BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OCONTO COUNTY	Case 115 No. 49868 MA-8081
and	
OCONTO COUNTY COURTHOUSE EMPLOYEES LOCAL 778-A, AFSCME, AFL-CIO	

Appearances:
Mr. David Ofria, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Dennis W. Rader, Godfrey & Kahn, S.C., on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1993-94 collective bargaining agreement between the parties, the parties requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a dispute between them regarding the proper interpretation of the language of Article XIX. The undersigned was designated arbitrator and hearing was held in Oconto, Wisconsin on December 7, 1993. A stenographic transcript of the proceedings was made and received by December 29, 1993. The parties submitted their initial briefs by January 31, 1994 and the County submitted its reply brief by February 18, all of which were exchanged by the undersigned at the parties' request.

Issue:

The parties stipulated that the following contract interpretation issue is the sole issue to be determined in this case:

> Pursuant to Article XIX of the collective bargaining agreement, does the phrase "150 days" mean calendar days or work days?

Relevant Contract Language:

ARTICLE XIX - LIMITED TERM EMPLOYEES

> A limited term employee (temporary) is one hired for legitimate temporary purposes (e.g., fill-in for vacation, sick leave, other temporary absence, or special limited term projects) which at the time of hire is anticipated not to exceed 150 days in a calendar year or overlapping calendar years. If the Employer is unable to determine the permanency of the position within 150 days, the Employer shall have an additional 30 days in which it must make that determination. Temporary employees shall be separated on or before the end of said period, however should a longer need exist, mutual agreement in writing between the Union and the Employer shall be required to extend the period of temporary employment. It is clearly understood by the parties that during the temporary employment period, such employees will not be entitled to any of the benefits or protections afforded under

> this Agreement to regular employees, except as specified above. Following the hire of a temporary employee for a period of time anticipated to be at least five (5) days in duration, the Employer will provide the Union with written notification and the anticipated duration of such employment. Seniority shall accrue from date of permanent hire.

Facts:

The facts surrounding Grievant Bonnie Schaut's employment with the County are not in dispute. On February 15, 1993, County Personnel Coordinator sent the Local Union a notice stating that ". . . Bonita Schaut has started working in the Clerk of Courts Office as a Limited Term Employee on Feb. 11, 93 (sic) . . . and is not expected to work over 150 days." Ms. Schaut was employed on a limited term project to computerize the County's Child Support System using matching funds donated by the Federal government (66%) and the County (34%). In its grant proposal to the Federal government, the County estimated that it would take 82.14 work days at seven hours per day or 16.43 weeks to fully computerize child support accounts. When the County applied in May 1993 for additional interim funds for 60 additional work days to finish the project, the County had employed Ms. Schaut for 54 work days and with 28.14 days of work left on the original grant. Schaut worked from February 11, 1993 through June 7, 1993 and also from June 14, 1993 through October 1, 1992 for a total of 142 work days. At that point, the project was complete and Ms. Schaut was terminated by the County.

The Union filed the instant grievance on July 21, 1993 seeking as a remedy that the County "make a position and post."

Facts regarding previous disputes over Article XIX:

In January, 1991, the Union filed a grievance regarding the employment of LTE's Behnke, Lemirande and Wos. The County later notified the Union that it denied the grievance, but it settled the case by assuring that LTE's would no longer be used in typist positions in the Public Health Office, as the grievants had been used.

On February 22, 1993 the County advised the Union that LTE Hipke would soon reach the "150 days limitation" and requested that she be allowed to complete the special "Fire Number Project" by extending her employment for "another 80 work days." The Union agreed to this scheme and signed the February 22nd notice from the County in which the following language had been included:

> Local 778-A Courthouse Employees bargaining unit agrees with a one-time extension for LTE, Rose Hipke of 80 working days to complete the "Fire Numbering Project" in the Land Office. It is understood this will not set a precedent.

No grievance was ever filed over the Hipke case.

Another former LTE, Ms. Cichonofsky, was hired as a regular full-time employe in May, 1990 and the parties agreed that Cichonofsky's seniority would date back "150 work days after her initial (LTE) hire date." The Cichonofsky case never went to arbitration and the settlement thereof contained no language indicating the case would not set a precedent. At this time, the LTE provision contained language regarding the procedure to be followed when an LTE position became a regular position and that 150 work days' seniority should be granted to the former LTE entering a regular position. That language was thereafter deleted from Article XIX, apparently in the last bargain between the parties.

Positions of the Parties:

Union

The Union argued that the ordinary meaning of "days" is calendar days and that several sections of the effective labor agreement (other than Article XIX) use the word "days" to mean calendar days. For example, the Union observed that the evidence regarding past practice showed that the following Articles used the word "days" to mean calendar days:

1) Article III (Leaves of Absence): states that such leaves are not to exceed thirty days;

2) Article VIII (Sick Leave) Section 3: refers to employes with 90 days or more of service who may convert accumulated sick leave to up to 3 emergency days;

3) Article IX (Funeral Leave): refers to employes with 90 days or more of service being allowed up to 3 work days to attend a funeral.

In addition, the Union observed, references to months in the labor agreement have been construed and applied by the parties to mean calendar months, not work months, as follows:

1) Article IV (Seniority): refers to a probationary period of 6 months;

2) Article V (Vacations): refers to 4 months of initial employment in determining credit for a full year of service;

3) Appendix A: refers to a 6 month probationary period and to 12 months of service.

The Union urged that the references to days of vacation or sick leave are different from other types of time referred to in the contract and that references to days of usage (clearly meaning work days) are really referring to a measure of compensation not to a measure of time per se as used elsewhere.

The Union further contended that the parties understood and used "work days" where they wanted to express a concept different from the ordinary meaning of days (calendar days). On this point, the Union noted that the term "work days" was used in Article II (Grievance Procedure), in Article IV (Seniority) regarding posting periods and in Appendix A of the contract regarding work hours and work months. The Union argued therefore, that because the parties did not use the term "work days" or "work hours" in Article XIX, this requires a conclusion that they intended the Article XIX reference to 150 days to mean calendar days.

Finally, the Union contended that the source of funding for LTE's or the nature of the projects upon which LTE's are employed are not relevant to this case. The Union also asserted that the grievances that have arisen in the past over Article XIX merely proved that the parties have disagreed over the proper interpretation of Article XIX. The introduction of Grievant Schaut's desk calendars showing the hours Schaut worked does not bind the Union and is irrelevant.

The Union urged that the grievance be sustained and it sought that "the County should be directed to post a clerk position and allow Grievant Schaut

the opportunity to apply."

County

The County argued that the language of Article XIX is ambiguous and that standard principles of contract interpretation must be applied to determine the meaning of the language. The County contended, therefore, that the contract must be considered as a whole. In this regard, the County noted that although Article XIX refers to "calendar years" it does not refer to days as calendar days, which omission implies that days in Article XIX means work days. In addition, the County observed that the reference to "5 days" in Article XIX would lead to inconsistent and absurd results if days were taken to mean calendar days in Article XIX. On this point, the County further argued that references to "hire" and to the separation of temporary employes from employment reasonably leads to a conclusion that the 150 day period referred to in Article XIX must mean 150 work days. Any other interpretation, the County urged, would lead to ridiculous results, especially in the case of sporadically employed LTE's who are hired to fill in for vacationing or sick full-time employes.

The County contended that the past practice proved in this case supports its interpretation of Article XIX. The County noted that in the Hipke and Cichonofsky cases, the Union either failed to file a grievance or it settled the dispute short of arbitration which clearly left the County's interpretation in place.

The County asserted that the Union is now attempting to gain through arbitration what it could not or did not try to gain through bargaining. The County noted on this point that the LTE language was added to the contract in 1984, later amended to include the reference to "calendar year . . ." and that the language regarding the procedure to follow if a limited term position became a regular position was later deleted.

The County argued that this case is without merit and that the remedy sought by the Union -- to create and post an opening -- is not required by the contract. Indeed, were the Arbitrator to order such a remedy, she would exceed her authority under the contract, in the County's view. Where, as here, the Union has failed to prove its case and has admitted that the County has not abused or over-used the LTE provision, the grievance should be denied and dismissed.

Reply Briefs:

The Union chose not to file a reply brief in this case and advised the undersigned of this fact by telephone. The Employer's reply brief was received on February 18, 1994 at which time the record herein was closed.

County:

The County observed that no evidence was submitted to show the intent of the parties at the time the language of Article XIX was negotiated and amended. Therefore, the County urged, the Union's arguments regarding what the parties intended by their various uses of the terms "work days" and "days" in the labor agreement should be disregarded. The County argued that given the fact that no evidence of bargaining history was proffered, which supports the County's view herein, the disputed language must be understood in the entire context in which

it appears.

The County contended that the absence of the term "work days" in Article XIX does not support the Union's claims that "150 days" must then mean 150 calendar days. The County observed that the term "calendar" is omitted prior to "days" in the disputed portion of Article XIX.

The County asserted the evidence of past practice -- the Hipke and Cichonofsky settlements -- clearly supports its arguments in this case. In any event, the County urged, even if the grievance were sustained, the undersigned has authority only to order the separation of LTE Schaut on or before the end of the 150 day period (which the County has already done), not to require that the County create and post a position. Therefore the County sought denial and dismissal of the grievance or, should the Union prevail, an order of the limited remedy described above.

Discussion:

This is precisely the type of case regarding which the parties should have negotiated a comprehensive settlement. However, the parties were unable to do this over the many years that disputes regarding Article XIX have arisen. They have therefore sought an award interpreting Article XIX once and for all. 1/

What the parties wish to gain from this proceeding is an award which determines whether the Article XIX reference to "150 days" means work days or calendar days. The parties have made many arguments regarding numerous contract provisions wherein references have been made to days, weeks, months and hours. I find these provisions to be conflicting and that the only language that is instructive in determining this case is that contained in Article XIX. I note that there is no general contract provision defining or describing the proper use or application of the word "days" as referred to in the contract.

Although the language of Article XIX does not specifically use one of the terms, "work days" or "calendar days," the language, in context, shows that "days" was intended to mean "work days." In this regard, I note that the overall intent and purpose of clauses such as Article XIX is to identify and limit the number of days an LTE may work without impinging upon or threatening bargaining unit work. Here, Article XIX defines a "limited term employee" as "one hired for legitimate temporary purposes. . . ." The references to "hire" and to separation of employment imply that the quantity of work time must be limited or temporary. The "purposes" for such temporary work, listed thereafter in parenthesis, all describe work day time periods during which the LTE must "fill-in" for regular employes "for vacation, sick leave, other temporary absence. . . ." The last item in this parenthetical group of purposes was to "fill-in" for ". . . special limited term projects." Also, the grouping together of this last phrase with the other purposes listed, strongly implies that such limited term projects should be counted, as were the other listed "purposes," in terms of work days. At the end of the Article, there is reference to "hire . . . for a period of time anticipated to be at least five (5) days in duration. . . ." As the County persuasively pointed out the linking of the terms "hire" and "time" in this sentence leads to a reasonable conclusion that "days" in Article XIX was intended to mean "work days." In addition, as the County also observed, it would lead to inconsistent results if days were taken to mean calendar days in this sentence, because the number of work days involved therein would vary from one to five workdays, for each LTE hired depending upon their date/day of hire.

In support of the above analysis is the extrinsic evidence that the original language of Article XIX did not contain the phrase "in a calendar year or overlapping calendar years." The testimony revealed that the Union later proposed the addition of this phrase so that if a limited term employe were hired near the end of a calendar year, the 150 days would be counted across both calendar years. This evidence, in my view, supports the County's assertions and undermines the Union's arguments that the reference to calendar year(s) clarifies the reference to 150 days in Article XIX. In addition, the

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1/ In its initial brief the Union sought creation of a Clerk's job and an opportunity for Ms. Schaut to apply therefor. I note that no evidence was offered by the Union in support of this remedy and that at hearing the parties expressly stipulated that this case was one of contract interpretation only. I have therefore issued this Award stating the proper interpretation of Article XIX only.

recent deletion of language from Article XIX which gave 150 work days' seniority credit to LTE's whose positions became regular or who were hired as regular employes, also tends to support the County's contentions in this case.

The prior cases involving Article XIX are mixed in their applicability to this case. The evidence showed that the grievance relating to Behnke, Lemirande and Wos was a dispute relating to the type of work performed by these three LTE's and it did not relate to the 150 days dispute. As such, I find that the evidence regarding this grievance is neither relevant nor material hereto and it has not been considered in reaching the instant award.

However, the evidence relating to both the Hipke and Cichonofsky grievances is relevant to this case. In both of these cases, the County referred to the 150 days limitation in terms of work days and there was no evidence offered to show that the Union ever objected to these references. Thus, this evidence although not of great weight herein, tends to support the County's arguments and to undermine the Union's arguments.

Finally, contrary to the Union's contentions, I find that the evidence offered by the County regarding its applications for grant monies, the manner in which it paid Ms. Schaut, the type of work she performed and the way that Schaut kept track of her work hours are all relevant to this case. In this regard, I note that Article XIX specifically lists "special limited term projects" as a separate category; that the evidence showed that some of the funds for such projects have often been acquired through grants; and that grant monies were applied for and used in part, to pay Ms. Schaut. Thus, the language used in the application for these funds which referred to work hours and work weeks, as well as the manner in which the County required Schaut to keep track of her work time, support the County's position in this case.

Therefore, based upon the relevant evidence and argument herein, I issue the following

AWARD

Pursuant to Article XIX of the collective bargaining agreement, the phrase "150 days" means work days.

The grievance is otherwise denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 7th day of March, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator