BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BROWN COUNTY DEPARTMENT OF SOCIAL SERVICES PARAPROFESSIONAL EMPLOYEES ASSOCIATION	Case 483 No. 48441 MA-7602
and	
BROWN COUNTY (DEPARTMENT OF SOCIAL SERVICES)	

Appearances:
Mr. Frederick J. Mohr, Attorney at Law, on behalf of the Brown County Departm
Mr. John C. Jacques, Assistant Corporation Counsel, on behalf of Brown County

ARBITRATION AWARD

Brown County Department of Social Services Paraprofessional Employees Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Brown County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 26, 1993 in Green Bay, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 16, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County raises the issue of procedural arbitrability which may be stated as follows:

> Is the grievance procedurally arbitrable based upon the fifteen (15) working days time limit in the contract for filing the arbitration request with the Wisconsin Employment Relations Commission?

The parties stipulated to the following statement of the substantive issue if the grievance is found to be arbitrable:

> Should advancement on the ESS II schedule be based upon date of hire as an ESS I or length of service as an ESS II?

CONTRACT PROVISIONS

> Article 9. GRIEVANCE PROCEDURE
>
> The parties agree that prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application or enforcement of the terms of this agreement, or questions involving wages, hours and conditions of employment shall constitute a grievance.

Grievances may be brought by the Association or an individual employee or employees. In the event a grievance is brought by an individual employee or employees, the Association shall be notified and shall have the right to participate in each stage of the grievance procedure. All grievances which may arise shall be processed as follows:

Step 1. Supervisor: Grievance shall first be presented in writing to the appropriate supervisor within fifteen (15) working days after the date of the event or occurrence which gave rise to the grievance.

Step 2. Director: If the grievance is not settled at Step 1 within five (5) working days after having been presented to the supervisor, the grievance may be presented in writing to the Director not later than five (5) working days after receipt of the supervisor's decision. The Director will provide his/her written decision within five (5) working days after receipt of the grievance.

Step 3. Director of Personnel: If the grievance is not settled at Step 2 within five (5) working days after having been presented to the Director, then the grievance may be presented to the Director of Personnel of Brown County not later than ten (10) working days after the date of the receipt of the Director's decision. The Director of Personnel shall provide his/her written decision within ten (10) working days after receipt of the grievance.

Step 4. If the grievance is not settled at Step 3, it may be submitted to arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission, under the procedure as set forth below, provided that the request to the WERC for such arbitration is made within fifteen (15) working days after the receipt of the decision to the Director of Personnel with notification of such request being given to the other party. The arbitrator shall be chosen from a list of five (5) arbitrators from the staff of the WERC chosen by mutual agreement of the parties on an annual basis. Such list will be submitted to the WERC along with the request to arbitrate with directions to the WERC to appoint one (1) of the five (5) individuals named. If the parties are unable to agree on a list of 5 arbitrators, the WERC shall appoint the arbitrator.

. . .

SCHEDULE "A"

The starting rate for newly hired employees will be $.40 per hour less than their classified rate for the first six (6) months of employment.

. . .

Six Eight Twelve Sixteen

Classification	Year	Start	Months	Years	Years	Years
Clerk I	1990+.05	$7.57	$7.97	$8.04	$8.10	$8.17
	1991	7.89	8.29	8.36	8.42	8.50
	1992	8.22	8.62	8.69	8.76	8.84
	. . .	. . . . .				
Economic Support Specialist I	1990+.05	8.42	8.82	8.88	8.94	9.00
	1991	8.77	9.17	9.24	9.30	9.36
	1992	9.14	9.54	9.61	9.67	9.73
Economic Support Specialist II	1990+.05	9.22	9.62	9.68	9.75	9.80
	1991	9.60	10.00	10.07	10.14	10.19
	1992	10.00	10.40	10.47	10.55	10.60

. . .

The first pay period following the one year anniversary of obtaining the Economic Support Specialist I classification, the employee shall be reclassified to Economic Support Specialist II and receive the appropriate rate of pay provided he/she performs the work of Economic Support Specialist II.

. . .

MEMORANDUM OF UNDERSTANDING

Reopener of the Economic Support Specialist Position Rate of Pay Adjustment

The following agreement has been reached between Brown County and the Social Services Para-Professional Employees Association, represented by Lise Gammeltoft, Attorney.

The parties agree to make a good faith effort to bargain a rate of pay adjustment for the Economic Support Specialist position and any retroactivity of that rate of pay adjustment. Negotiations will commence no later than October 1, 1991. If no adjustment is reached by December 1, 1991, the parties may proceed to Interest/Arbitration with Mediator, Bill Houlihan, retaining jurisdiction as mediator (as required under 111.70 Subsection 4, Wisconsin State Statute).

The purpose of this reopener is to allow time for the County Internal Auditor to complete his study of the Economic Support Unit manpower problems which will be considered in their reopener negotiations.

FOR THE COUNTY:

Gerald E. Lang /s/ 7/12/91
GERALD E. LANG DATE

FOR THE UNION:

Lise E. Gammeltoft 7/10/91
LISE GAMMELTOFT DATE

BACKGROUND

The County maintains and operates the Brown County Department of Social Services and the Association is the exclusive collective bargaining representative of those employes of the Department not classified as professional employes. The parties negotiated a 1991-1992 collective bargaining agreement covering those employes and that Agreement contained the reopener provision set forth above regarding the pay rates for the Economic Support Specialist (ESS) position.

The parties attempted to negotiate a mutually agreeable pay rate for the ESS position, but were unsuccessful and proceeded to interest-arbitration with their dispute. At the time of the negotiation of the 1991-1992 Agreement and the interest-arbitration on the ESS position pay rates, the County had a different Personnel Director and the Association had a different attorney than the persons now in those positions.

The proposals of the parties and the attendant issues in the ESS pay rates arbitration were succinctly set forth as follows in Arbitrator Gundermann's Award in that case:

> There are three aspects to the wages issue: (1) the size of the wage increases; (2) the number of step increases; and (3) retroactivity.

Association's Final Offer

Classification	Start	6 mos.	12 mos.	24 mos.	36 mos.	48 mos.	8 yrs.	12 yrs.	16 yrs.
ESS II - 1991*	9.60	10.10	10.40	10.55	10.80	11.00	11.07	11.14	11.19
- 1992**	10.00	10.50	10.80	10.95	11.20	11.40	11.47	11.54	11.59

* Effective first payroll period of 1991
** Effective first payroll period of 1992

County's Final Offer

Classification	Start	6 mos.	24 mos.	36 mos.	48 mos.	8 yrs.	12 yrs.	16 yrs.
ESS II - 1991*	9.60	10.10	10.40	10.55	10.80	10.87	10.94	10.99
- 1992**	10.00 10.50	10.80	10.95	11.20	11.27	11.34	11.39	

* Effective 9/29/91
** Effective 12/22/91

On September 28, 1992, Arbitrator Gundermann issued his Award wherein he awarded that the County's offer be included in the parties' Agreement. In implementing the Award, the County paid the employes in the ESS II classification based upon their length of service in the ESS II classification with regards to those steps after the 6 months step and before the longevity steps of eight, twelve and sixteen years. On October 20, 1992, the Association filed a grievance with the Department claiming that employes in the ESS II classification should be paid according to their length of service with the County. 1/ On October 21, 1992, the Director of the Department denied the grievance and the Association appealed it that same date to the third step with the present Personnel Director, Wayne Pankratz.

1/ Some employes were hired directly into the ESS I classification, however some employes have posted into ESS I from other classifications.

On October 27, 1992, Pankratz sent the following memorandum to Chris Belanger, Association Steward:

> TO: Chris Belanger
> Social Services Para-Professional Bargaining Unit
>
> FROM: Wayne E. Pankratz
> Human Resources Director
>
> DATE: October 27, 1992
>
> SU: Grievance Over Interpretation of Arbitrator's Decision on ESS II
>
> As per our verbal conversation today, it is my understanding that both parties to this grievance mutually agree that we will extend the timelines at Step 3 of the grievance procedure regarding the above grievance until an opinion is rendered by Mediator Bill Houlihan with respect to the implementation date for increases as per the arbitration award.
>
> It is my further understanding that both parties agree a joint letter will be sent seeking an independent decision from Mediator Houlihan to clearly specify whether the arbitrator's award dealt with the date of hire the individual has been employed by the County, the date the individual has been employed as an ESS I worker, or the date the individual has been employed as an ESS II worker.
>
> If I have misstated anything during the course of this correspondence, or if there is anything you do not agree with, please contact me in writing as soon as possible. If I do not hear from you, the County's position will be that the timelines have been extended, a joint letter will be sent, and a decision at Step 3 of this grievance will be rendered after information is secured from the mediator.
>
> Thank you very much for your time and consideration with respect to this matter.

On October 30, 1992, Belanger sent Pankratz the following memorandum on behalf of the Association:

> **TO:** Mr. Wayne Pankratz
>
> **FROM:** Exec. Committee - ParaProfessional Union
>
> **SUBJECT:** Memo regarding grievance on ESS Pay ReOpener interpretation
>
> After reading your memo on the above grievance, the Executive Committee disagrees on what was decided at the meeting held on Tuesday, October 27th. We agreed to have a joint letter written to either Mr. Houlihan or Mr. Gundermann. Per our conversation with you on Wednesday (phone), I told you that Mr. Fred Mohr, our legal counsel, would call you and between the two of

> you, it would be decided as to whom the letter would be written to.
>
> I'm sorry that you feel we are not cooperating with you in good faith, but we have to follow the advice of our legal counsel. We do not wish for this grievance to go to arbitration, and I feel a solution can still be worked out between you and Mr. Fred Mohr.
>
> Sincerely,
>
> Chris Belanger /s/
> Chris Belanger
>
> **DATE:** 10/30/92

On November 3, 1992 the Association's present attorney, Fred Mohr, met with Pankratz to discuss a number of matters of concern to the Association, including the instant grievance. At that meeting, Mohr and Pankratz were unable to agree on who to send a letter to, the interest-arbitrator or the mediator, requesting an interpretation of the ESS II wage schedule. At the meeting, Pankratz suggested that Mohr obtain and review a copy of the brief filed by the Association's attorney in the interest-arbitration and Mohr indicated that he would try to do that and then they would get together to see if they could resolve the matter.

On November 4, 1992, Pankratz sent Belanger his response to the grievance, stating:

> "Based upon initial offer intent and language contained in arbitration briefs and arbitrator's award - Grievance denied. Please disregard request for timeline extension."

On December 9, 1992, Mohr, having been advised by Belanger approximately near the end of November that Pankratz had denied the grievance, sent a "Request to Initiate Grievance-Arbitration" to the Commission and copied Pankratz. On December 10, 1992, Pankratz sent Mohr a letter wherein he advised Mohr that he had submitted his response to the grievance to Belanger on November 4th, that therefore a request to arbitrate would have had to have been filed by November 25 to meet the timelines in the parties' Agreement, and that, hence, the arbitration request was untimely. Pankratz reiterated the County's position that the request for arbitration was untimely in his letter of December 16, 1992 to Mohr.

The parties were unable to resolve their dispute both as to the merits of the grievance and the timeliness issue and proceeded to arbitrate those issues before the undersigned.

POSITIONS OF THE PARTIES

The Association

With regard to the issue of whether the grievance is procedurally arbitrable, the Association notes the factual background of the processing of

the grievance. It also notes the testimony of Mohr that he has represented various bargaining units in Brown County since 1978 and that during that period timelines for processing grievances have been uniformly waived. The County has produced no evidence contrary to Mohr's testimony in that latter regard. Also noted is a prior grievance between these parties where the County failed to comply with the contractual time limits, as well as additional evidence of the uniform lack of adherence to timelines in the Sheriff's Department, which employes are also represented by Mohr.

In support of its position that the matter is arbitrable, the Association cites the following from How Arbitration Works, Fourth Edition, Elkouri and Elkouri:

> "It has been held that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance. Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement.
>
> If both parties have been lax as to observing time limits in the past, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence of the contractual requirements."

Given the evidence that the parties have been lax in the past as to observing the time limits and the lack of any evidence showing a change in that practice, the County's timeliness argument must fail. Elkouri and Elkouri also point out that even if the time limits can only be waived in writing, the oral understanding of the parties or their actions can constitute waiver. In this case, Pankratz memorialized in writing the agreement to waive the Step 3 time limits in his October 27th memorandum. Further, at their meeting on November 3rd, Pankratz suggested that Mohr obtain the brief of the Association's prior attorney before further discussions occurred on the grievance. Mohr acted in good faith and attempted to obtain the information and Pankratz's actions constituted a waiver of the time limits. Moreover, the very next day Pankratz denied the grievance, but failed to inform Mohr of that fact. Under the circumstances, Mohr could reasonably expect that Pankratz would formally advise him of any response to the grievance, and the time limits to request arbitration did not start to run until Mohr had been formally advised of the denial. Pankratz's failure to advise Mohr of the denial should now estop the County from raising the issue of timeliness. That failure should also toll the running of the time limits.

In its reply brief, the Association notes the County's argument that the evidence as to the practices in the Sheriff's Department is irrelevant with regard to the processing of grievances, and that the County subsequently argues it was not required to give Mohr individual notice of the denial of the grievance because he had sent Pankratz correspondence involving matters in that same bargaining unit requesting that he respond directly to the union steward. The Association asserts the County cannot have it both ways, i.e., Pankratz was either required to give Mohr notice of the denial or the evidence as to how the parties followed the time lines in the Sheriff's Department should be considered relevant. For the above reasons, the grievance should be considered arbitrable.

As to the merits of the grievance, the Association cites Elkouri and Elkouri for the maxim that in construing a written agreement the interpreter

must, if possible, ascertain and give effect to the mutual intent of the parties and that in determining that intent, inquiry is to be made as to what the language meant to the parties at the time the agreement was written. (At page 348.) The Association also cites decisions of the Wisconsin Supreme Court as holding that where contract language is not clear and unambiguous, the practical construction given it by the acts of the parties is of "great force" or "entitled to great weight" and that in such circumstances the Court will ordinarily place the interpretation upon the terms of the contract which the parties, in the course of their dealings, have adopted. Martinson v. Brooks Equipment Leasing, Inc., 36 Wis. 2d 209, 219 (1967).

To establish that intent, the Association first looks to the interest-arbitration award issued by Arbitrator Gundermann and cites the following from page 2 of that Award:

> "Under the terms of the collective bargaining agreement, after one year in the ESS I classification an employee is reclassified to an ESS II. Accordingly, the relevant issue in this case is the rate of pay for the ESS II after 12 months."

In so describing the Association's position, Gundermann clearly recognized that it was the Association's intent that an ESS II would be placed on the 24 month step after 24 months of employment in the County. Next cited are the County's exhibits in the interest-arbitration (Joint Exhibits 8 and 9 in this case) as representing the costing data submitted by the County. Those exhibits disclose the intent of the County. In Joint Exhibit 8, the first four ESS II positions were hired on April 16, 1992 (sic) (the exhibit reads "4/16/90") and as of December 31, 1992, those employes would have had less than 24 months in the ESS II position, but more than 24 months of employment with the County. Under the "1992 proposed rate", the County listed those individuals at $10.80 per hour, representing the 24 month pay level in 1992. Since none of those individuals would have had 24 months of experience as an ESS II in 1992, clearly the County costed its package assuming movement to the 24 month rate based on County longevity, and not experience within the ESS II classification. Similarly, the exhibit shows an ESS II who was hired on April 2, 1989 and who would have had less than 36 months of experience in that position, but more than 36 months experience in the County. The exhibit discloses a proposed 1992 rate of $10.95, the 36 month level rate. Clearly, the County utilized County longevity in preparing its costing data for the arbitration. That same approach was taken by the County in its exhibit in what is Joint Exhibit 9 in this case. (Employer Exhibit 10(b) in the interest-arbitration). In that exhibit, six individuals were shown to be hired on May 13, 1991, and would have become ESS II's after 12 months of employment, or May 14, 1992. The County's figures show that those individuals would have been receiving $10.50 per hour in 1992, i.e., the 6 month rate in the ESS II position. This shows they would not be paid the start rate for an ESS II of $10.00 per hour, but instead were granted County longevity in determining the proper pay slot. Thus, the County consistently used countywide seniority disclosing its true intent.

The Association also cites the testimony of the Association's bargaining committee members who were present at the mediation session on the ESS II pay schedule. Sherry Officer testified that it was made clear to the mediator how the schedule would work and who it would affect and that a rough costing was done. Officer also testified that the starting rate for an ESS II position has never been used. Karen Baenen testified that after being hired as an ESS I on April 16, 1991 she moved to the ESS II position after one year, and received the six months rather than the starting rate, because she had at least six months of employment with the County. Sandy Stirdivant similarly testified that she had been treated in the same manner as to the Clerk II position. Finally, Belanger testified that it was made clear through discussions at the mediation session that progression on the steps of the ESS II pay schedule

would be based upon the date of hire with the County. Belanger also testified that she discussed the matter with the Department's business manager who indicated that it would be very difficult to put a start date for ESS II workers in the computer other than the date of hire and that that is how the computer would have handled it.

The Association asserts that the County's only witness was Wayne Pankratz, who started with the County after the interest-arbitration hearing took place. Pankratz testified that an employe, upon obtaining an ESS II position, is not placed at the start rate but is instead granted the six month rate of pay. While Pankratz stated that he disagreed with the practice, it discloses the intent of the parties insofar as the County's interpretation only makes sense if an ESS II upon obtaining the position, reverts to the start rate.

In its reply brief, the Association first asserts that the County failed to produce any of the witnesses who were present during the mediation to verify its intent at the time. The only evidence of the County's intent in the record is the costing data of the County, which supports the Association's position. The Association also rejects the County's reliance upon the Association's brief in the interest-arbitration. The language cited from that brief is as follows:

> "It is for that reason that the Association believes that the salary should be significantly increased after one year when the ESS worker enters the ESS II classification, rather than after working for two years."

The Association asserts that under its offer an ESS II 12 month step existed, while under the County offer there was no 12 month step, but instead a 24 month step. The above language indicates it was the expectation of the Association that an ESS II would be placed on the 24 month step after two years of employment and that supports the Association's contention. Lastly, the Association notes the County's argument that its costing exhibits were merely errors and should not be considered since the Arbitrator did not rely specifically on those exhibits in his decision. The Association asserts that what the Arbitrator relied on is speculative at best and that the County's intent is clearly set forth in its costing exhibits and there is no contrary evidence in the County exhibits or brief that would vitiate the Association's interpretation.

County

Concerning the issue of procedural arbitrability, the County asserts that the Association did not comply with Article IX of the Agreement which clearly states that the time limit within which to file a request to the Commission for arbitration is "within fifteen (15) working days after receipt of the decision of the Director of Personnel. . ." That time limit began to run on November 4th or 5th, 1992 when Pankratz delivered his decision to Belanger and expired on November 25th, 1992. The Association's Request to Initiate Grievance Arbitration was received by the Commission on December 11, 1992, long after the time period for filing had expired. Even using the mailing date of the request, December 9, 1992, that still exceeds the 15 working days from November 5, 1992. By means of Pankratz's letter of December 16, 1992 to Mohr, the County timely raised its procedural objection to arbitrability in this grievance.

With regard to the Association's claim that there was a "waiver" of the 15 working day time limit, the County asserts that there is no evidence of such a waiver. The exhibit the Association submitted regarding the other grievance between these parties is not evidence of any waiver, since that grievance never went to arbitration, and no request for arbitration was ever filed. As to

those exhibits submitted by the Association relating to the Sheriff's Department employes, the County asserts they have no relevance in this case. The Association cannot claim a "past practice" relating to another bargaining unit not a party to this Agreement.

The testimony of Belanger and Mohr made clear that the 15 working day time limit was not met and that no representations were made to them to "waive" that time limit after November 5, 1992. Their testimony also did not adequately explain the Association's failure to file within that time limit. As to Pankratz's submitting his response to Belanger, the Association steward, rather than Mohr, the County asserts that delivery of the Step 3 decision to Belanger was proper under the grievance procedure. Further, the denial notice was not copied to Mohr since he had previously indicated as to another union he represents that correspondence be directed to the union rather than to him.

The County cites Elkouri and Elkouri's How Arbitration Works as to the need to comply with procedural prerequisites to arbitration:

> If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus the practical effect of late filing in many instances is that the merits of the dispute are never decided. (At pages 148-149).

The County asserts that if any condition precedent set forth in the grievance procedure is not met, the grievance is not arbitrable. Since the request for grievance arbitration was untimely and the County made a timely and continual objection to procedural arbitrability, the question of procedural arbitrability is properly before the Arbitrator. The County cites a Wisconsin Court of Appeals decision as recognizing that a grievant's failure to follow the arbitration procedure is a fatal defect denying the arbitrator authority to reach the merits of the grievance. Citing, Carpenter v. Oshkosh School District, Slip. Opinion No. 86-0893 (1987). It also cites the Wisconsin Supreme Court's decision in Milwaukee Professional Firefighters v. City of Milwaukee, 78 Wis. 2d 1, 21 (1977), as recognizing that an arbitrator's authority is limited to that which the parties have agreed to give him by contract.

With regard to the Association's position that there is a past practice of a blanket waiving of time limits, the County asserts that such a theory would render the time limits set forth in the contract meaningless. Here, the parties have agreed to a clearly-written grievance procedure and the arbitrator should apply that procedure and determine that the instant grievance is not arbitrable. Further, the County was never requested to waive the 15 working day time limit, and therefore could not have done so.

In its reply brief, the County cites an arbitration award in the Sheriff's Department where it asserts the arbitrator rejected a waiver argument similar to that made by the Association in this case. The County reiterates its position that there is no factual support in the record for a finding of waiver of the time limits. Belanger admitted receiving the denial notice of the grievance on November 5th, and Mohr received verbal notice of the denial from Belanger within a week or so thereafter. Even if a week is added to the November 5th date in order to calculate the 15 working day time limit, more than 15 days elapsed between November 12th and December 11th, 1992, the date the request was filed. As to the contention that Mohr was entitled to be "formally advised" of the denial, the County asserts that it is clear that Belanger advised Mohr of that formal denial at the latest November 12th. It asserts that there is no estoppel as to Mohr's failure to timely file the request counting from November 12th. Being aware of the 15 day limit, Mohr

failed to act for the 26 days between November 12th and December 9, 1992, the date he mailed the request for arbitration. Also during that time, Mohr did nothing to request a waiver or seek clarification of Pankratz's position, nor did he contact Pankratz to inform him that the Association would be seeking arbitration after having reviewed the interest-arbitration file. The County reiterates its contention that it did nothing during that 26 day period or before which would constitute a waiver or estoppel as to the time limits.

With regard to the merits of the grievance, the County notes that it was the County offer that was awarded in the interest-arbitration, and asserts it must be interpreted as was intended by the County, i.e., an incentive for ESS II's retention and to discourage posting out. It asserts that ESS II's had historically posted out into clerical classifications paying almost as much as the ESS II. The Association's position that length of service as an ESS I or II is not relevant, but only the date of hire, is not supported by the evidence.

The County asserts that the misconception stems from the fact while most ESS II's were initially hired as ESS I's, some have posted in from clerical positions, and it is the latter group that claims the date of hire determines the ESS II rates. That group now wishes to be given credit for time in clerical positions on the ESS II pay schedule, however, the County clearly intended to provide an incentive to retention as an ESS II and not to Department longevity. The County notes that the longevity rates on the pay schedules apply to all employes of the Department and not just to the ESS II service. However, the language specifically relating to ESS pay rates in the Agreement clearly indicates the intent to reward service as an ESS:

> The first pay period following the one year anniversary of obtaining the Economic Support Specialist I classification, the employee shall be reclassified to Economic Support Specialist II and receive the appropriate rate of pay provided he/she performs the work of Economic Support Specialist II.

When an individual starts as an ESS I, the employe begins at the starting rate and at six months moves to the ESS I, six-month rate, and after one year moves to the ESS II six-month rate by past practice, albeit contrary to the schedule in the contract. New hires with over one year as an ESS in another county could be hired at the ESS II start rate.

The County asserts that the Association wanted the ESS II employes to get an increase at an earlier point in time, and proposed that those employes in an ESS II position for 12 months would then go to the 12 month rate on the ESS II. After another 12 months as an ESS II, the employe would then move to the 24 month rate. That clearly was the difference in the parties' final offers. Under the County's final offer, the ESS employe would move from ESS I start to the six month rate after six months as an ESS I, and after 12 months go to the six month rate of an ESS II. After serving as an ESS II for 24 months, the employe would then move to the ESS II 24 month rate. That difference is illustrated by the Association's attorney at the time in the Association's interest-arbitration brief:

> A major difference in the final offers of the Employer and the Association is the point in the ESS seniority scale at which the proposed salary increases would go into effect. The Employer proposes a significant increase after two years; the Association proposed an increase after one year. The Association proposal is based on the fact, as testified to at the arbitration hearing, that after one year, when an ESS worker changes classification from ESS I to ESS II, the responsibilities of the ESS workers increase

> substantially, primarily in terms of caseload and training. It is for that reason that the Association believes that the salaries should be significantly increased after one year when the ESS worker enters the ESS II classification, rather than after working for two years. As testified to at the hearing and as referred to in the audit report, a large amount of the turnover in ESS workers occurs between 12 and 24 months, and it is the Association's position that a substantial salary increase at 12 months will minimize the turnover. (Emphasis added)

The County contends that Belanger's and Officer's testimony indicates that while using date of hire rather than service as an ESS II may have been discussed, it was not something that was agreed to by the parties. Although Belanger testified it was the consensus of the Association's committee and its legal counsel, and she thought of the mediator, that does not make it an agreement between the parties.

Regarding Belanger's testimony as to the difficulty the computer would have in calculating length of position as an ESS II versus date of hire if the County's implementation were used, the County questions why that was even discussed if it was not clear as to the intent and difference between the final offers. This is a classic admission against interest.

Comparing the Association's final offer with the County's, and the utilization of past practice of an ESS I start rate, six-month rate, and after another six months as an ESS I moving to the ESS II schedule, one sees that under both final offers, the ESS II six month rate is $10.50. Under the Association's final offer and philosophy, after 12 months in the ESS II position, they would move to $10.80 (Association's 12 month step), while using the County's final offer, after 24 months as an ESS II they would move to the $10.80. This clearly demonstrates the differences of the parties' final offers, yet still utilizes the existing practice of placement to which the parties testified. Belanger testified that the Association wanted to get those employes increases at an earlier time, i.e, 12 months and then 24 months. That not only illustrates the differences between the offers, but supports the County's contention that the present implementation method is accurate.

The County also cites the parties' briefs in the interest-arbitration as clearly indicating that the County final offer was meant to reward service as an ESS II and did not relate to date of hire in other clerical positions, and that the retention problem was only as to the ESS II's and not other clerical positions.

With regard to the County's costing exhibits in the interest-arbitration, the County notes that there is no mention of those exhibits in its brief in the interest-arbitration, rather, the County relied upon the factors of market comparable rates, percentage increases in rates, and the need for retention of ESS II's. The County asserts there is no question that its final offer was selected by the Arbitrator for reasons other than the cost exhibits. The determining factor utilized by the Arbitrator in selecting the County's final offer was the wage rates of comparable counties. Since the arbitration award was not based in any way on those exhibits, they are of no probative value in this dispute. The County's costing error in those exhibits related to the mistaken assumption that all ESS II's were hired as ESS's and a computer program without data as to the ESS date of service. The computer-generated costs are erroneous only as to those ESS II's that posted into the ESS position from clerical positions.

The County concludes that the date of hire is not relevant to time in ESS service for purposes of the additional wage rates and earlier wage raises given

only as an incentive to retain ESS II's. The date of hire in a clerical position bears no rational relationship to retention in an ESS II position. Thus, the Association's argument does not consider the meaning and intent of the County's final offer, i.e., to retain ESS II's.

In its reply brief, the County asserts that the testimony of Association members is not persuasive since it is self-serving and relates to events occurring before the interest-arbitration. The sole reason for the interest-arbitration was to determine new times for wage rates and the number of ESS II wage rates. The situation was new and different from all other job classifications. Thus, any past practice as to a Clerk II is totally irrelevant. The County also asserts that the Association ignores the contract language that provides for automatic reclassification of an ESS I to an ESS II after one year as an ESS I. The practice of paying them at the ESS II six months rate relates to the automatic reclass language treating ESS II's differently from other classifications even before the interest-arbitration. That language relates only to the one year period as an ESS I and not to date of hire as alleged by the Association in its brief. The County also takes issue with the Association's argument that the interest-arbitrator "recognized that the Association's intention was that an ESS II would be placed in a 24 month classification after 24 months of employment." That argument is inconsistent with the quoted language, since the Arbitrator understood that for the ESS II rates to begin the employe had to serve "one year in the ESS I classification. . ." Thus time employed in other classifications was not considered at all in arriving at the ESS II rates.

The intent of the County's final offer was clear that service as an ESS II was to control. Since the Arbitrator selected the County's final offer, that award should be implemented as the County intended, i.e., to reward only service as an ESS II. In that regard, ESS II's who had previously held other clerical positions should not be given a windfall. Equity among the ESS II's requires that ESS II rates be based on ESS II experience.

DISCUSSION

Procedural Arbitrability

As the County asserts, the wording of Article 9, Grievance Procedure, Step 4, of the parties' Agreement, is clear that the request to the WERC for arbitration must be made "within fifteen (15) working days after the receipt of the decision of the Director of Personnel. . ." Starting with November 5, 1992, the day Belanger testified she actually received Pankratz's response, the fifteen working days expired on November 25, 1992. Thus, whether the date Mohr mailed the request for arbitration (December 9) is used, or the date it was received by the WERC (December 11, 1992) is used, both exceeded the contractual time limit for requesting arbitration. The County then made a timely objection based upon procedural arbitrability once it received a copy of the Association's request for arbitration. The Association claims the County waived the time limits for Step 4 in this case and the County asserts there is no evidence of any waiver.

Both parties have cited excerpts from Elkouri and Elkouri, How Arbitration Works, in support of their respective positions; however, one gets a better perspective on the "general rule" when the full text is set forth:

> If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided.

> It has been held that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance. Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement.
>
> If both parties have been lax as to observing time limits in the past, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence to the contractual requirements.
>
> Of course time limits may be extended or waived by a special agreement in writing. Oral agreements have also sufficed for this purpose. Even where an agreement expressly required time limit waivers to be in writing, it was held that the parties' actions may produce a waiver without a writing.
>
> 4th Ed.
> (At pages 193-194, footnotes omitted)

The Association first argues that the parties have a history of being lax as to following the time lines in the grievance procedure and that the County failed to put the Association on notice that it was going to start requiring strict adherence to those time limits. That argument fails for lack of evidence. With the exception of one grievance, the Association's documentary evidence and Mohr's testimony related to the alleged practice in a different bargaining unit with a different labor organization. Although Mohr had acted as legal counsel for that labor organization and others representing employes in other County bargaining units for years, Mohr had not represented this unit since 1984 and only began representing the Association after the interest-arbitration from which this dispute arose. The evidence as to the one grievance arising in this bargaining unit where management did not meet the time lines for responding is one out of three grievances filed. Evidence as to one grievance is not sufficient to demonstrate a practice of ignoring the contractual time limits to the extent that the County would be precluded from enforcing the time limits absent prior notice to the Association.

The Association also argues that the time limits were waived or their running tolled by Pankratz's memorandum of October 27, 1992 to Belanger, extending the time lines of Step 3 and by the meeting of Mohr and Pankratz on November 3rd where Pankratz suggested that Mohr obtain and review a copy of the Association's brief in the interest-arbitration. In addition, the Association contends the County is estopped from asserting the time limit, since Pankratz failed to notify Mohr of the denial of the grievance. The record indicates that Belanger notified Pankratz in her October 30th memorandum that Mohr would be representing the Association in the matter and indicated that she felt Pankratz and Mohr could resolve the matter. Belanger testified that she did not know when she received Pankratz's denial of the grievance on November 5th that he and Mohr had met on November 3rd, and that she still assumed Mohr and Pankratz would be meeting to resolve the dispute. (Tr. 36-7) Pankratz testified on cross-examination that he had suggested to Mohr at their meeting on November 3rd that Mohr review the interest-arbitration brief the Association's prior legal counsel had filed and that Mohr had indicated that he would try to get the file from that attorney and do that and then they would see whether it could be resolved. (Tr. 16). Pankratz then issued his response denying the grievance the next day, November 4th, but did not notify Mohr of

that fact. 2/ Belanger received the denial on November 5th, but assumed that Pankratz and Mohr were still to meet. (Tr. 36-37). Belanger did not send Mohr a copy of the denial until sometime near the end of November (Tr. 34), although it appears she called Mohr about it sometime before then. Mohr mailed the request for arbitration on December 9, 1992.

Given the above, it was not unreasonable for Belanger and Mohr to believe, for different reasons, that things were more or less on hold as far as the need to move to the next step in the grievance procedure. It appears that once Mohr had read the Association's brief in the interest-arbitration and he was made aware by Belanger that Pankratz had responded and denied the grievance, he acted on the matter without undue delay. Although it is not clear from Mohr's and Belanger's testimony whether Mohr filed the arbitration request within fifteen working days, that doubt is resolved against forfeiture of the right to arbitrate the grievance. Under the circumstances, it is concluded that this case is one of those instances described in Elkouri and Elkouri where "circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement." Thus, it is concluded that the instant grievance is arbitrable.

Merits

It is first necessary to note the difference in the parties' present respective positions. The County utilizes only time in the ESS II position to determine when an employe moves to the 24 months, 36 months and 48 months steps on the ESS II schedule. (County brief at p. 6). The Association asserts that it was intended that length of service in the County be the basis for movement to those steps on the schedule. 3/ (Association Brief at p. 1). Contrary to the County's characterization of the dispute, that difference in the parties' present positions does not affect only those employes who posted into an ESS position from another classification in the Department, rather, it affects anyone in the ESS classification who was not initially hired as an ESS II. In other words, under the County's position, an employe hired as an ESS I moves to the ESS II 6 months step after one year as an ESS I and moves to the 24 months step after 24 months in the ESS II position (a total of 36 months in ESS classification). (County Brief at p. 8). Under the Association's position, the one year in the ESS I position counts toward the 24 months for purposes of movement to the ESS II 24 month step on the schedule (a total of 24 months in ESS classification). Thus, even for an employe who is hired initially as an ESS I there is a difference as to how they are treated under the parties' present positions.

The only contract language cited states as follows:

> The first pay period following the one year anniversary

2/ Pankratz testified that his failure to notify Mohr of his response denying the grievance was based upon Mohr's correspondence in the Sheriff's Department unit, asking that correspondence be directed to the union rather than to him. There is, however, no evidence that Mohr made such a request in this unit and Belanger's memorandum appears to infer the contrary. The County may no more rely on events in other bargaining units to excuse its actions or inaction in this case than may the Association.

3/ It is noted that the Association's position is consistent with the position it stated on the grievance, but is not the same as the position in the stipulated issue the parties have submitted in this case. However, as the parties have fully litigated their respective present positions, the Association's position is fully considered in this award.

> of obtaining the Economic Support Specialist I classification, the employee shall be reclassified to Economic Support Specialist II and receive the appropriate rate of pay provided he/she performs the work of Economic Support Specialist II.

The term "appropriate rate of pay" is not clear and unambiguous, but the practice according to both parties was that the employe, upon becoming an ESS II, was placed on the ESS II six month step.

This case is somewhat unique in that the parties proceeded to interest-arbitration on a new salary schedule for the ESS II position and both now primarily rely on the interest-arbitration proceedings as the bargaining history to support their respective positions. Cited are excerpts from the Association's brief in the interest-arbitration, costing exhibits the County submitted in the interest-arbitration and the interest-arbitration award. Those exhibits have been carefully reviewed and the following is noted from that review.

First, the Association's description of the parties' final offers in its interest-arbitration brief indicates that the Association understood that both parties were crediting the one year of service as an ESS I toward placement on the ESS II schedule:

> A major difference in the final offers of the Employer and the Association is the point in the ESS seniority scale at which the proposed salary increases would go into effect. The Employer proposes a significant increase after two years; the Association proposes an increase after one year. The Association proposal is based on the fact, as testified to at the arbitration hearing, that after one year, when an ESS worker changes classification from ESS I to ESS II, the responsibilities of the ESS workers increase substantially, primarily in terms of caseload and training. It is for that reason that the Association believes that the salaries should be significantly increased after one year when the ESS worker enters the ESS II classification, rather than after working for two years. As testified to at the hearing and as referred to in the audit report, a large amount of the turnover in ESS workers occurs between 12 and 24 months, and it is the Association's position that a substantial salary increase at 12 months will minimize the turnover. (Joint Exhibit 10, at page 7.) (Emphasis added) 4/

The above describes placement at the Association's proposed 12 months step on the ESS II schedule based upon the one year spent as an ESS I. It also describes the difference between the two proposals as being that the employe would have to work for two years under the County's offer since it did not contain a new step until "24 months". An employe having worked one year as an ESS I would go to the 6 months step based on the one year's service, but as

---

4/ It is noted, however, that the Arbitrator in the interest-arbitration described the Association's position as similar to that which the County now takes; i.e., that movement was based on time as an ESS II. That appears to stem from a misreading of the wording in the Association's interest-arbitration brief cited above. However, the basis for movement was not an issue litigated in the interest-arbitration. (Jt. Exhibit 7, at page 14.)

there is no step between 6 months and 24 months, the employe would have to work another year to move to the next step, 24 months.

Next, the costing exhibits submitted by the County in the interest-arbitration (Jt. Exhibits No. 8 and No. 9) indicate that those ESS II's who were hired into the ESS I classification on April 16, 1990 and November 26, 1990, and who as of December 31, 1992 would have 24 months or more time in the ESS classification, but less than 24 months in the ESS II classification, would be on the ESS II 24 months step. While the Association cites those examples as using the date of hire with the County as the basis for placement on the ESS II schedule, it may also be said that they indicate the hire date as an ESS I as being the basis for placement, since it appears they were initially hired as ESS I's. The latter would be consistent with how the Association viewed the placement on the steps under the two offers in the interest-arbitration, as described in its brief in the interest-arbitration. It would also be consistent with the practice of placing the employe on the ESS II 6 months step upon being reclassified from an ESS I, i.e., it credits the employe for the one year of service as an ESS I. Since the next step after 6 months was 8 years, and now is 24 months, the 6 months step would be the "appropriate rate of pay" if that one year as an ESS I is credited.

The County's argument that those costing exhibits were errors and that, at any rate they are irrelevant, is not persuasive. There is nothing in the record to indicate whether or not Arbitrator Gundermann relied upon the County's costing exhibits and they are relevant as indicative of the County's intent. The undersigned has reviewed the County's brief in the interest-arbitration and finds nothing to indicate a basis for placement contrary to those exhibits. There was no explanation as to exactly how an employe would be placed on the schedule, save for the costing exhibits. There was also nothing to indicate any change in the existing practice of crediting ESS I service by placing the employe at the ESS II 6 months step upon becoming an ESS II. As to an alleged error because the County hire date and ESS I hire date were the same, that would only be meaningful if the dispute was whether the County employment hiring date or the hire date in the ESS classification was to be used. Here, the County is arguing the date the employe becomes an ESS II is when they start earning time toward movement on the ESS II schedule.

With regard to the Association's argument that the past practice is to be placed on the step according to length of service in the County, it is noted that the County concedes that was, and is, the case as to the 8, 12 and 16 year longevity steps. However, it is only the ESS II classification that now has any interim steps between the "6 months" and "8 years" steps, and those steps were newly created via the negotiations culminating in the interest-arbitration before Arbitrator Gundermann. Therefore, it is the parties' intent as expressed in those negotiations and the interest-arbitration that controls. As noted above, the intent gleaned from that bargaining history indicates placement based upon utilizing the date of hire as an ESS I. There is no mention in that bargaining history of placing an employe who has just been reclassified from an ESS I to an ESS II on the 36 months or 48 months step because they had two years of service as a clerk before posting into the ESS I classification. 5/

It is concluded that the weight of the evidence supports a finding that advancement on the ESS II salary schedule is based upon the hiring date in the ESS classification, in this case as an ESS I. It is noted that the stipulated submission to this arbitrator was whether advancement on the ESS II schedule should be based upon date of hire as an ESS I or the length of service as an

---

5/ The example the Association cited in the County's costing exhibit as being placed on the 36 months step does not indicate whether that person initially was hired in a position other than ESS I.

ESS II. As noted at the start of this discussion of the merits, the Association has taken a position that is broader than its apparent position in the submission. Based upon the evidence, that broader position has been rejected and the Arbitrator has confined his decision to the question posed in the stipulated submission.

On the basis of the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

Advancement on the ESS II salary schedule is based upon an employe's date of hire as an ESS I. Therefore, the County is directed to immediately place the affected employes on the appropriate step in accord with that finding and make them whole by paying them the difference in the pay they received and the pay they would have received had they been placed on the appropriate step at the appropriate time as determined by the date they were hired as an ESS I.

Dated at Madison, Wisconsin this 30th day of June, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator