should be ascribed to the phrase "most senior qualified" (Section 2.02(4)). The Union urged that under this "sufficient ability clause" and given the lack of any evidence to the contrary, the Grievant was clearly qualified to perform extra hours and overtime work at all times relevant. The Union asserted that the County's denial of overtime to the Grievant was based solely on her attendance record, not on her actual qualifications to perform overtime work. The Union noted that during each quarter of 1991 and the first quarter of 1992, the Employer increasingly assigned the Grievant to Charge Nurse duties (up to 142 hours in the first quarter of 1992). The Union urged that such assignments showed that the Employer must have believed that the Grievant was qualified to

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3/ In a memo dated February 28, 1992, identical to the one placed in Sanders' file, Johnson was purportedly informed that she would not be scheduled for any extra hours until further notice because her attendance was unacceptable.

perform extra hours and overtime work during this period of time.

In addition, the Union relied upon an unnamed grievance arbitration case which it cited as appearing at 81 LA 51 as controlling this case. 4/ The Union asserted that the Employer has an Attendance Policy with clear guidelines and limits to which the Grievant was subjected when her attendance reached an unacceptable level. Yet nowhere in this Policy is there mention of withholding extra hours or overtime as a part of the discipline connected with this Policy. Nor is there a reference therein to the number of tardiness incidents that will result in discipline.

The Union further noted that the Employer had not even followed its own attendance procedures in this case and that the County had denied the Grievant due process because the Employer did not review the Grievant's attendance, as it should have, at the end of 1991. The Union observed that its analysis of the Grievant's time cards indicated that the Grievant would have had a 4.6% absenteeism rate for the year 1991, less than the 5% rate. The Union also urged that the Employer's treatment of the Grievant otherwise denied her due process because the County failed to give the Grievant a copy its January 15, 1992 memo.

The Union observed that although the Employer offered evidence that it had previously denied extra hours/overtime work to two employes with attendance problems, the Union had been unaware of these cases until the Employer raised them herein. In fact, the Union proffered evidence from RN Lisa Uribe to contradict that submitted by the Employer on this point. Uribe testified that after being counseled for her attendance she was nonetheless allowed to work overtime and extra shifts. Finally, the Union pointed out that not only did the Employer incorrectly count the Grievant's absences for 1991, the Employer's assessment of the Grievant's attendance was also unfair because the Employer did not count all of the hours worked by the Grievant during the period, in accordance with the County's (recently) changed method of counting all hours worked by each employe.

In these circumstances, the Union argued that the Employer lacked just cause for its denial of overtime and extra hours to the Grievant. The Union contended that the grievance should be sustained and that the Employer's refusal to offer the Grievant extra shifts and overtime since October 1991 requires that the remedy herein be an amount of backpay equal to an average of the number of hours/overtime work received by the Grievant for the period from June through October, 1991, applied to the period from October, 1991 to April 14, 1992.

4/ That case may be Florida Power Corp. (Kanzer, 1983), in which the arbitrator held that the Employer was not privileged to consider an employe's high absenteeism rate in determining "fitness" for a position.

Employer:

The County asserted that Section 1.05 of the labor agreement allows it to discipline Lisa Sanders by refusing to give her extra hours and/or overtime work because of her attendance/tardiness problems. The County further urged that Sanders' poor attendance and tardiness had made her "less qualified" for overtime rotation and extra hours.

The County contended that a ruling in favor of the Union would force it to disregard its duty "to provide adequate numbers of registered nurses. . . on all shifts as necessary consistent with sound practices, and to fill approved vacancies as soon as possible in order to provide safe and adequate nursing care . . . " as required in Section 3.01(5) of the labor agreement. According to the County, when employes fail to come to work on time or at all, the County's ability to meet the requirements for safe and adequate nursing care is jeopardized.

The County argued (for the first time in its brief) that the grievance was not timely filed under Section 4.02(8) and that therefore, even if a ruling is made in favor of the Union herein, the remedy should be limited to a prospective period, 90 days after the April 14, 1992 filing of the instant grievance. On the remedy point, the County noted that in any event, the Union had failed to prove that any specific denial of overtime or extra hours had occurred. In fact, Sanders admitted that after October, 1991, she requested no overtime or extra hours until March 18, 1992 and that Sanders did work some overtime in 1992. The County also observed that the Union failed to prove that Sanders was at any relevant time, the most senior RN eligible to work in the overtime rotation.

In conclusion, the County urged that based upon the disciplinary policies and practices it had proved, the grievance should be denied and dismissed.

DISCUSSION

In this case, it is significant that nowhere in the County's own policies, procedures and guidelines is there any reference to denying voluntary overtime or extra hours to employes who have attendance problems. Notably, since the 1980's, the County has created and maintained a very specific Attendance Policy, Guidelines and Disciplinary Program detailing its attendance review procedures, which list items that must be disregarded in analyzing attendance, guidelines for the applications of progressive discipline, and specific percentages of absence (including the number of hours and the number of days) necessary to reach each percentage benchmark and to trigger each distinct disciplinary action. No mention is made in any of these documents that the County will deny overtime and extra hours under any circumstances.

In addition, I note that the County has no formal, approved tardiness policy and no written guidelines or procedures for dealing with repeated employe tardiness. Rather, as Ms. Lucey testified, the County has considered tardiness on a case-by-case basis, often in conjunction with absenteeism rates and that the County has dealt with tardiness within its normal progressive disciplinary procedure. Furthermore, I observe, no evidence was placed in this record showing how the County has dealt with prior cases of excessive tardiness. It is in this context that I must judge the County's treatment of Lisa Sanders in denying her March 18, 1992 request for voluntary overtime. 5/

5/ The validity and the substance of MCMC's Attendance Reviews of Sanders are not before me in this case.

The County has argued that Section 2.02 Overtime Subsection (4) allows it to deny Sanders overtime because her absenteeism/tardiness rates disqualify her for such work. I disagree. The Union is correct that Section 2.02 subsection (4) constitutes a clearly stated, unambiguous "sufficient ability" clause. Thus, under such a clause, if Sanders could be considered generally competent to perform overtime and extra hours and if she had seniority over the other person or persons requesting overtime on March 18th, she should have been granted the overtime. Notably, under such a "sufficient ability" clause, any comparison between "applicants" for the overtime would be "unnecessary and improper". Elkouri and Elkouri, How Arbitration Works (4th Ed., 1985), pages 611-612.

Applying these principles to this case, I note that Sanders was never criticized by the County for her competency. Rather, during the period of time relevant here, the County repeatedly and increasingly appointed Sanders to act as Charge Nurse, an undisputedly more responsible and demanding position than her regular R.N. position. Furthermore, Sanders worked two overtime shifts, one in December, 1991 and one in February, 1992 for which the County must have found her "qualified" despite the January 15, 1992 memo placed in Sanders' personnel file stating she would no longer be eligible for any extra hours due to her attendance. All of these facts as well as the arbitral principles stated above, undercut and erode the County's arguments on this point.

Both parties offered evidence of "past practice" regarding the County's treatment of other similarly situated employes. As noted above, I have found that the language of Section 2.02(4) of the labor agreement is clear and unambiguous and that it is silent regarding whether the County is privileged to deny employes with absenteeism problems extra hours. In addition, I have observed that the County's own policies, procedures and guidelines are also silent on this point. In this context, I find that the evidence of "past practice", although relevant and admissible, is contradictory and inconclusive.

In addition, as a whole, I find that evidence of past practice tends to support the Union's case, not the County's. I note that an analysis of this evidence, regarding Uribe, 6/ Holz and Johnson, shows that their cases were significantly different from Sanders'. Uribe and Holz's absence rates were significantly worse than Sanders' at the time the County determined to deny Sanders overtime and extra hours in Sanders' February 15, 1992 Attendance Record Review. In regard to Johnson, although her absenteeism rate was 6.0% for the period April 1, 1991 to March 31, 1992 there is no evidence to show what Johnson's absenteeism rate was for the period just before this. Such evidence might well have indicated that Johnson's absenteeism rate for that prior period equaled or exceeded that of Sanders for the period February 15, 1991 to February 15, 1992. In addition, I note that on Johnson's March, 1992 review the apparent restriction on her working overtime and extra hours was lifted by her supervisor, despite Johnson's then 6.0% absenteeism rate.

6/ The case of Uribe is particularly damaging to the County's case - a 12.4% absenteeism rate failed to trigger a denial of overtime. The Uribe situation also tends to show that the County has arbitrarily applied its "policy" of denying overtime/extra hours to employes with attendance problems.

Finally, I note that the Union offered uncontradicted testimony that it knew nothing of the Holz and Johnson cases, thus eliminating the possibility that the Union previously waived its right to complain about the treatment of Sanders by its previous acquiescence to or agreement with the County's denial of overtime/ extra hours to other similarly situated employes.

The County argued that the requirements and obligations of Section 3.01(5) would be jeopardized were the undersigned to rule in favor of the Union herein. However, the County failed to provide evidence to demonstrate that such a result would in fact occur. Therefore, I do not find the County's argument on this point to be persuasive.

In its brief, the County argued for the first time that the grievance was untimely filed. As a general rule in arbitration cases, such an argument should properly be raised at the earliest stage of the grievance process in order to give the parties an opportunity to address the argument. Waiting to raise such an argument in the brief, after having failed to do so at each stage of the grievance process and even at the hearing, requires a conclusion that the County previously waived any objection it had to timeliness and that the merits are properly before me.

Having reached the above conclusion, however, does not mean that the County's arguments regarding the proper timing and extent of the remedy here are groundless. Rather, I agree with the County that Sanders failed to request overtime or extra hours between January 15th and March 18, 1992 so that no remedy should lie for this period. In addition, for the period from October, 1991 to January 15, 1992, the Union failed to prove that Sanders had in fact requested and been denied any overtime or extra hours because of her absenteeism record. I note that although Sanders stated that in October 1991 she was told by nurses office employe Marcia that she would no longer get extra hours, Sanders made no further inquiries into the matter, she did not request extra hours to "test the waters" and she failed to file a grievance to protest this alleged County action. In these circumstances, Sanders can be said to have inappropriately "sat on her rights", so that principles of laches would apply to deny Sanders any monetary remedy for the period from October, 1991 to March 18, 1992. 7/ I note that Sanders apparently failed to request overtime or extra hours after March 18, 1992, that she filed the instant grievance on April 14, 1992 and that she then went out on a line-of-duty injury from May 18, 1992 through December 14, 1992. In my view, no back pay remedy would appropriately lie for Sanders during the period of time from March 18, 1992 forward.

Therefore, the only viable request for overtime/extra hours filed by Sanders prior to filing the instant grievance was her request of March 18th to work the PM shift on March 24, 1992 which was denied due to her absenteeism. Contrary to the County, I do not believe it is up to Sanders to prove she was

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7/ The evidence that nurses office employes had sought out Sanders and offered her overtime and extra shifts prior to October, 1991, does not require a conclusion that the County must pay Sanders for some overtime she might have agreed to work based on the average number of overtime hours she worked during a prior period. This is just too inexact and nebulous for the undersigned, and to order such a remedy would not do justice where, as here, Sanders has been guilty of laches.

the most senior person available to work on the date requested. Rather, it was the County's burden (being in possession and control of the relevant data) to prove Sanders was not the most senior person who requested overtime on March 18. The County having offered no evidence on this point, I find that Sanders should have received eight hours overtime on March 24, 1992 pursuant to her March 18, 1992 request because, as found above, the County was not privileged under Section 2.02(4) of the labor agreement to deny Sanders' request due to her absenteeism and/or tardiness record.

Based upon the relevant evidence and argument herein, I issue the following

AWARD

The County violated the collective bargaining agreement when it denied Lisa Sanders voluntary overtime due to her attendance/tardiness rate.

The County shall therefore make Sanders whole by paying Sanders eight hours overtime pay (and benefits thereon) for the eight-hour shift she should have worked on March 24, 1992. The County shall also immediately cease and desist from denying Sanders and all other employes similarly situated voluntary overtime and/or extra hours because of their absenteeism and/or tardiness rates and the County shall resume granting employes such hours based upon the language of Section 2.02(4).

Dated at Madison, Wisconsin this _____ day of April, 1993.

By _____
Sharon A. Gallagher, Arbitrator