BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between COLUMBIA COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION LOCAL 995, AFSCME, AFL-CIO and COLUMBIA COUNTY	Case 159 No. 51548 MA-8640 Case 160 No. 51579 MA-8653

Appearances:

Mr. Donald J. Peterson, Corporation Counsel, Columbia County, Columbia County Courthouse, 400 DeWitt Street, Portage, Wisconsin 53901, for the municipal employer.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for the labor organization.

ARBITRATION AWARD

The Columbia County Highway Department Employes Union, Local 995, AFSCME, AFL-CIO, and Columbia County are parties to a collective bargaining agreement which provides for final and binding arbitration of grievance arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide two grievances over the interpretation and application of the terms of the agreement relating to an employe's work schedule and the pro-rating of the employe's fringe benefits. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Portage, Wisconsin, on December 5, 1994; it was not transcribed. The County and the Union filed written arguments on January 23, 1995 and April 4, 1995, respectively, and, on April 28, 1995, waived their rights to file reply briefs.

ISSUES:

The parties agreed to the following statement of the issues:

Case 159:

Did the County violate the collective bargaining agreement when it changed the grievant's hours of work?

If so, what is the remedy?

Case 160:

Did the County violate the collective bargaining agreement when it pro-rated the grievant's benefits?

If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE:

AGREEMENT

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ARTICLE 2 - RECOGNITION

2.01 The Employer recognizes the Union as an exclusive bargaining representative for all of the employees of the Columbia County Highway Department, except the Assistant Highway Commissioner, the Highway Commissioner, the Shop Superintendent, the Patrol Superintendent, and confidential clerical personnel (Highway Department employees working in the County Administration Building and County Highway Office, Wyocena, Wisconsin) on all matters pertaining to wages, hours and conditions of employment.

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just cause, to transfer or lay off because of lack of work or other legitimate reasons, to subcontract for economic reasons, to determine any type, kind and quality of service to be rendered to the citizenry, to determine the location, operation and type of the physical structures, facilities, or equipment of the Highway Department, to plan and schedule service and work, to plan and schedule any training programs, to create, promulgate and enforce reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of

this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

ARTICLE 4 - GRIEVANCE PROCEDURE

4.01 Definition of a Grievance. A grievance shall mean a dispute concerning the interpretation or application of this Contract.

4.02 Step 1. Employees or employee and/or their steward shall present the misunderstanding or grievance to their most immediate supervisor who has authority in the matter no later than ten (10) days after the cause of such grievance or within thirty (30) days after he should have known of the cause of such grievance.

4.03 Step 2. If the grievance is not settled at the First Step, then the employee and/or union representative shall present the grievance in writing to the Highway Commissioner. The Highway Commissioner shall provide a written answer within five (5) working days of receipt of the grievance.

4.04 Step 3. If the grievance is not settled at the Second Step, the employee and/or union representative shall submit the grievance in writing to the Personnel Committee, or the Personnel Director (with a copy to the Highway Commissioner). The Personnel Committee or Personnel Director shall meet with representatives of the Union within thirty (30) days of receipt of the grievance. The Personnel Committee or Personnel Director shall provide the Union with a written answer within ten (10) days of the meeting.

4.05 Step 4. If a satisfactory solution is not found at Step Three, either party may submit the matter to arbitration. The party wishing to arbitrate the matter shall notify the other within two (2) weeks after the Personnel Committee's and/or Personnel Director's written answer is received that it wishes to appeal the matter to arbitration. The parties shall attempt to select a mutually agreeable arbitrator to hear the grievance. In the event the parties are unable to agree upon an arbitrator, either party may request that the Wisconsin Employment Relations Commission (WERC) to appoint an arbitrator from among its staff. The arbitrator shall hear the grievance and render a final and binding decision at the earliest possible date. The cost of the arbitration shall be borne equally by

the parties, including the fees of the arbitrator. However, the parties shall bear the costs of their own attorneys (if any). The costs of a court reporter and transcript shall be borne by the party requesting such services. If the parties mutually request such services, or if both parties request a copy of the transcript, such costs shall be borne equally by the parties.

4.06 Union Representatives. The Union shall inform the Employer in writing of its selection of employees who are authorized to represent the Union in grievances or other matters related to employee-employer relations.

ARTICLE 5 - PROBATIONARY PERIOD

5.01 Probationary Period. All newly hired employees shall serve a probationary period of six (6) consecutive months. Employees, during the course of probationary employment, shall be subject to discharge without prior notice or recourse to the grievance procedure contained herein. The Commissioner shall have the right to extend the probationary period as much as six (6) additional months. The Commissioner shall, if he/she decides to extend the initial six (6) months probationary period, give the employee a statement in writing giving the reasons for and the time of the extension. The president of the local Union shall receive a copy of such notification. Upon completion of the probationary period, an employee's seniority shall date from his/her date of original employment which is followed by continuous service.

5.02 Reductions in Force. In the event that a reduction in the work force is necessary, all seasonal and probationary employees shall be laid off before any regular employees are laid off. Whenever it becomes necessary to lay off regular employees, due to shortage of work or lack of funds, employees shall be laid off in inverse order to their length of service and whenever so laid off, shall possess re-employment rights for a period of one (1) year. Whenever it becomes necessary to employ additional workers, either in vacancies or in new positions, former employees who have rendered satisfactory service without delinquency or misconduct on their part, within one (1) year prior thereto, shall be entitled to be re-employed in such vacancies or new positions. Employees so laid off and re-employed within one (1) year shall experience no loss of seniority as a result of the lay off.

Employees who voluntarily lay off or terminate shall, if re-employed, start as new employees.

a) Section 5.02 requiring layoff of employees in inverse order of their length of service shall not apply to Mechanics.

5.03 Classifications of Employees. All employees shall be classified by the Employer as (1) Regular employee; (2) Regular employee (probationary), or; (3) Seasonal employee. If an employee works full-time for six (6) consecutive months, or in case of an extension of his/her probationary period, until his/her probationary period is completed, he/she then shall automatically become a regular employee.

5.04 Physical Examinations. The Highway Commissioner may require a prospective employee to have a physical examination at County expense.

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ARTICLE 7 - HOURS OF WORK

7.01 Work Day, Work Week. The regular schedule of hours for all employees except employees classified as Ferry Operators shall be eight (8) hours per day, Monday through Friday, forty (40) hours per week. The daily work hours shall commence at 7:00 a.m. The noon lunch period shall be one-half hour (30 minutes).

7.02 Ferry Operators. Ferry Operators shall work a daily and weekly schedule of hours during the term of this Agreement, which will be approximately equal to the daily and weekly hours of work during the previous year. Should the Employer desire to make any change in the hours of work, the Employer shall first discuss the proposed changes with the Union.

7.03 Jury Duty, Subpoena Duty. Employees called for jury or subpoena duty shall continue to receive their regular pay, but will endorse over to the County the amount received for such duty, excluding mileage for the time they have served such duty.

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ARTICLE 12 - INSURANCE, RETIREMENT

12.01 Hospitalization and Surgical Insurance. There shall be a group hospital, surgical, dental, and vision insurance plans in effect for employees and their dependents. The plan shall provide benefits which are at least equal in all respects to the group plan attached as Appendices B-D. The Employer shall pay ninety (90%) share of the premium.

12.02 Wisconsin Retirement System. The Employer shall participate in the Wisconsin Retirement Plan as provided by State Law and Wisconsin Retirement Board Rules. The Employer shall pay on behalf of each employee, the full employee's normal contribution.

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ARTICLE 8 - SALARY CLASSIFICATION, HOURLY RATES, OVERTIME RATES

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8.04 Ferry Operators. Ferry Operators shall be employed on a year-round basis. When the ferry is not in operation, they shall be employed in another classification in the department at the appropriate rate of pay for that classification. Ferry Operators shall be paid on a straight time hourly basis for all hours worked as a Ferry Operator and shall receive an additional eight (8) hours of holiday pay when they work the holidays. Ferry Operators shall receive vacation and sick leave credits while working as ferry operators and shall be entitled to the same benefits as other employees during the non-ferry operation season.

ARTICLE 9 - HOLIDAYS

9.01 Holidays. The following shall be paid holidays for all regular employees and regular probationary employees:

1) New Year's Day
2) Memorial Day
3) July 4th
4) Labor Day
5) Thanksgiving Day
6) the day following Thanksgiving
7) December 24th
8) Christmas Day
9) Good Friday
10) one (1) floating holiday

To be eligible for holiday pay, the employee must be on the payroll

on the workdays before and after the holiday.

9.02 Holidays on Weekends. If any holiday falls on a Saturday, the preceding Friday shall be the holiday to observe. If any holiday falls on a Sunday, the following Monday shall be the holiday to observe.

9.03 Probationary Employees. No employees are entitled to take a floating holiday while they are on probationary status.

ARTICLE 10 - VACATION

10.01 Entitlement Schedule. Each regular employee shall be entitled to an annual vacation with pay as follows:

(a) After six (6) months continuous service - one (1) week vacation;

(b) after twelve (12) months continuous service - one (1) additional week vacation;

(c) after two (2) years continuous service - two (2) weeks vacation;

(d) after seven (7) years continuous service - three (3) weeks vacation;

(e) after fifteen (15) years continuous service - four (4) weeks vacation;

(f) effective 1/1/95, after twenty-five (25) years continuous service - one (1) additional day per year, to a maximum of twenty-five (25) days.

10.02 The above provision under 10.01 shall prevail for all regular employees except that employees with continuous service and who commenced their probationary period prior to January 1, 1958 shall all have a January 1 anniversary date for the purpose of this section and each January 1 shall be credited with vacation earned during the previous calendar year. Such employees with a January 1 anniversary date who terminate and give notice as provided in 13.03 or who are terminated or retire, shall be entitled to use any unused vacation earned during the previous calendar year

plus a prorated vacation for the year in which they terminate or retire.

10.03 Ferry Operators. Ferry Operators are entitled to use two (2) calendar weeks of vacation during the summer season to be paid for as though they had worked at the summer rate (56 hours per week). Their remaining earned vacation shall be during the winter season and paid for according to their winter rates.

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10.05 Carry-Over. Employees may accumulate their annual vacation time for an additional four (4) months of the subsequent year. Employees are urged to schedule their vacations at the earliest possible date but not less than ten (10) days written notice to the office shall be required, unless prior approval of the Supervisor is secured, in the Supervisor's sole discretion, for leaves of less than ten (10) days notice. Applications for vacations shall be obtained from management, and all requests shall be approved by the Highway Commissioner or person he/she may designate and a written permit shall be issued to the employee.

ARTICLE 11 - SICK LEAVE

11.01 Each regular employee shall be credited with one (1) day of sick leave for each month of his/her probationary period at the completion of the probationary term of employment and shall accumulate further sick leave credit at the rate of one (1) day per month of employment to a maximum accumulation of one hundred and twenty (120) days. To be eligible for sick leave benefits, the employee must have completed the probationary period. The employee shall make a written request for sick leave benefits on the form provided by the Employer. Employees who take more than six (6) instances of sick leave in a calendar year, regardless of length of duration of each instance, shall furnish a certificate issued by a doctor or dentist or other satisfactory proof of illness. Worker compensable illnesses or hospitalizations shall not be included as an illness. Employees shall report all absences under sick leave within one (1) hour prior to the start of the scheduled shift. Abuse of sick leave may be considered cause for discipline. Sick leave payments will be paid at the rate of the employee's

regular salary. Up to four (4) days of sick leave per year may be used for the care of ill or injured immediate family members residing in the same household.

a) Any employee who has accumulated one hundred twenty (120) days of sick leave shall have a catastrophic sick leave account established. Additional sick leave shall be accredited to the account, up to a maximum of twelve (12) days, at the rate of one-half (1/2) day for each completed calendar month of compensated service during which the employee has maintained one hundred twenty (120) days of accumulated regular sick leave. The catastrophic sick leave account may only be drawn from to cover eligible absences that are medically documented, where the employee has exhausted all previously accumulated regular sick leave. This account shall not be used in any other manner.

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11.03 Bereavement Leave. Three (3) consecutive working days leave of absence with pay will be granted to all regular employees when there is a death in the immediate family, which shall be defined as wife, children (single or married), sister, brother, father or mother of employee or spouse, or any member of the employee's household. One (1) day leave of absence with pay will be granted to all regular employees when there is the death of a sister-in-law or brother-in-law. Employees will be allowed one (1) day of sick leave in case of serious illness of other family members of his/her immediate family. Employees will be granted one day leave of absence with pay to act as pallbearer. However, this provision shall be limited to five (5) such occurrences during any calendar year.

11.04 For the purpose of this Agreement, one (1) day sick leave shall be considered to be normal working hours at the time of the illness. Employees shall accumulate sick leave while on payroll, which shall be defined as actually working, or being absent from work because of holiday, vacation or sick leave.

11.05 Payout. Employees who terminate from service of the Employer through death or layoff shall be entitled to any unused sick leave accumulation and earned vacation to be paid either to the employee or to the employee's estate at the employee's basic wage rate. Employees who retire and are eligible for Wisconsin Retirement Annuity and/or Social Security shall be paid

fifty percent (50%) of the accumulated sick leave at their daily hourly rate. This section does not apply to the catastrophic sick leave account.

11.06 Retiree Health Insurance. All employees who retire from the Highway Department and have reached age 62 and who have ten (10) continuous years of service shall be eligible for the County's health insurance program until age 65, provided they pay the full cost of the premium. Consistent with the 1989 Amendments to the Wisconsin Retirement System, any employee who retires earlier than 62, at full pension, will also be eligible for participation in group insurance on the same basis as retirees described above.

ARTICLE 12 - INSURANCE, RETIREMENT

12.01 Hospitalization and Surgical Insurance. There shall be a group hospital, surgical, dental, and vision insurance plans in effect for employees and their dependents. The plan shall provide benefits which are at least equal in all respects to the group plan attached as Appendices B-D. The Employer shall pay ninety (90%) share of the premium.

12.02 Wisconsin Retirement System. The Employer shall participate in the Wisconsin Retirement Plan as provided by State Law and Wisconsin Retirement Board Rules. The Employer shall pay on behalf of each employee, the full employee's normal contribution.

OTHER RELEVANT LANGUAGE:

The collective bargaining agreement between the County and AFSCME Local 2698-B includes a recognition clause as follows:

ARTICLE I - RECOGNITION

1.1 It is hereby agreed that the Columbia County Courthouse and Human Services Employees Local 2698-B, WCCME, AFSCME, AFL-CIO, has been selected by the majority of the eligible employees of Columbia County as the exclusive bargaining agent for all regular full-time and regular part-time employees (employed 900 or more hours per year), and effective January 1, 1989, employed 800 or more hours per year, excluding

> administrative, managerial, professional, confidential, temporary and part-time employees employed less than 900 or more hours per year, and effective January 1, 1989, employed less than 800 hours per year, and that pursuant to the provisions of Section 111.70 of the Wisconsin Statutes, said Union is the exclusive bargaining agent for said employees with respect to wages, hours and other conditions of employment, pursuant to certification by the W.E.R.C., September 10, 1987, Case XIV, No. 17136, ME-974

BACKGROUND:

The grievant, Peter Croft, has worked for the Columbia County Highway Department since 1988. On March 20, 1991, while serving as an Assistant Patrolman, Croft suffered a work-related injury, namely a herniated lumbar disc. Croft underwent a surgical laminectomy in June, 1991, and remained off work until that August, when he returned to duty. In April, 1992, he underwent a revised laminectomy, and was again off until that August, when he returned, performed mowing work for three days, and again went off-duty until September, when he accepted re-assignment to the County's Recycling Center. Later that fall, when the job he was performing was eliminated, Croft transferred to the Sheriff's Department, where he remained until that December, when he again took leave.

According to an independent medical examination on September 9, 1992 and July 6, 1993, Croft had suffered seventeen (17) percent permanent partial disability of the body as a whole, and had reached his healing plateau without further surgery, which the independent physician recommended against, rather than risk a "disastrous" outcome.

As to work restrictions, the physician stated as follows:

> The patient needs to avoid heavy lifting. He can occasionally lift up to ten pounds. He should avoid bending and twisting. He should (avoid) yanking and jerking forces to his back. He should avoid working on wet, muddy, snowy, icy or slippery surfaces.

In August, 1993, Croft accepted assignment as a receptionist at the County Nursing Home, working approximately 12 hours per week, until January, 1994, when he went to 20 hours per week.

On February 11, 1994, Highway Commissioner Kurt Dey wrote to Croft as follows:

> Dear Mr. Croft:
>
> You have requested to reinstate your employment at the Highway Department as a regular full-time employee. With your light duty

restrictions, the Highway Department will put you on as a full time employee effective Tuesday, February 15, 1994. Your hours of work will be 2 p.m. thru 10 p.m. Tuesday through Thursday and Friday and Saturday evenings from 10 p.m. until 6 a.m. The position we have available is winter dispatching with other light duty tasks. This position is all within the physicians guidelines.

If you have any questions regarding this letter with regards to your reinstatement at the highway department please feel free to contact me.

Regards,

Kurt W. Day /s/
Kurt W. Day
COLUMBIA COUNTY HIGHWAY COMMISSIONER

On February 15, Dey wrote to Croft as follows:

CERTIFIED MAIL

Dear Mr. Croft:

This letter is to advise you that we have a full-time position open for you with our department. This position is 40 hours per week; hours to include Tuesday through Thursday 2:00 p.m. to 10:00 p.m. and Friday and Saturday 10:00 p.m. to 6:00 a.m. This is a winter dispatching job and it meets the sedentary restrictions that both Dr. Plooster and Dr. Huffler have given you.

Please respond formally by February 23, 1994 as to whether or not you are going to be accepting this position. If we do not hear from you by this date, we will assume you are declining this position.

Sincerely,

Kurt W. Day /s/
Kurt W. Day
COLUMBIA COUNTY HIGHWAY COMMISSIONER

On February 17, 1994, Dey wrote to Dr. Michael Plooster, Croft's attending physician, as follows:

February 17, 1994

Dear Dr. Plooster,

This letter is being written to you on behalf of your patient, Mr. Peter Croft. A joint meeting and a tour was conducted today with Mr. Croft, his employer at Columbia County, Mr. Kurt Dey, Mr. Croft's union representative, Mr. David White, and with myself, James Hill, Mr. Croft's vocational rehabilitation counselor. A modified job is being proposed for Mr. Croft that should allow him to work within your restrictions, and gradually increase his work hours to 8 hours/day. The current job available for Mr. Croft is to work 6 hours/day, as a dispatcher, with the following duties:

> Dispatching/phone work. Mr. Croft's primary responsibilities will be doing phone and radio work which will allow him to alternately sit, stand and move around while he is on the microphone.
>
> Occasional filing and paper shredding. File drawers will be placed, if necessary, on a table so that Mr. Croft will need to do little bending. Items to be filed will be individual documents, forms, and small files.
>
> Very light maintenance work. This will include dusting tables, cleaning sinks and water fountains and using a modified cleaner with a 4 foot handle to clean toilets. No mopping, or lifting any materials over 10 pounds is included.
>
> Other duties may be assigned to Mr. Croft as needed, but under no circumstances will the job tasks exceed the sedentary work restrictions assigned by both you and Dr. Huffer.

Mr. Croft will be contacting you, and we would like your opinion, as soon as possible, as to whether he could start on this job with a 6 hour/day schedule. After seeing the work site and duties, Mr. Croft said he would like to give it a try. The state DVR office will be contacted about providing Mr. Croft with an

orthopedic chair, if that would help. We would also like your opinion as to what kind of time frame would be necessary for Mr. Croft to eventually return to an 8 hour/day schedule, if he continues with this dispatching job.

According to your 2/14/94 restrictions, Mr. Croft needs to do sedentary work, can sit 3-5 hours and stand/walk 1-4 hours. Given now that he has opportunities to do all these activities in the proposed 6 hour/day, we would hope that you would see this fitting into your guidelines.

Plans are to start Mr. Croft in this position on Tuesday, February 22nd. Your cooperation in providing a return to work form or other correspondence allowing Mr. Croft to work 6 hours/day would be greatly appreciated as soon as possible. Please contact Mr. Kurt Dey at (608) 429-2136 with any questions you may have.

Sincerely,

James Hill /s/
James Hill, M.S. C.R.C.
Vocational Rehabilitation Counselor
Chiron/AMS

Kurt W. Dey /s/
Kurt W. Dey, Commissioner
Columbia County Highway & Transportation

P.S. to Dr. Plooster:

After completing the tour today of Peter's work site, I believe the employer is very willing to accommodate and adjust his return to work in any way possible. I hope you will give Peter the ok to try a 6 hour work day.

James Hill /s/
277-2424

On February 18, 1994, Dr. Plooster issued an Attending Physician's Return To Work Recommendations Record, wherein he allowed Croft to "work 6 hr/day in the capacity outlined in the letter 2-17-94." Croft and department management thereafter reached an agreement whereby Croft would work 3:30 p.m. to 9:30 p.m. on Tuesday through Friday and 9:00 a.m.

to 3:00 p.m. on Saturday. 1/ Subsequently, in April, the employer altered Croft's hours to be 3:30 p.m. to 9:30 p.m. on Wednesday-Friday and 9:00 a.m. to 3:00 p.m. on Saturday and Sunday. It is that change which Croft now grieves.

POSITIONS OF THE PARTIES:

In support of its assertion that the grievance should be sustained, the Union asserts and avers as follows:

> The grievant is a regular, non-probationary employe and as such is entitled to full benefits. The collective bargaining agreement explicitly requires the employer to classify all employes as either regular, regular (probationary) or seasonal. Upon working full-time for six consecutive months after his 1988 hire, the grievant automatically became a regular, non-probationary employe. As the agreement has no provision of an hours-threshold for maintaining regular status once attained, any employer argument that one should now be read into the agreement cannot be sustained.
>
> The agreement specifically provides for certain benefits to certain classifications of employes. But there is no provision of pro-rating of benefits; in the absence of such a provision, none can be read into the agreement. While the employer has negotiated such provisions into agreements with other unions, the parties to the highway department agreement have chosen not to do so. In the absence of any provision to pro-rate benefits, no pro-ration can be read into the agreement.
>
> Further, as to the grievant's hours of work, the parties reached an agreement as to what the grievant's hours would be. The employer later unilaterally changed the agreed-to hours, causing the grievant great personal hardship in complicating his efforts to see his daughter. Since the grievant's hours of work were the result of an agreement between the parties, that agreement cannot be unilaterally abrogated by either party.
>
> Accordingly, the grievances should be sustained, and the employer directed to make the grievant whole by making available to him un-

1/ The Union states the hours as being 4:00 p.m. to 10:00 p.m. and 10:00 a.m. to 4:00 p.m., while the employer states them as noted. The discrepancy is not material to my consideration of the underlying grievance.

prorated health insurance; reimbursing him for any medical expenses that he incurred which he would not have incurred but for the violation of the agreement; paying him the difference between what payments were made and what payments should have been made for other benefits; restore his mutually agreed-upon work hours, and to not change such work hours without agreement of the parties, and any other remedy that the arbitrator may find appropriate.

In support of its contention that the grievances should be denied, the County asserts and avers as follows:

> Since the collective bargaining agreement does not address part-time employes such as the grievant nor the duties and schedules created by the employer to accommodate the special needs of a disabled employe, the issue turns on the matter of oral commitments. The employer and grievant understood that there was not a guarantee to keep the new work hours the same, especially when winter dispatching needs diminished in the spring. Further, where the employer creates a special six-hour day schedule to accommodate the grievant, some latitude ought to be afforded the employer in determining which days those six hours are worked. The spring scheduling change was a necessity to meet management's needs for seasonal dispatching.
>
> Given that the collective bargaining agreement does not address part-time employes, and that there were no oral agreements to the contrary, and that all other part-time employes receive prorated benefits, the employer did not violate the contract when it offered the grievant prorated benefits. The grievant does not meet the eight-hour day definition of a regular employe. Since the contract does not address part-time employes such as the grievant, the answer lies outside the agreement, in past precedent and internal comparables.
>
> There being no past precedent on how the Highway Department treated benefits of part-time employes, the appropriate resolution is to review how benefits are provided to part-time employes in other internal bargaining units. It is noteworthy that the agreement between the employer and the Courthouse and Human Services employes union does define part-time employes, and does provide prorated benefits.
>
> Allowing this grievant to be the only county employe to receive full

benefits while working only part-time would be to establish a precedent which should be left to bargaining and which would be patently unfair to other part-time employes.

The grievance as to benefits was filed on February 11, 1994. Should the arbitrator deem the grievant entitled to full benefits the award would not have accrued at the earliest before January 11, 1994, pursuant to section 4.02 of the bargaining agreement requiring a grievance to be filed within ten (10) days after he knew or 30 days after he should have known of the cause of the grievance. Particularly as to health insurance there was no showing by the grievant that he had uncovered medical expenses or acquired alternate health insurance at a higher cost than that offered by the employer.

Having failed to prove his case, the grievant's schedule change and the county's prorating of his benefits should be upheld. These issues are not addressed by the parties' bargaining agreement and fall within the ambit of management rights. Further, the county should not be penalized for its diligent efforts in creating a position to accommodate the grievant's special health restrictions.

DISCUSSION

The collective bargaining agreement provides that the management of the Highway Department "and direction of the working forces is vested exclusively"in the employer, including the right to "plan and schedule service and work," and to "determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement." For other than Ferry Operators, the agreement also provides for standardized hours of work, namely an eight-hour day, commencing at 7:00 a.m., Monday through Friday.

Peter Croft suffered a serious injury which, at all times relevant to his grievance, made it impossible for him to meet that work schedule. To accommodate Croft, the employer offered a variety of work assignments at various work-sites on a variety of schedules. As of February, 1994, Croft and the employer had reached an agreement whereby Croft would work 3:30 p.m. to 9:30 p.m. on Tuesday through Friday and 9:00 a.m. to 3:00 p.m. on Saturday, doing dispatching and other work consistent with his medical condition. In reaching this agreement, Croft enjoyed Union representation and vocational rehabilitation counseling.

The employer testified that, in February, Croft was aware that, come the change in seasons and the lessening of the need for winter dispatching, his duties and schedule would likely change. Croft acknowledged that he was aware that his hours could possibly change, but not that the days

of work would change. Working both Saturday and Sunday was not part of the February, 1994 agreement, he maintained, and, had be been aware of that possible eventuality, there might not have been an agreement at all.

The Union contends that the initial modified schedule was "the result of an agreement between the parties," and that such agreement "cannot be unilaterally abrogated by either party." Since Croft never agreed to the subsequent change in hours and days, the Union argues, the employer's action constitutes a violation of the collective bargaining agreement.

I agree. Although the Union misstates the situation somewhat in describing Croft as a party, it does accurately assess matters in asserting that a party cannot unilaterally abrogate a term of the agreement. Indeed, that is the linchpin of the collective bargaining process -- that, once the parties reach an agreement, neither party can unilaterally alter the terms absent the concurrence of the other. But that is what the employer has here sought to accomplish by the April, 1994 alteration of Croft's schedule.

The collective bargaining agreement provides for a standard work day (eight hours duty, starting at 7:00 a.m.), and work week (Monday through Friday). Those are specific terms which limit the broad management rights powers found elsewhere in the agreement.

For whatever reason (and the record is silent on whether external laws might have affected the employer's attitude toward providing Croft with a modified schedule), the employer went to some lengths to accommodate Croft's need for lighter duty and a modified schedule. Because the Union and Croft participated in, and concurred in, that modification, the altered work day and work week did not constitute a violation of the collective bargaining agreement.

As the seasons, and the employer's needs for particular duties, changed, the employer modified Croft's particularized schedule. The employer asserts that Croft had implicitly given his assent to such further changes in the discussions leading up to the February, 1994 agreement; Croft asserts that he understood the possible future changes would affect his hours of work, but not his days on duty.

The employer's written argument gives some support for the Union's assertion that Croft did not agree beforehand to the change in days, in that the County's brief describes the February 17, 1994 agreement as indicating that, "although the grievant's duties would remain the same the hours could change in the spring." (emphasis added). Further, the employer argues that "where the employer creates a special six hour per day schedule to accommodate the grievant some latitude ought to be afforded the employer in determining which days those six hours must be worked." Had there been an agreement between the parties in February as to subsequent assignment of days, the employer would not need latitude at this juncture. Finally, the personal hardship which the Saturday/Sunday schedule causes the grievant -- severely complicating custodial and visitation arrangements with his daughter -- lead me to conclude that the grievant would not have agreed to a schedule requiring him to work both Saturday and Sunday.

The collective bargaining agreement provides for a regular work week. The parties mutually agreed to a modification to accommodate Croft's need for a shorter workday. The employer subsequently unilaterally imposed changes. In so doing, it violated the collective bargaining agreement, as modified.

As to remedy, the Union seeks the restoration of the "mutually-agreed upon work hours," and that the employer not "change such work hours without agreement of the parties." Of course, here the Union is using "work hours" to mean both hours and days, a bit of casualness in terminology that could cause confusion when used in drafting contracts as opposed to just writing arbitration briefs.

While the Union is correct in assessing there are no other remedies available other than the restoration of the old schedule, it fails to acknowledge that there is another old schedule besides the February, 1994 modification, namely that as stated in the collective bargaining agreement. The record is silent on what, if any, obligation the employer had to accommodate Croft's need for a reduced workday. Consistent with such obligation, if one exists, and mindful that it must not act, even in part, out of hostility or retaliation towards Croft for the lawful exercise of his rights, the employer may either return Croft to the work schedule as provided for in the collective bargaining agreement, or restore the schedule agreed to in February, 1994, or any other schedule to which the parties mutually agree.

I turn now to the issue of the reduction in Croft's benefits caused by the employer's treatment of him as a part-time employe.

In support of its actions, the employer calls my attention to the provisions of labor agreement between itself and the Courthouse and Human Services employes, on the theory that internal comparables may be instructive. They are, but not to the conclusion as the employer would wish.

The presence of provisions in the other agreement describing part-time employes and defining their benefits establishes clearly that the employer is familiar with the concept of part-time employment, and, when it has felt the need strongly enough, able to bargain as to its application. In the Highway Department agreement, however, there is no such provision.

At hearing, the employer apparently also relied on language in the County's personnel code, as set by ordinance. However, following the hearing, the employer withdrew that exhibit and declined to offer the ordinance into evidence. It thus forms no basis for my review and consideration.

As the labor agreement does not provide for part-time employes, neither does it provide for pro-ration of benefits on the basis of an employe working less than full-time. There being no such provision in the labor agreement, the employer's action unilaterally imposing such a reduction in benefits constituted a violation of the agreement.

In its discussion of remedy, the employer notes that grievances must be filed within 30 days of the time the employe knew or should have known of the grievance, and that remedy to prior to January 11, 1994 -- 30 days prior to the February 11, 1994 filing of the grievance -- is not allowable. I agree.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That grievances No. 159 and 160 are sustained. The employer shall:

1. Return the grievant to either the work schedule as set by the collective bargaining agreement, the work schedule which was in force between February 18, 1994 and April, 1994, or some other schedule to which the parties mutually agree;

2. Restore to the grievant the benefits package all other unit employes receive, calculated to January 11, 1994.

I shall retain jurisdiction to resolve any disputes which may arise over the implementation of this Award, relinquishing such jurisdiction in sixty (60) days unless either party notifies me any issues remain unresolved.

Dated at Madison, Wisconsin this 27th day of July, 1995.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator