

August 2, 1993

Ms. Cynthia Cooper, NHA
Administrator
Park Lawn Nursing Home
1308 South 22nd Street
Manitowoc, WI 54220

Mr. Jerry Ugland
Staff Representative
Wisconsin Council 40,
AFSCME, AFL-CIO
P.O. Box 370
Manitowoc, WI 54220-0370

Re: Park Lawn Home
Case 1 No. 47784 MA-4957
(Ruelle Grievance

Supplemental

Award - Back Pay)

Dear Ms. Cooper and Mr. Ugland:

The following is my Supplemental Award pursuant to the parties' mutual agreement that I have jurisdiction to decide their back pay dispute regarding the Ruelle grievance:

SUPPLEMENTAL AWARD

In the prior proceeding, the undersigned issued an Award wherein it was found that there was not just cause for the termination of Karen Ruelle and she was ordered reinstated and made "whole under the labor agreement for all lost wages and benefits from the date of her suspension without pay to her date of reinstatement or the date of the offer of reinstatement if she declines the offer", less any unemployment compensation benefits she received.

In computing Ruelle's back pay, the parties recognized that Park Lawn had been reducing hours of staff and agreed that would be reflected in the calculation of money due. Ruelle earned \$2,645.90 in overtime at another job during the interim, and the parties cannot agree as to whether that overtime should be applied as an offset to the back pay Ruelle has coming.

The Employer contends that it should be given full credit for

all wages earned by Ruelle during the interim and should not be penalized for wages another characterized as "overtime". The Award does not exclude overtime pay earned at another employer. If overtime is excluded from the offset against the back pay Ruelle has coming, she will be made more than "whole". That would be unfair to the Employer.

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The Union contends that overtime pay Ruelle received from the other employer during the interim should not be included in the offset against her backpay. Had Ruelle continued to work at Park Lawn, that overtime would not have been available to her. Park Lawn had been cutting staff hours and that was recognized in calculating Ruelle's back pay. It was through Ruelle's efforts, beyond the work hour requirements of Park Lawn, that she earned the overtime.

The undersigned has considered the parties' arguments and reviewed his award ordering Ruelle reinstated and made whole. The award is silent as to what is to be included as far as computing any offset to the backpay except for unemployment compensation benefits she received. As far as the parties' respective arguments, there is some equity on both sides. However, the parties agreed to recognize that hours had been reduced at Park Lawn in computing the amount Ruelle had coming as back pay. Further, if as it seems she did, Ruelle earned the overtime pay by working more hours than she would have worked had she been at Park Lawn, that overtime was earned through Ruelle's extra efforts and should be treated similarly to earnings from "moonlighting" and not applied to the benefit of the Employer in this case.

With regard to guidance from arbitral authority, a review shows there is precious little in this area. Beyond agreeing that interim earnings generally are properly deducted from backpay, 1/ there is almost no discussion on the point in issue in this case. Elkouri and Elkouri note this general agreement among arbitrators, courts and the National Labor Relations Board (NLRB), but do not provide further comment on the point in issue. As far as the courts and the NLRB, it is noted in Remedies In Arbitration 2/ that the NLRB has held that "overtime earnings in interim employment are similar to supplemental pay or earnings from

1/ How Arbitration Works, Elkouri and Elkouri, 3rd Ed., pp. 357-358.

2/ Sinicropi and Hill, 2nd Ed., (BNA, 1991), at p. 211.

'moonlighting' and thus should not be deducted from backpay orders."

Based upon the above, the undersigned concludes that the overtime Ruelle earned from the employment she held in the interim should not be included in the offset against her backpay.

SUPPLEMENTAL AWARD

The overtime pay Ruelle earned from the other employer during the interim period is not included in the offset against the backpay she is to receive as a result of her having been ordered reinstated and made whole under the February 1, 1993 Award in this case.

Dated at Madison, Wisconsin this 2nd day of August, 1993.

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