BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GRANT COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 3377-A, WCCME, AFSCME, AFL-CIO and GRANT COUNTY	Case 50 No. 51286 MA-8560

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of Grant County Professional Employees Union, Local 3377-A, WCCME, AFSCME, AFL-CIO.

Mr. Jon E. Anderson, at hearing and on brief, and Peter L. Albrecht, on brief, Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, P.O. Box 1110, Madison, WI 53701-1110, appearing on behalf of Grant County.

ARBITRATION AWARD

Grant County Professional Employees Union, Local 3377-A, WCCME, AFSCME, AFL-CIO (Union), and Grant County (County) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (Commission) from its staff. On July 15, 1994, the Union filed a request with the Commission to initiate grievance arbitration in this matter. The County concurred in said request. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. Hearing was held on October 10, 1994, in Lancaster, Wisconsin, at which time both parties were afforded the opportunity to call witnesses, present other evidence and to make arguments as they wished. Said hearing was transcribed. The parties filed briefs and reply briefs, the last of which was received on February 20, 1995. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Kelly Bull (Grievant) was hired by the County on or about June 4, 1990, as the Hazardous Material Planner. At that time, she was a limited term employe working approximately 20 hours per week. On August 31, 1991, it was determined by a committee of the County that the Grievant was and had been a regular part-time employe since January 26, 1991. As such, the County could have the Grievant work up to 39 hours per week. On February 7, 1994, the Grievant's

supervisor, Ruby Jahnke (Supervisor) sent a memorandum to the Grievant as follows:

> Starting this week and until another memorandum is issued, your hours per week will not exceed 35 hours per week.
>
> No overtime hours will be permitted. Just arrange your day so you don't exceed 8 hours per day.

The Grievant filed a grievance, alleging this action violated the collective bargaining agreement. The grievance was not resolved through the parties' grievance procedure and is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE 1 - RECOGNITION

. . .

1.02 Non-Discrimination: The parties hereto agree that there shall be no discrimination with respect to any employee because of age, sex, race religion (sic), handicap, national origin, union affiliation, marital status or sexual orientation, contrary to applicable state and/or federal law.

. . .

1.03 Definition of Employees:

A) Regular Full-time Employee: A regular full-time employee shall be defined as an employee who is regularly scheduled to work forty (40) hours per week.

B) Regular Part-time Employee: A regular part-time employee shall be defined as an employee who is regularly scheduled to work less than forty (40) hours per week. Regular part-time employees who are regularly scheduled to work an annual average of twenty (20) hours or more per week shall be entitled to all fringe benefits as provided in this Agreement on a pro-rata basis, except that insurance benefits shall not be pro-rated. Part-time employees who are regularly scheduled to work an annual average of less than twenty (20) hours per week shall not be entitled to fringe benefits, except to Wisconsin Retirement Fund contributions if eligible.

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote, demote, transfer or lay-off employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

2.02 The County's exercise of the foregoing functions shall be limited only by the express provisions of this contract, and the County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

ISSUE

The parties stipulated to framing the Issue as follows:

Did the County violate the terms of the applicable collective bargaining agreement when it reduced the hours of the Grievant?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union

On brief, the Union argues that the weight of the credible evidence establishes that the Grievant had her hours reduced in February 1994, not because of some legitimate management interest, but rather, because the Supervisor was interested in punishing the Grievant for her successful efforts in obtaining a fair wage for herself by exercising her rights under law. The Union asserts that the contract provides that the parties will not discriminate against employes on the basis of their union affiliation. By cutting the Grievant's hours, the County has clearly so discriminated, in violation of the contract and of the law. Clearly, the Union argues, the cut in

hours constitutes a violation of the contract.

The Union requests the arbitrator to uphold the grievance, to find that the County violated the collective bargaining agreement when it reduced the Grievant's hours from 39 hours per week to 35 hours per week, to order the County to immediately reinstate the 39 hour week, and to order the County to make the Grievant whole for losses incurred as a result of this contract violation.

On reply brief, the Union argues that despite the County's attempt to portray the Grievant as "disingenuous," the weight of the credible evidence establishes that the Grievant's testimony is credible and that the Supervisor's testimony is anything but credible. According to the Union, the fact of the matter is that the Grievant had her hours reduced in February 1994 because the Supervisor wanted to punish the Grievant for her successful efforts to improve her wages, hours, and conditions of employment by exercising her rights under law. The Union reiterates its argument that the contract provides that the parties will not discriminate against employes on the basis of their union affiliation and that, by cutting the Grievant's hours, the County has clearly so discriminated, in violation of the contract and the law.

County

On brief, the County argues that the reduction in the Grievants hours of work was a permissible exercise of the County's management rights; that the right to establish hours of work is a right traditionally reserved to management; that the collective bargaining agreement does not restrict the County's right to establish maximum amount of hours that the Grievant could work; and that the Grievant presented no evidence of past practice that would restrict management's rights to establish hours of work. The County concludes that the Grievant, quite simply, has presented no evidence that the County's action amounted to a violation of the collective bargaining agreement and, accordingly, the County requests that the grievance be denied.

On reply brief, the County argued that the Union presented no evidence of any restrictions on the County's right to establish the maximum number of hours that the Grievant could work. According to the County, the Union's cries of discrimination with respect to the reduction of the Grievant's hours of work is nothing more than a diversionary tactic, that the Union presented no evidence of discrimination at the hearing, that it is only in its post hearing brief that the issue of discrimination has become its central theme, and that the discrimination claim is nothing more than a tactic to draw attention away from the fact that this is a simple, straight forward, management rights issue.

DISCUSSION

The Union argues that the Grievant's were hours reduced to punish the Grievant for her successful efforts in obtaining a fair wage for herself by her Union affiliation. In essence, the Union also asserts that the financial reason given for the reduction in hours is pre-textual in that

the County had money in other areas of its budget to pay for the Grievant's working 39 hours per week.

The Grievant testified that the Supervisor told the Grievant that the Supervisor did not want an employe making more money than the Supervisor. This is the sum of the Union's evidence that the County discriminated against the Grievant based on her Union affiliation.

The record does not show that the Grievant was engaged in any protected, concerted activity, other than being a member of the bargaining unit and receiving the fruits of the contract negotiated for her by the Union.

And while it can be assumed that the Supervisor and the County were aware of the Grievant's Union affiliation, there is no evidence that the Supervisor or the County was hostile to such activity or that the Supervisor and the County's action was based in any part upon any such hostility.

It clear from the record that, at the time of the decision to limit the Grievant's hours, the County believed that it did not have enough money budgeted for the Grievant's salary to pay for the Grievant's salary at the rate of 39 hours per week. While the County did have money it could transfer to cover the Grievant's working 39 hours per week, it was under no contractual or legal obligation to do so. And nothing in the record suggests that the County made a decision not to transfer money to cover based on any hostility toward the Grievant or her Union affiliation or her engagement in protected, concerted activities.

In addition, the record shows that the underlying premise of the Union's argument, that the Grievant was working 39 hours a week, is erroneous. In 1993, she averaged about 35 hours per week. During the first five weeks of 1994, the five weeks immediately proceeding the memorandum limited the Grievant's hours to 35 hours per week, the Grievant worked an average of 37.9 hours per week. In only one of the first three pay periods of 1994 did the Grievant work 39 hours per week.

So it is clear that the Grievant did not have a set working schedule, that she was not scheduled for 39 hours per week, and that, in any case, the County had the right to limit the Grievant's hours, absent any illegal reason for doing so. I find no such reason in this case.

Therefore, for these reasons stated above, the Arbitrator issues the following

AWARD

1. That the County did not violate the terms of the applicable collective bargaining agreement when it reduced the hours of the Grievant.

2. That the Grievance is denied and dismissed.

Dated at Madison, Wisconsin this 8th day of June, 1995.

By James W. Engmann /s/
James W. Engmann, Arbitrator