BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| PIERCE COUNTY COURTHOUSE EMPLOYEES, LOCAL 556, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO | Case 96 No. 50608 MA-8316 |
| and | |
| COUNTY OF PIERCE | |

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Pierce County Courthouse Employees, Local 556, American Federation of State, County, and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, referred to below as the County, or as the Employer.

## ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of JoAnn Manor, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 11, 1994, in Ellsworth, Wisconsin. The hearing was not transcribed, and the parties filed briefs by August 30, 1994.

## ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Employer violate Article 19, Section 4 of the collective bargaining agreement when it prorated the Grievant's paid holidays consistent with her scheduled hours of work?
>
> If so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

ARTICLE 9 - GRIEVANCE PROCEDURE

> Section 1. Definition. A grievance shall mean a dispute between the Employer and the employee and/or Union, concerning the interpretation or application of this Contract, or any questions concerning hours, wages, terms or conditions of employment.

> Section 2. All grievances must be presented promptly and no later than fifteen (15) work days from the date the employee(s) knew or should have known of the cause of such grievance.
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> . . .
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> ARTICLE 19 - GENERAL PROVISIONS
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> . . .
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> Section 4. . . . Regular part-time employees shall receive prorated fringe benefits in accordance with the amount of time worked.

BACKGROUND

The Union filed the grievance on November 19, 1993. 1/ The grievance notes Article 19, Section 4, as the provision at issue, and seeks the following remedy:

> To comply with labor agreement, Art. 19, Sect. 4, that employee be made whole. Compensate for holiday hours on time worked . . .

David Sorenson, the County Clerk, denied the grievance in a memo dated November 23, which states that the grievance was "not filed in a timely manner." The Union responded with a memo dated November 24, which states that the "grievance was filed 12 work days after receiving Mr. Weld's detailed response to an inquiry regarding Holiday Pay."

The "detailed response" referred to in the Union's memo was a letter, dated November 4, from Stephen Weld to the Grievant. That letter states:

1/ References to dates are to 1993, unless otherwise noted.

This is confirmation of the oral decision I presented to you at the October 20, 1993, Personnel Committee meeting. That Committee meeting followed your request that the County review the treatment of holidays for part time courthouse employees. Specifically, you asked that the Committee consider adjusting your pay and amending the current practice of prorating holiday pay for part timers on the basis of hours scheduled. You argue that the County's treatment of holidays for part timers in the courthouse unit is inconsistent with the way it treats vacations, sick leave and health insurance for this group of employees and inconsistent with the way the County treats holidays for part timers in the community health service group.

While you are correct that the County does use a different method for prorating holidays for part timers in the community health service unit, a review of the County's payroll records indicates that holidays have been prorated for part timers in the courthouse in this fashion for a minimum of 17 years. The present bookkeeper took over her tasks in 1990 and, at the time, was presented with a memo explaining how to prorate the holiday benefit for part timers in the courthouse unit. The practice has been consistently applied to all part timers in the courthouse unit. Accordingly, we believe that your request for an adjustment in the compensation method is inappropriate.

We have, by virtue of your request, become aware of this situation and intend to raise it at the bargaining table.

Secondly, you requested backpay for the period of time November, 1992, through July, 1993, utilizing actual hours worked as the basis for the proration of the back pay amount. The backpay request is for between $130 and $150 depending on which computation method is utilized. Once again, the County has consistently prorated vacation, sick leave and health insurance (not holiday) benefits by counting the number of work days in the three month period, multiplying that number by seven, arriving at the total number of hours in that three-month period available for a full time employee in this bargaining unit to work. That total is then divided into the number of hours actually worked by that part time employee in those three calendar months. This, too, is a practice that has been in place for as long as anyone can remember. We believe it is the proper interpretation of the contract.

> Finally, you indicated that in response to your inquiry, your department switched your holiday compensation. You indicated that this change of practice occurred on or about July 1 and that, therefore, the July 4 holiday and the Labor Day holiday in 1993 were, in your opinion, applied correctly. The Committee disagrees as that is contrary to the treatment of other part timers in the unit and the practice for 17 years with part timers in the courthouse unit. The Committee explored briefly the concept of asking reimbursement of the excess monies paid to you for the Fourth of July and Labor Day of 1993 but decided that it would waive that request provided the Union and you agree that our payment for those two days cannot be used to demonstrate a practice in either future negotiations or grievance hearings.
>
> Finally, you were very specific in indicating that you have not filed a grievance. If you do decide to file a grievance, it would seem appropriate that the matter go directly to arbitration.

The Grievant has worked for the County since 1988, when she was hired as a temporary employe. She applied for, and received, a permanent part-time position in the County Extension Office in May of 1992. She has held that position at all times relevant to the grievance. She is scheduled to work a 2/5 schedule -- two days per week. Her actual hours of work, however, vary, depending on the amount of time she is called in to relieve other employes. Viewed on a quarterly basis from May of 1992 through June of 1993, she has worked no less than 49% of a full time schedule and as much as 62% of a full time schedule.

The Grievant has received 2.8 hours payment for each holiday she has worked in her part time position, with the exception of the Fourth of July and Labor Day in 1993. The 2.8 hours reflects 40% of her seven hour work day. The County paid the Grievant on the basis of her actual hours worked for the two holidays noted above. This happened after the Grievant discussed the matter with Sue Richardson, the County's Payroll Clerk, and referred her to Article 19, Section 4. As noted above, the dispute prompted by this correction ultimately came to the attention of the County's Personnel & Finance Committee in October.

Prior to the October meeting, Sandy Langer, the Administrative Assistant to the Administrative Coordinator, discussed the proration of holidays for part-time employes with Richardson. Langer learned that Richardson's predecessor, Ruth Winkler, instructed Richardson on how to prorate the holiday benefit for part-time employes. Richardson did so for every part-time employe entitled to the holiday benefit in the same fashion until the Grievant prompted her to make the corrections noted above for the Fourth of July and Labor Day in 1993. Sorenson testified that Winkler worked as Payroll Clerk from 1978 until 1990, and treated the proration of holidays for part-time employes consistently throughout that period.

Further facts will be noted in the DISCUSSION section below.

## THE UNION'S POSITION

The Union phrases the issues for decision thus:

> Did the Employer violate Article 19, Section 4, when it failed to pro rate the Holiday benefit in accordance with the amount of time worked?
>
> If so, what is the appropriate remedy?

Noting that there is no dispute that "holidays constitute a fringe benefit" and no dispute that "the grievant is a regular part-time employee" entitled to fringe benefits, the Union concludes that the language of Article 19, Section 4, "is in fact clear and unambiguous that the basis of the prorationing is hours worked."

The Union asserts that the grievance must be considered timely, since the Grievant filed her grievance within fifteen work days of the date the Union was formally notified that the County "would continue to pay Courthouse employees on the basis of assigned percentage rather than the contractual mandate of hours worked." Even if this was not the case, the Union contends the grievance must be considered timely because "the failure of the County to pay according to the Agreement is a continuing violation."

Nor can the County's assertion of a longstanding practice be considered persuasive, according to the Union. At most, such a practice exists only from 1988, the Union argues. Even if taken to be a practice, the Union argues that the practice is "contrary to the clear and unambiguous language of Art 19 Sec. 4." Such a practice is, the Union asserts, valid only until notice is served that the terms of the Agreement are to be enforced. The Union applies this consideration to the record thus:

> What is particularly egregious in this matter is that after November 19, 1993 when they were put on notice that they were in violation of the Agreement and aware of this Arbitrators decision that, once put on notice that the contract would be enforced a practice ceases to have force and effect, the County continued to pay members of this bargaining unit in a violative manner.

The Union urges that the County should be ordered to "pay regular part-time employees prorated holidays based on hours worked for all holidays occurring after November 19, 1993 . . ."

THE COUNTY'S POSITION

The County, at hearing, phrased the issue for decision thus:

> Did the Employer violate Article 19, Section 4 of the collective bargaining agreement when it prorated the Grievant's paid holidays consistent with the hours scheduled, its longstanding practice?

The County notes initially that it has demonstrated a seventeen year practice of prorating holidays for part-time employes based on hours scheduled, not on hours worked. That practice, according to the County, is binding, and

particularly significant since Article 19, Section 4, cannot be considered "clear and unambiguous on its face - 'time worked' is a phrase which requires definition . . ."

Even if the language is found clear and unambiguous, the County urges that arbitral precedent requires that the practice be given binding force. Most significantly, the County urges that this result is compelled from Pierce County, MA-6649 (McLaughlin, 2/92), and Rock County, MA-7998 (McLaughlin, 3/94). Under these and other cases, the County urges that "clear contractual language cannot be used to terminate a contrary past practice without proper notice to the other party and an attempt to achieve the change through the mutual give-and-take of the bargaining process."

In sum, the County contends that the language should be found ambiguous, thus making the practice determinative. In the alternative, the County argues that the language, if unambiguous, cannot be applied without proper notice from the Union. In either event, the practice is significant and, according to the County, meets any arbitral definition of "past practice." More specifically, the County urges that a review of the record establishes the practice meets each of the three criteria articulated in Celanese Corp. of America, 24 LA 168 (Justin, 1954). That another Courthouse unit is provided the proration sought in this case is, according to the County, irrelevant.

The County concludes that the grievance lacks merit, and should be dismissed. If the grievance is found to have merit, the County urges that the Grievant's calculation of the amount she is due is inaccurate, and that under no view of the facts should she receive a remedy for periods of time preceding the filing of a grievance.

DISCUSSION

The parties have not stipulated the issues. The issues I have formulated include a threshold issue of timeliness. This issue must be addressed due to Sorenson's November 23 denial of the grievance. The timeliness issue is not raised in Weld's November 4 letter. This letter cannot, however, be read as a waiver of the timeliness argument. The Grievant, at the October meeting,

declined to characterize her concern as a grievance. Thus, Weld's waiver of the steps preliminary to arbitration, if a grievance was filed, cannot be seen as a waiver of any particular argument posed by the yet to be filed grievance.

The timeliness dispute focuses on Section 2 of Article 9, which requires that "all grievances must be presented promptly and no later than fifteen (15) work days from the date the employee(s) knew or should have known of the cause of such grievance." The grievance has been timely filed if the cause of the grievance is Weld's November 4 letter. Sorenson's November 24 denial appears to presume that the Grievant "knew or should have known of the cause of such grievance" upon her first receipt of a prorated holiday.

There is no persuasive factual or policy basis to ground this presumption. It is not unusual for an employe to rely on the accuracy of employer payroll records. There is no factual basis to question the Grievant's contention that she did not become aware of the discrepancy until the summer of 1993. The amount of time the County prorated the holiday benefit does indicate less than scrupulous diligence on the Union's and the Grievant's part in enforcing the labor agreement. The record does not, however, indicate even arguable misconduct in processing the matter. The proration is a small portion of an employe's check, and thus easily overlooked. Nor did any delay preclude a considered review of the issues. Having become aware of Article 19, Section 4, the Grievant discussed the matter with her department head, the payroll department, the personnel department and relevant County Board committees before formally posing the matter for arbitration.

Nor does implying she should have become aware of the interpretive issue sooner further any clear bargaining policy. Section 1 of Article 9 broadly defines "grievance," thus indicating the purpose of the provision is not to erect traps for the unwary. Article 9, Section 1, by its terms, extends the grievance procedure to a variety of disputes ranging from issues of contract interpretation to "any questions concerning hours, wages, terms or conditions of employment." The County's restrictive view of the "cause" of the grievance does not effect this broad language. Beyond this, the continuing proration of the holiday benefit reopens the interpretive issue with each holiday. Sealing the dispute from arbitration only assures a continuing source of irritation, thus unduly restricting the broad scope of Article 9, Section 1.

As the County brief notes, however, this "continuing violation" has remedial implications. The threshold issue posed here, however, is not whether the Grievant's belated filing of a grievance is a basis to limit any remedy she can claim, but whether she is entitled to pose the issue at all. On this record, the "cause" of the grievance should be taken to be Weld's November 4 letter which clarified that the County's proration was not an error but a considered position. This posed the matter for arbitration.

I have adopted the County's statement of the issue as it appears in the County's brief. That view does not substantially differ from the Union's. It does, however, differ from the County's statement of the issue at hearing, which referred to "its longstanding practice" of prorating the holiday benefit based on scheduled hours. That reference precluded a stipulation of the issue at

hearing. Any of these statements of the issue on the merits, however, reflect that the fundamental interpretive dilemma is the tension between the language of Article 19, Section 4, and the County's implementation of that language.

The principles governing the issue on the merits were set, as each party notes, in an arbitration award I issued in February of 1992 (this decision is referred to below as MA-6649). 2/ As the County appropriately notes, however, that decision is relevant only if the language of Article 19, Section 4, is unambiguous and contrary to a past practice.

The phrase "time worked" can, as the County notes, be subject to interpretation regarding whether such items as overtime and paid leaves are included within it. The phrase is not, however, unclear on these facts. The reference to "time worked" is in clear contrast to a reference to "time scheduled." These references are terms of art in collective bargaining. Terms such as "time scheduled" or "hours scheduled" denote that a proration is not subject to variance based on an employe's actual hours of work. This basic distinction is not unclear in Article 19, Section 4. That Richardson changed the practice when the Grievant pointed out this language underscores this point. This is not to say the County is bound by that change, but to point out that the fundamental distinction between "time worked" and "time scheduled" is not unclear. The parties' written agreement, contrary to the County's practice, requires proration based on hours of work. In sum, as the County points out, the following passage from MA-6649, with the substitution of "Union" for "County," summarizes the record:

> While ambiguity can be read into virtually any contract provision, the County's assertion that the provisions posed here are not sufficiently ambiguous to require arbitral interpretation is persuasive. 3/

The issue thus becomes whether the County has established a practice which can be opposed to Article 19, Section 4.

This case, unlike MA-6649, involves a practice not based on an express agreement, but on conduct on which mutual agreement may be implied. In MA-6649, the County "knowingly afforded the Grievant (a) longevity and vacation payment" in two years, then sought to deny it in the third. In this case, the Union never expressly agreed to a proration based on time scheduled.

In a case where a practice must be implied, the principles of Celanese Corp. of America, assume their most persuasive force:

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2/ County of Pierce, MA-6649 (McLaughlin, 2/92).

3/ MA-6649 at 9.

> (Past practice), to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. 4/

The third criterion implies that a practice has been mutually accepted. The criteria, however, only come into play if one of the contracting parties denies the existence of the practice. It is, arguably, then, impossible to find an "established practice accepted by both parties." The persuasive force of the Celanese criteria, however, lie less in express acceptance than in the establishment of circumstances in which it is appropriate to imply an agreement denied by one of the parties. The factual basis for this implication is less that the parties expressly accept the practice than that the practice is so well entrenched in work place conduct that it should not be denied. The policy basis for the implication is that the practice is a known and undisputed feature of a functioning work place which should be given binding force to avoid disruption in that environment. Put more simply, the binding force of practice lies in the agreement manifested by the parties' conduct. The three Celanese criteria define when it can be appropriate to imply such agreement.

Those three criteria have, with one reservation, been proven in this case. The County's practice of prorating the holiday benefit by hours scheduled is unequivocal. The Grievant provoked the only exceptions in roughly seventeen years covered in witness testimony, and the County denied those exceptions as soon as they were discovered. The practice cannot, however, be said to have been "clearly enunciated" except within County management. There is no evidence the County informed the Union of the practice. The evidence does, however, demonstrate that the County has employed part-time employes since the 1970's, and has prorated roughly ten holidays per year per part-time employe over that period. The practice was, then, "enunciated" on relevant check stubs, and thus "ascertainable over a reasonable period of time." The only difficulty in the proof is that the Union was never made expressly aware of the practice. As the County persuasively argues, however, such knowledge can be implied on this record. The proration, although one which could be overlooked, cannot be dismissed as one which can be ignored.

In sum, as in MA-6649, an established practice conflicts with clear contract language. The principles stated in MA-6649 govern this point:

> . . . This poses the question whether the asserted practice has, . . . modified the parties' agreement. This type of situation has been long-discussed in arbitral precedent. Elkouri & Elkouri, in their Third Edition to How Arbitration Works, (BNA, 1976) put the point thus:
>
> > A related rule is that a party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. 4/

4/ 24 LA 168 (Justin, 1954) cited at MA-6649 at 7.

> The same statement is contained in the Fourth Edition. 5/ Arbitrator Thomas J. McDermott offers a more detailed view of this rule:
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> > (T)here is the situation where the language contained in the contract is clear and explicit, but a practice has been established, which runs contrary to the meaning of the contractual language. In that case, to uphold the practice would constitute a rewriting of the contract by making the written provision agreed to by the parties null and void. That is not within the authority of the arbitrator. However, the party seeking to regain what is a clear contractual right has the obligation to notify the other side of his intention to regain that right. 6/

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4/ How Arbitration Works, Third Edition at 409.

5/ How Arbitration Works, Fourth Edition at 454.

6/ Master Builders' Association, 74 LA 1072, 1075-1076 (McDermott, 1980).

The Union did not serve notice of its desire to enforce the language of Article 19, Section 4, until the filing of the grievance on November 19, 1993. Under the principles cited in MA-6649, the Grievant's entitlement to the benefit of that language arose only with that notice:

> (T)he party seeking to assert a clear contractual right contradicted by an established practice 'cannot regain that right retroactively.' 5/

It can perhaps be argued that practice can be a better guide to parties' intent than contract language. 6/ Contract language is, however, undeniable evidence of agreement. Practice is arguable evidence of agreement. Language should not be set aside for a practice in the absence of unmistakable proof of mutual agreement. Enforcing language over practice encourages care in drafting. Enforcing practice over language can serve to encourage litigation over negotiation. The practice in MA-6649 was not treated as an amendment of conflicting language, and the practice in that case was based on express agreement.

In conclusion, the Union's contention that holiday proration should be based on "time worked" not "time scheduled" is persuasive. The Grievant is

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5/ MA-6649 at 10, citing 74 LA at 1076.

6/ See, for example, Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, from Arbitration and Public Policy, (BNA, 1961).

not, however, entitled to a proration of any holiday benefit preceding the filing of her grievance on November 19.

The Award entered below does not address the remedy in detail. The County's brief challenges the Grievant's calculation of her "time worked" for the quarters preceding the grievance. Without further argument, no certainty is possible on what the actual proration would be for holidays following the filing of the grievance. This may not pose any significant remedial issue given the conclusion that proration of holidays following November 19 should be based on time worked. Such a proration is already part of the payroll process regarding other benefits. Beyond this, the Union has asserted any remedy extends to all part-time employes, while the County has noted the Grievant is the only part-time employe who has grieved. Whether these or other points will pose remedial issues is not apparent on the record developed to this point. Rather than attempt to anticipate points of contention and address them without the benefit of the parties' arguments, I have retained jurisdiction for not less than forty-five days. This is not to encourage further hearing, but to provide the parties the opportunity to address the issue of remedy while providing the possibility of further hearing if those remedial issues cannot be informally resolved.

## AWARD

The Employer violated Article 19, Section 4 of the collective bargaining agreement when it prorated the Grievant's paid holidays consistent with her scheduled hours of work. Because the County had an established practice of prorating the Grievant's paid holidays consistent with her scheduled hours of work, the County is not obligated to prorate any holiday, preceding the filing of the grievance on November 19, 1993, based on time worked.

As the remedy appropriate to the violation of Article 19, Section 4, the County shall prorate holidays covered by the collective bargaining agreement and following November 19, 1993, consistent with time worked. To address any

uncertainty in the implementation of this remedy, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this arbitration award.

Dated at Madison, Wisconsin, this 11th day of November, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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