BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MENOMINEE COUNTY	Case 46 No. 48929 MA-7765
and	
MENOMINEE COUNTY HUMAN SERVICES DEPARTMENT EMPLOYEES, AFSCME, AFL-CIO	

Appearances:

Mr. James Clay, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the County.

Mr. Philip Salamone, AFSCME Council 40 Staff Representative, 7111 Wall Street, Schofield, WI 54476, appearing ofn behalf of the Union.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of their 1992-93 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the County's Social Services Building in Keshena, Wisconsin on June 2, 1993. The hearing was not transcribed, but the parties agreed that the Arbitrator could maintain an audio tape recording of the evidence and arguments for his exclusive use in award preparation. The parties summed up their positions in written briefs and short letter replies, the last of which was received on August 17, 1993, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

> 1. Is the grievance timely filed as to either or both the Front End Verification Specialist/Welfare Fraud Investigator or the Social Worker/Prevention Specialist?

2. Did the County violate the Agreement when it refused to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked outside of 8AM-4:30PM Monday through Friday and/or in excess of eight hours in any one day worked?

3. If so, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

ARTICLE III - GRIEVANCE PROCEDURE

SECTION 3.01. Definition. Any difference or misunderstanding which may arise between an employee(s) or the Union regarding this Agreement and the Employer concerning the interpretation or application of any of the provisions of this Agreement shall be handled and settled in accordance with the following procedure.

SECTION 3.02. Time Limit for Filing Grievance. A grievance shall be filed within ten (10) working days from the date the grievance occurred or ten (10) working days from the date the employee should have had knowledge thereof. The grievance may be filed in person or letter; postmark on letter to be considered date of filing. Any grievance not filed within this time limit shall be barred.

SECTION 3.03. Grievance Steps.

Step 4. Arbitration. . . .

The arbitrator so selected shall hold a hearing at a time and place convenient to the parties and shall take such evidence as in his judgment is appropriate for the disposition of the dispute. Statements of position may be made by the parties and witnesses may be called. The arbitration award shall be reduced to writing and submitted to the respective parties. The decision of the arbitrator shall be final and binding. The

arbitrator shall have no right to either add to, subtract from, ignore or modify any of the terms of this Agreement or expand the issue before him. He shall consider and decide only the particular issue presented to him. Only one (1) grievance may be decided by the arbitrator at any hearing; however, the parties may mutually agree to waive this requirement. The arbitrator shall render no award under this Contract which shall be retroactive for more than ten (10) days prior [to] the date the grievance was originally filed with the Employer, except for failure to pay the contractual wage rate(s) due.

If any issue is questioned on a grievance's arbitrability, the arbitrator shall have the authority to determine whether or not the dispute is arbitrable. Once it is determined that a dispute is arbitrable, the arbitrator shall proceed in accordance with this Article to determine the merits of the dispute and his decision shall be final and binding upon all parties.

Section 3.05. Working Days Defined. All times referred to in this Article, unless otherwise specified, are Monday through Friday, excluding Saturday, Sunday and any holidays listed in this Agreement, provided, however, all time requirements set forth in this Article may be waived or extended by mutual agreement of the parties.

. . .

ARTICLE V - HOURS AND OVERTIME

Section 5.01. Regular Hours. The normal workday shall consist of eight (8) consecutive hours for five (5) days per week, i.e., Monday through Friday. The normal working hours shall be from 8:00 a.m. until 4:30 p.m., however, the Executive Director may establish different working hours in a unit to provide adequate coverage and fulfill the responsibilities of the Department, but he shall not do so unreasonably. This shall include a thirty (30) minute unpaid lunch and two (2) fifteen minute paid breaks, one in the

morning and one in the afternoon, provided, however, the employee may combine the two (2) fifteen (15) minute breaks with the thirty (30) minute lunch period for a one (1) hour lunch break, provided the employee works a full eight (8) hour day.

ARTICLE VI - PREMIUM PAY

Section 6.01. Beyond Regular Work Hours. All employees shall receive overtime in compensatory time off at the rate of time and one-half (1 1/2) for all time worked outside their normal shift and/or in excess of eight (8) hours in any one (1) day work period. No overtime may be worked by any employee without prior approval by his immediate supervisor or Director, except for a proven emergency.

Section 6.02. Compensatory Time Off. Each employee may accumulate a maximum of sixty (60) hours of compensatory time off which may be carried over from year to year. Compensatory time in excess of sixty (60) hours must be taken off in the year in which it was earned or forfeited. Employees who resign, retire, are discharged or die will be paid up to sixty (60) hours of accumulated compensatory time at the rate in existence at the time of the resignation, retirement, discharge or death.

. . .

ARTICLE VII - SENIORITY

Section 7.01. Probationary Period. New employees shall be on a probationary status for a period of six (6) months and shall be subject to dismissal for any reason without recourse to the grievance procedure. If still employed after six (6) months, their seniority shall date from their last date of hire.

. . .

ARTICLE XXIV - NEW POSITIONS

Section 24.01. New Positions. When any new position is to be established or any

current position is intended to be significantly changed, a notice of the new position or the change shall be provided to the Union not less than thirty (30) days prior to the effective date. The Union will notify the Employer if it desires to negotiate on the wages, hours and working conditions of the new position or position designed to be significantly changed within ten (10) days of receiving the notification by the Employer. If the Union wishes to negotiate on the new position or significant changes in an existing position, the position may be filled by the Employer. If the parties are unable to agree, the matter shall be processed through the Grievance Procedure and any benefits awarded, if any, shall be retroactive to the day the new position was filled or the significant change was made.

ARTICLE XXV - MANAGEMENT RIGHTS

Section 25.01. Exclusive Rights. The Union recognizes the right of the Employer to operate and manage its affairs pursuant to law and the exclusive right of the Executive Director to promulgate reasonable departmental rules and procedures which do not relate to or impact on mandatorily bargainable issues. The following rights are among those reserved for management consistent with the terms of this Agreement and applicable County, State and Federal laws:

a. To direct the operations of the Human Services Department

. . .

i. To determine work schedules and the need for and to schedule overtime

. . .

BACKGROUND

The County's Human Services Department provides a variety of social services to County residents. The Union represents a bargaining unit of non-supervisory professional employes in the County's Human Services Department. The County and Union are

parties to a calendar 1991-93 Agreement which was entered into in April of 1993. The Union became the exclusive representative of the bargaining unit at a time when the wages, hours and other conditions of employment in effect were those set forth in the County's calendar 1990-91 agreement entered into by the County in March of 1990 with Labor Association of Wisconsin, Inc. (LAW), the previous exclusive representative of this bargaining unit. All of the PORTIONS OF THE AGREEMENT set forth above are materially the same in both of those agreements.

The basic facts essential to a resolution of the STIPULATED ISSUES are not disputed. In May of 1991, the County created a position called Front-End Verification Specialist/Welfare Fraud Investigator (FEVS/WFI) to conduct investigations to verify new applicants' entitlements to benefits and to determine (by means of surveillance where necessary) whether benefit recipients are engaging in welfare fraud. The County notified LAW about the general nature of the background to be required of applicants for the position and the work to be performed and the salary contemplated by the County, and LAW informed the County that it did not object to the salary proposed by the County. Following pre-hire interviews of several candidates, the County hired Patrick Rocole for the position.

During the pre-hire interviews, the County made it clear to Rocole: that the job would require working flexible hours with some of his work performed in the evenings, outside of the Department's established office hours of 8AM-4:30PM, Monday-Friday. Rocole commenced his employment sometime after being interviewed in late April of 1991, and he was provided with a copy of the latest Agreement then in existence. During post-hire orientation, Rocole was further informed that the standard workweek was 40 hours and that he was to schedule his own work hours so that he scheduled time off (on an hour for hour basis) during the Department's regularly scheduled hours so that the requirements of the job could ordinarily be met without exceeding the 40 hour limit, even though he might work in excess of eight hours on some of the days in a week. Rocole received compensatory time off at time and one half for each hour worked in excess of 40 hours in a workweek, but he did not receive compensatory time at the time and one half rate for work performed outside of the Department's established office hours or for work hours that exceeded eight hours in any one day worked. Rocole scheduled himself in the manner prescribed above, and he never objected or grieved about his treatment in any of those regards.

Susan Benka succeeded Rocole as the FEVS/WFI, commencing her employment in that position in January of 1992. Benka was similarly informed, oriented, provided with a copy of the latest Agreement, and treated as regards work schedule and compensatory

time received. Benka never objected or grieved her treatment in any of those regards, either.

In October of 1991, the County created a grant-funded position called Social Worker/Prevention Specialist (SW/PS) to provide community awareness and youth intervention services concerning problems relating to alcohol and drugs. Part of the job description stated, "Shall maintain flexible hours to meet the goals and objectives of the AODA Prevention Grant." On October 17, 1991, the County forwarded to the AFSCME Staff Representative then servicing the bargaining unit, a copy of that description along with notice of the creation of the job and of the Union's right to negotiate wages, hours and working conditions of the new position. The AFSCME representative responded shortly thereafter by letter expressing the Union's interest in bargaining with the County on those subjects and suggesting "that this be accomplished during the upcoming round of bargaining, retroactive to the date of hire." The County and AFSCME ultimately entered into the 1991-93 Agreement in March of 1993. It listed a rate for Benka as the incumbent FEVS/WFI position, but made no mention of the SW/PS position, perhaps because that position was in the process of being initially filled when the language of the Agreement was being finalized. In any event, the record indicates that the only issue discussed about the SW/PS in the bargaining that led to the 1991-93 Agreement was whether the position would be treated as "on call." When the County answered that it was not, the Union advanced no proposals and asked no other questions concerning the SW/PS position.

Christine Naniot (nee Gilbert) commenced work as the SW/PS on March 23, 1992. During the course of her pre-hire interview, she was informed that the job would involve some work on evenings and Saturdays. During pre- and/or post-hire discussions with the County, she was also informed that the job would regularly involve youth intervention programs which would be conducted after school; that those hours would be considered part of her regularly scheduled workload; and that she could adjust her daily and/or weekly hours on an hour for hour basis to meet the needs of the program without incurring unnecessary compensatory time off at the time and one-half rate. Shortly after commencing her employment, she was provided with a copy of the latest available Agreement. In practice she scheduled her own hours and ordinarily was able to schedule herself in such a way as to avoid working more than eight hours in a day by starting and ending her work day later. She did not receive any compensatory time for such days. In most instances in which she worked in excess of eight hours in a workday, she received compensatory time off at a rate of time and one half. In a few instances, including some weekend work, she scheduled herself off on roughly an hour for hour basis for portions of other days Monday-Friday during weeks when she would

otherwise have worked more than 40 hours. Naniot never objected or grieved about any of those arrangements. She left the SW/PS position in early March of 1993, and no one was working in that position from that time through the time of the arbitration hearing.

The instant grievance was filed on July 15, 1992 by Ken Sann in his capacity as the President of the Union. Sann testified that he initiated the grievance after learning by chance three days earlier that Benka and Naniot were working outside of 8AM-4:30PM Monday-Friday and in excess of eight hours in a work day but only receiving compensatory time at a straight time rate, based on what the County termed "flex-time." He further testified that he was not aware until talking with those employes at that time that they were not being paid compensatory time at the time and one half rate for all hours worked outside of 8AM-4:30PM Monday-Friday and, in some cases, for hours worked in excess of eight in a day, as well. Sann also testified that, prior to those discoveries, he had assumed these employes were receiving compensatory time at the time and one half rate for work performed after 4:30PM because that is how everyone else in the unit was being compensated for work beyond 4:30PM.

The County promptly responded to the grievance, asserting that it was both procedurally time-barred and substantively without merit. The County further responded, in part, that if the County were required to work the two employes from 8AM-4:30PM each day and then to have them go on to perform their additional work as needed outside those hours, it "would mean either that the Department must abandon the services and activities which are carried on during the irregular hours or the employees will be required to work unreasonably long hours to fulfill the responsibilities of their job." The matter was ultimately submitted to arbitration as noted above. Prior to the hearing date, the Arbitrator denied the County's request that the procedural arbitrability be heard and decided before the merits of the grievance were heard.

POSITION OF THE UNION

The grievance was timely filed because it was filed both

within 10 days of the dates the incumbents in the two positions "should have had knowledge" of the occurrence giving rise to the grievance, and within ten working days of the date the employe who actually filed the grievance "should have had knowledge" of that occurrence. Incumbents Benka and Naniot commenced employment in January and February of 1992, respectively. Even though they possessed copies of the contract, as new employes it would be understandable that they might not be sufficiently aware of the collective bargaining agreement to realize that the "flex" schedules referred to in their job descriptions, hiring interviews and post-hire instructions were not consistent with the contractual hours and overtime provisions read together. They would also understandably be reluctant to grieve while serving their Sec. 7.01 six-month probationary period. 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, with the burden on the employer to prove untimeliness by a preponderance of the evidence. The County has not met its burden of proving that the incumbents should have had knowledge of the occurrence giving rise to the grievance more than 10 working days before the instant grievant was filed.

In any event, the continuing nature of the County's violations makes it inappropriate to conclude that the grievance is untimely. In that regard, Elkouri and Elkouri state in How Arbitration Works (BNA 4th ed, 1985) at page 197:

> Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day--each day there is a new "occurrence"; these arbitrators have permitted the filing of such grievances at any time, this not being deemed a violation of the specific time limits stated in the agreement (although any back pay ordinarily runs only from the date of filing).

On that basis the instant grievance might be denied any retroactive effect, but it could not be found procedurally non-arbitrable. Given the language of Sec. 24.01, it may be appropriate to treat the grievance as "retroactive to the day the new position was filled or the significant change was made."

The merits of the case reflected in Issue 2 are simple. These two positions are covered by the contract and hence subject to the requirements of Articles V, Hours and Overtime and IV, Premium Pay. Section 5.01 establishes all bargaining unit

BACKGROUND (cont'd)

employes' regular hours as 8AM-4:30PM, Monday through Friday. Section 6.01 requires that employes who work outside of those regular hours shall receive compensatory time off at a rate of time and one half. The Agreement cannot be interpreted as the County argues because the "outside their normal shift" portion of Sec. 6.01 would thereby be rendered meaningless. The Director would be able to simply change each individual employe's normal schedule whenever he chose to have them work different hours and would not have to worry about the compensatory time premium payment for hours worked outside the employe's normal shift.

The positions in question sometimes require the incumbents to perform work outside of 8AM-4:30PM, Monday through Friday. The Union does not dispute the right of the County to schedule an alternate schedule to meet its operational needs. However, given the absence of proof that the Union agreed to create an exception to Secs. 5.01 and 6.01 for these positions, those Agreement provisions require that the County pay compensatory time at the time and one half rate for all hours worked outside of the regular hours of 8AM-4:30PM, Monday-Friday. The evidence clearly establishes that the County has failed and refused to pay the incumbents at that premium rate for hours worked outside of 8AM-4:30PM, Monday-Friday.

The Arbitrator should therefore order the employer to make the employes whole for the losses each has experienced due to the County's violations and should further order the County to cease and desist from such violations in the future. At the hearing the Union specified that it was requesting make whole relief retroactive to January 1, 1992, and that the retroactivity provision in Sec. 3.03, Step 4 did not apply because the instant case falls within the exception in that provision for failures to pay the contractual wage rate(s) due the employes involved.

POSITION OF THE COUNTY

The grievance was not timely filed. Reading Secs. 3.01 and 3.02 together, to be timely filed, a the grievance that was not filed within 10 working days of the date the grievance occurred must have been filed within 10 working days of the date the employee(s) in the affected classification(s) should have had

knowledge of the occurrence giving rise to the grievance. For, Section 3.01 refers to grievance initiation by the employee or by the Union, whereas Sec. 3.02 refers only to the date the employe should have had knowledge of the occurrence giving rise to the grievance. The employes in the affected classifications in this case have each known how they were to schedule themselves and how they were being compensated when they worked hours outside 8AM-4:30PM and when they worked in excess of eight hours in any one day worked. In addition, each of the employes has had a copy of the collective bargaining agreement for nearly as long a period of time, and well in excess of 10 working days prior to the date on which the instant grievance was filed. Accordingly, the grievance was not filed within 10 working days of either the date the grievance occurred or the date those employes should have had knowledge that it occurred.

The County has the right and obligation to schedule work in a manner that provides the services to be provided by the classification in the most efficient and economical manner. To allow the Union and/or the employes to sit on their rights and then assert a contract violation could lead to selective and retaliatory contract enforcement. It is not fair to permit the Union or employes to grieve work schedules 14 and 10 months after those schedules were created. Especially so when the County fulfilled its Art. XXIV obligations by giving the Union timely notice of the creation of both classifications and an opportunity to bargain about the County's intentions to have the employes work what the Social Worker/Prevention Specialist notice to the Union described as "flexible hours." The Union did not make any proposal on that subject and therefore ought not now be allowed to object to the compensatory time arrangements that the incumbents in both positions have been living with without objection or grievance for months. The Arbitrator should not deem this a continuing grievance because, unlike the regular periodic occurrence of a contract violation which would give rise to a continuing grievance, the circumstances here indicate irregular occurrences without pattern, which are primarily outside the control of the Department because for the most part the employes establish their own schedules.

If the Arbitrator reaches Issue 2, the answer to all aspects of that issue should be "no." Section 6.01 refers to "their normal shift" rather to a rigid "the normal shift." When that Section is read together with the Executive Director's expressed Sec. 5.01 right to establish hours that are different from the normal working hours described elsewhere in Sec. 5.01, it follows that the Executive Director has the right to schedule employes so that "their normal shift" is any 40 hours in a workweek without regard to the Sec. 5.01 references to eight hours per day, 8AM-4:30PM and Monday-Friday. The only limitation on the Executive

BACKGROUND (cont'd)

Director's Sec. 5.01 right to establish hours different from those regular working hours is that "he shall not do so unreasonably." There is no Union contention that the schedules of the two employes in question are unreasonable. On the contrary, the record shows that the schedules in each case are entirely logical and reasonable in light of the nature of the duties involved in each position.

The FEVS/WFI position involves a substantial amount of investigation and surveillance which cannot be effectively done exclusively between 8AM and 4:30 PM or in periods of time limited to eight hours in a day. Accordingly, the normal work shift for the position has been a work period of forty hours in a workweek; the FEVS/WFI incumbents have been instructed to confine their normally scheduled hours to a work period of forty hours in each workweek; and they have been paid compensatory time at a time and one half for all hours worked in excess of forty hours in a workweek. Nothing in the Agreement restricts an employe's normal shift to a single work day. It is also reasonable and necessary to treat the normal shift of this position as 40 hours in a workweek because requiring the County to pay the time and one half premium for hours worked in excess of eight in a day would enable the employe to generate excessive daily compensatory time without exceeding the forty hour per week guideline and without adequate control or approval on the part of the Department.

The services provided by the SW/PS position involve after-school and other meetings and activities outside of the 8AM-4:30PM Department office hours. An analysis of the evidence regarding the hours worked by the SW/PS indicates that, for the most part, when after school meetings were scheduled to comply with the job responsibilities, the SW/PS altered her daily hours by starting later in the day or extending her lunch hour to get the work done within an eight hour workday. When work was performed beyond an eight hour workday, the SW/PS received compensatory time at the time and one-half rate. In only a few isolated instances in June, July, October and November, 1992, was flex-time on other than an eight hour workday basis used. In each of those instances, the employe was allowed to alter her work schedule so she did not perform in excess of 40 hours in any workweek, consistent with the Executive Director's Sec. 5.01 authority to establish different

normal working hours.

For those reasons, in all respects, the County has acted within its rights as regards the compensatory time it has paid to the employes in the two positions at issue in this case. In any event, retroactive relief beyond 10 days prior to grievance filing is prohibited by Sec. 3.03 Step 4.

DISCUSSION

Procedural Arbitrability - Timeliness of Grievance Initiation

The subject grievance was filed on July 15, 1992. The Sec. 3.02 time limit for filing grievances provides, as one alternative means of timely filing, that "a grievance shall be filed within (10) working days from the date the grievance occurred." A review of Exhibits 12 and 18 reveal clearly that both Benka and Naniot worked hours outside of 8AM-4:30PM Monday-Friday on one or more of the 10 workdays preceding July 15, 1992. Exhibit 12 shows that Benka worked in excess of 8 hours on several of the 10 working days preceding July 15, 1992, but that she took hour for hour compensatory time off on other days in the weeks involved and did not exceed 40 hours of work in any of those weeks such that she did not receive compensatory time off at the time and one half rate for any of those hours worked in excess of 8 in any one day worked or for any of those hours worked outside 8AM-4:30PM on any of those days. Exhibit 18 shows that Naniot worked 8AM-12:15PM at a Family Retreat on Sunday, June 28, 1992, but took off only four hours 12:30-4:30PM (or roughly hour for hour compensatory time) on the following Thursday, July 2, 1992, such that she did not receive compensatory at the rate of time and one half for those Sunday hours which were outside of 8AM-4:30PM Monday through Friday. Exhibit 18 also shows that, on July 14, 1992, Naniot worked 4:30-7:30PM and roughly correspondingly fewer hours in the morning, without receiving compensatory time at the rate of time and one half for those hours outside of 8AM-4:30PM.

Thus, within 10 working days of the date the grievance was initiated, both of the employes who are the subject of the grievance worked hours outside 8AM-4:30PM Monday-Friday and received less than compensatory time at the time and one-half rate for the work so performed.

On that basis, the grievance was timely filed as to each of those two employes.

The County's contention that repeated alleged violations cannot be treated as a continuing grievance where, as here, they occur on an irregular rather than frequent and/or regular basis is neither supported by any citation of arbitral authorities nor

persuasive.

While the two employes exercised considerable control over their work schedules, the County remains obligated to assure compliance with Agreement provisions governing these employes' work schedules and compensation. Moreover, it was the County that chose to authorize the employes to exercise considerable discretion regarding their schedules, and it was the County that determined how the employes were compensated in each instance. It is true that the incumbents of these two positions and/or the Union could have challenged the propriety of the compensatory time the employes received as regards numerous previous instances. However, the fact that they did not do so is not sufficient to bar the Union from initiating the instant grievance when it did.

Nevertheless, in fairness to County, and consistent with established arbitral principles, the Arbitrator finds it appropriate to limit any make whole relief in this case to violations that occurred after the grievance was filed on July 15, 1992. After that date, the County was on notice that the Union was disputing the propriety of the County's failure to pay compensatory time at the rate of time and one half for time worked outside the normal shift of the FEVS/WFI and SW/PS, and for time worked by those employes in excess of eight hours in any one day work period. After learning of the Union's grievance, the County could have protected itself from subsequent make whole liability by altering its treatment of the employes in question. Accordingly, after that point in time, the County lost any persuasive claim that it was led by inaction on the part of the employes and the Union to believe that there was no dispute as to the propriety of the County's compensatory time treatment of the two positions in question.

Merits - Hours Worked Outside of 8AM-4:30PM Monday-Friday

The first question presented in Issue 2 turns on whether the County is obligated by the Agreement to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked outside of 8AM-4:30PM Monday-Friday.

Section 6.01, which is entitled "Beyond Regular Work Hours" provides, in the part pertinent to this question, that "All employes shall receive overtime in compensatory time off at the rate of time and one half (1 1/2) for all time worked outside of their normal shift." In labor relations parlance, a "shift" connotes, "A regularly scheduled period of work during the 24-hour day. . .". Roberts' Dictionary of Industrial Relations, 497 (BNA, rev. ed., 1971). The County's contention that a "normal shift" under the Agrement can consist of forty hours per week regardless of the hours worked during each day of that week is inconsistent with the above-noted definition of "shift" and with the language of Sec. 5.01.

Section 5.01, which is entitled "Regular Hours" provides, in part, as follows:

> The normal workday shall consist of eight (8) consecutive hours for five (5) days per week, i.e., Monday through Friday. The normal working hours shall be from 8:00 a.m. until 4:30 p.m., however the Executive Director may establish different working hours in a unit to provide adequate coverage and fulfill the responsibilities of the Department, but he shall not do so unreasonably.

The parties' respective proposed interpretations of the Executive Director's authority under that Section "to establish different working hours . . . " differ greatly. Neither of them is entirely persuasive. The Executive Director's authority in that regard is expressed as a proviso to the second sentence declaration that "The normal working hours shall be from 8:00 a.m. until 4:30 p.m." Its placement there, rather than in a separate sentence onto itself, persuades the Arbitrator that the Executive Director's authority "to establish different working hours" is limited to establishing different normal working hours than 8:00 a.m. until 4:30 p.m. The Executive Director's authority does not, however, extend to the independently-expressed provisions in the first sentence of Sec. 5.01 that "The normal workday shall consist of eight (8) . . . hours for five (5) days per week, i.e., Monday through Friday." So interpreted, the Executive Director may establish different normal working hours than 8:00 a.m. until 4:30 p.m., but he is not authorized by Sec. 5.01 to establish a different "normal workday" than "eight (8) . . . hours" The Executive Director's authority to establish different normal working hours than 8:00 a.m. until 4:30 p.m. is also limited by the proviso "but he shall not do so unreasonably."

The parties' use of the term "their normal shift" rather than

"the normal shift" in Sec. 6.01 confirms their understanding that in at least some cases a employe's normal working hours will be other than the "8:00 a.m. until 4:30 p.m." specified in the second sentence of Sec. 5.01

Reading Secs. 5.01 and 6.01 together, an exercise of the Executive Director's authority to establish different working hours than 8:00 a.m. until 4:30 p.m., if not done "unreasonably," will result in "their normal shift" being different than 8:00 a.m. until 4:30 p.m. However, because the Executive Director does not have the authority to establish a different normal work day than "eight . . . hours" nor to treat days of the week outside of "Monday through Friday" as among the employe's normal workdays in a week, the "normal shift" referred to in Sec. 6.01 must consist of "eight . . . hours" (subject to the unpaid lunch provision in the last sentence of Sec. 5.01) on five days per week, Monday through Friday. Section 6.01 requires that all employes shall receive compensatory time off at the rate of time and one-half for all time worked outside of "their normal shift" as that quoted phrase has been interpreted above.

The evidence clearly establishes that it was not unreasonable for the Executive Director to establish different normal working hours than 8:00 a.m. until 4:30 p.m. for each of these positions. The special requirements of each of these particular positions supports the operational need both to schedule each incumbents' normal working hours outside of the confines of 8:00 a.m. until 4:30 p.m., but also to have the employes' shift start times flexible so as to "provide adequate coverage and fulfill the responsibilities of the Department" as regards, for example, the FEVS/WFI's surveillance activities and the SW/PS's after-school meetings. The facts that the County informed the incumbents from the beginning that they would need to work a flexible schedule and permitted them to adjust their own schedules to meet their own needs as well as the Department's further support the reasonableness of the Executive Director's decision to establish different normal working hours for these positions than 8:00 a.m. until 4:30 p.m.

However, for reasons noted above, the Executive Director did not have the authority to establish a Sec. 6.01 "normal shift" for

the employes that deviated either from the normal work day of "eight . . . hours" or from a schedule on which the only normal work days were "Monday through Friday", even if that were done reasonably and in order to provide coverage and to fulfill the responsibilities of the Department.

The individual employes' acceptance without objection or grievance of the compensatory time they were or were not being credited with does not relieve the County of the requirements and limitations provided on the face of the Agreement. Nevertheless, the Arbitrator agrees with the Union's contentions in its brief that the County could have established a Sec. 6.01 "normal shift" for the employes that deviated from the normal work day of "eight . . . hours" and/or from the requirement that normal days consist only of "Monday through Friday," by seeking and obtaining the Union's agreement.

The Arbitrator also agrees with the Union that the County has not shown that it sought or obtained the Union's agreement in that regard. In the case of neither job did the County do more than put the exclusive representative on notice that the position being created would have "flexible hours." The absence of Union proposals to modify the Agreement in response to such a notification does not constitute a waiver of the applicability of Secs. 5.01 and 6.01 to those positions. Rather, given the County's notice to the exclusive representative of the creation of each of the classifications, and because each is undisputedly in the instant bargaining unit, the express reference to the FEVS/WFI position and the absence of any bargaining discussion or proposals about special arrangements for SW/PS position, results in the general applicability of Secs. 5.01 and 6.01 to both positions at issue in this case.

Accordingly, the County was within its rights to the extent that it treated the incumbents' Sec. 6.01 "normal shift" as "eight . . . hours" "five days per week . . . Monday through Friday," even if the starting time of that shift was different than "8:00 a.m." The County was not within its rights to the extent that it treated the incumbents' Sec. 6.01 "normal shift" as exceeding "eight . . .hours for five days per week . . . Monday through Friday." Section 6.01 requires the County to pay the incumbents compensatory time at the time and one half rate for all time worked outside of a normal shift consisting of "eight . . . hours for five days per week . . . Monday through Friday."

While the Arbitrator's interpretation above may result in less efficient or more costly operations, it follows directly from the language of Secs 5.01 and 6.01, which are specific provisions that control as against the more general management rights language in Sec. 25.01. The County's arguments that such a

conclusion would permit the employes to self-schedule in a manner that will generate excessive compensatory time at the time and one half rate is a matter peculiarly within the County's control. While, for reasons noted above, the Agreement permits the County to allow these employes considerable discretion regarding self-scheduling, the Agreement does not require the County to do so. The Agreement leaves the County free to determine whether and to what extent these employes shall be permitted to schedule themselves.

The Arbitrator's interpretation does not render the portion of Sec. 6.01 relating to time employes work "outside their normal shift" meaningless because that provision would apply generally to any work performed outside of Monday through Friday, and because it would also apply to any work performed outside of 8AM-4:30PM if the Executive Director's establishment of normal working hours different than those was done "unreasonably."

Merits - Hours Worked in Excess of Eight Hours In Any One Day Worked

The second question presented by Issue 2 turns on whether the County is obligated by the Agreement to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked in excess of eight hours in any one day worked.

Section 6.01, which is entitled "Beyond Regular Work Hours" provides, in the part pertinent to this question, that "All employes shall receive overtime in compensatory time off at the rate of time and one half (1 1/2) for all time worked . . . in excess of eight (8) hours in any one (1) day work period."

The Arbitrator is persuaded that the quoted language means just what it says. That is confirmed by the requirement set forth in the first sentence of Sec. 5.01 requirement that "The normal workday shall consist of eight . . . hours" and by the Arbitrator's conclusion, discussed above, that the Executive Director is not authorized by Sec. 5.01 to establish working hours inconsistent with that standard even if he does so reasonably and

"to provide adequate coverage and fulfill the responsibilities of the Department."

For reasons noted above, the Arbitrator finds that Secs. 5.01 and 6.01 apply to the positions in question and that the County neither meaningfully sought nor obtained the exclusive representative's agreement that these incumbents need not receive compensatory time off at the rate of time and one half for all time worked in excess of eight hours in any one day work period. Also as noted above, the individual employes' acceptance of the compensatory time they did or did not receive is not sufficient to waive the requirements of the Agreement.

Accordingly, Section 6.01 requires the County to pay the incumbents compensatory time at the time and one half rate for all time worked outside in excess of eight hours in any one day work period. The record shows that the County has complied with that requirement in many instances as regards its treatment of the SW/PS. However, to the extent that the County failed and refused to do so as to either of the incumbents, it violated Sec. 6.01.

As noted above, while that conclusion may result in less efficient or more costly operations, it follows directly from the language of Sec. 6.01 as confirmed by Sec. 5.01, both of which control as against the more general management rights language in Sec. 25.01. The County's arguments that such a conclusion would permit the employes to self-schedule in a manner that will generate excessive compensatory time at the time and one half rate is a matter peculiarly within the County's control. While, for reasons noted above, the Agreement permits the County to allow these employes considerable discretion regarding self-scheduling, the Agreement does not require the County to do so. The Agreement leaves the County free to determine whether and to what extent these employes shall be permitted to schedule themselves for more than eight hours of work in any one day work period.

Comment Regarding the Scope of ISSUE 2

Section 3.03 specifically and expressly directs the Arbitrator "to consider and decide only the particular issue presented to him." Because of its formulation, ISSUE 2 addresses the County's compensatory time obligations to incumbents of the two positions in question as regards hours worked outside of Monday through Friday, as regards hours worked outside of 8AM-4:30PM, and as regards hours worked in excess of eight in any one day worked. Accordingly, the Arbitrator has considered and decided each of those issues in this Award.

Also because of its formulation, however, ISSUE 2 did not address the additional question of hours worked in a day non-

consecutively, and the parties did not specifically direct arguments to that particular aspect of Sec. 5.01, either. While the Arbitrator's DISCUSSION, above, concering the questions presented by ISSUE 2 has unavoidably referenced the fact that the term "consecutive" appears in Sec. 5.01, the Arbitrator has otherwise sought not to consider or decide the implications of non-consecutive hours in developing the foregoing DISCUSSION, and in formulating the answers to ISSUES 2 and 3 set forth under DECISION AND AWARD, below.

Accordingly, the Arbitrator has expressly noted in DECISION AND AWARD paragraph 5 that neither his specific answers to ISSUE 2 nor his remedial order pursuant to ISSUE 3 is intended to decide or remedy the separate issue of non-consecutive hours of work in any one day worked.

Remedy

The Union has requested both of order that the County cease and desist in the future from violations of the sort found and an order making the past and present incumbents the positions in question whole for losses they experienced by reason of the County's violations of the Agreement, retroactive to January 1, 1992.

The Arbitrator finds the request for cease and desist relief appropriate, and that element has been ordered. It should be noted, however, that the Arbitrator has expressly prefaced the remedy paragraph with the phrase "Unless the Union and County agree otherwise in writing. . .". The Arbitrator has done so to permit the parties to discuss and adjust the remedy if and to the extent that they both agree in writing to do so if the County has continuing concerns about its ability operate effectively under the constraints of the Agreement as interpreted by the Arbitrator in this Award.

An order that the two affected employes be made whole is also generally appropriate. However, for reasons noted in the discussion of grievance timeliness, above, the Arbitrator has limited the scope of the make whole relief to losses experienced by the employes after the grievance was filed on July 15, 1992.

Accordingly, the Arbitrator has ordered the County, to the extent that it has not already done so, to credit the employes in the positions of FEVS/WFI and SW/PS for compensatory time off at the time and one half rate for hours worked by them in excess of eight in any work day after the grievance was filed on July 15, 1992.

The compensatory time off language in Sec. 6.02 limits year to year carry over of compensatory time to a maximum of sixty hours of compensatory time off and further provides that "Compensatory time in excess of sixty (60) hours must be taken off in the year in which it was earned or forfeited." In order to give the affected employes the fullest possible opportunity to be made whole in a manner that is consistent with the spirit of Sec. 6.02, the Arbitrator has ordered that the County credit the affected employes as of January 1, 1994, with the compensatory time each lost on account of the County's violations after July 15, 1992, and that the County treat that compensatory time as having been earned during 1994 for purposes of the application of Sec. 6.02 or whatever other compensatory time language becomes applicable during calendar year 1994.

In fashioning the make whole relief described above, the Arbitrator also considered the retroactivity language in Sec. 24.01 cited by the Union, the portion of Sec. 3.02, Step 4 cited by the County and which limits award retroactivity except in certain cases.

The retroactivity language in Section 24.10 is not applicable to the instant dispute. That Section permits the Union to process a dispute about what the wages, hours and working conditions of a new or significantly changed position shall be "If the parties are unable to agree . . ." concerning them. The instant grievance is not one filed pursuant to Sec. 24.01. Rather, it is a garden variety dispute as to the interpretation and application of the existing provisions of the Agreement to the two positions in question. For reasons noted above, both of the positions in question are covered by the Agreement, including its Secs. 5.01 and 6.01. Therefore, Section 24.10 is not applicable to this case.

Section 3.02, Step 4. Arbitration, provides, in part, that "The arbitrator shall render no award under this Contract which shall be retroactive for more than ten (10) days prior to the date the grievance was originally filed with the Employer except for failure to pay the contractual wage rate(s) due." It is not necessary to decide whether "contractual wage rate(s) due" includes or does not include the matters at issue in this case, because, as noted, the Arbitrator has found it appropriate to limit the make whole relief ordered to the period of time beginning after the grievance was filed with the Employer.

BACKGROUND (cont'd)

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The grievance is timely filed as to both the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist.

2. The County did not violate the Agreement when it refused to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked on Monday through Friday but outside the hours of 8AM-4:30PM.

3. The County did violate the Agreement, specifically Sec. 6.01, when it refused to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked outside of Monday through Friday.

4. The County did violate the Agreement, specifically Sec. 6.01, when it refused to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked in excess of eight hours in any one day worked.

5. Because the formulation of ISSUE 2, above, does not present the separate question of whether the County violated the Agreement

by assigning the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist non-consecutive hours of work in any one day worked, the declarations in 2-4, above, and the remedy in 6, below, are not intended to decide or remedy that separate issue.

6. Unless the Union and County agree otherwise in writing, the appropriate remedy for the violations noted in 3 and 4, above, is as follows:

a. Menominee County, its officers and agents, shall immediately cease and desist from

(1) refusing to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked outside of Monday through Friday; and

(2) refusing to pay the Front End Verification Specialist/Welfare Fraud Investigator and the Social Worker/Prevention Specialist compensatory time at the time and one-half rate for hours worked in excess of eight hours in any one day worked.

b. Menominee County, its officers and agents, shall make whole the individuals who have held the positions of Front End Verification Specialist/Welfare Fraud Investigation and Social Worker/Prevention Specialist after July 15, 1992, for the violations noted in 3 and 4, above, by

(1) crediting them, effective on January 1, 1994, with the amount of compensatory time each lost by reason of such violations occurring after July 15, 1992, and

(2) treating the compensatory time so credited as having been earned during 1994 for purposes of the application of Sec. 6.02 or whatever compensatory time language becomes applicable during calendar year 1994.

7. The Arbitrator reserves jurisdiction for the sole purpose of resolving, at the request of either party received by the Arbitrator within 60 days of the date of this Award or within any extension of that period that the Arbitrator may grant within that period, any dispute(s) that may arise concerning the meaning and application of the remedy set forth in 6, above.

Dated at Shorewood, Wisconsin
this 27th day of November, 1993 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator