BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between DOUGLAS COUNTY PARAMEDIC ASSOCIATION, LOCAL 4602, WFT, AFT, AFL-CIO and DOUGLAS COUNTY	Case 217 No. 52804 MA-9108

Appearances:

Mr. William Kalin, Staff Representative, Wisconsin Federation of Teachers (WFT), appearing on behalf of the Union.

Mr. John Mulder, Douglas County Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on November 7, 1995, in Superior, Wisconsin. Afterwards the parties filed briefs. The record was closed on January 16, 1996, when the parties notified the arbitrator they would not be filing reply briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the statement of the issue. The Union proposed the following issue:

> Is the County in violation of the collective bargaining agreement by not paying the grievant her full wage as a paramedic during the time that she was unable to perform her duties as a paramedic due to an injury on the job? If so, what is the appropriate remedy?

The Employer proposed the following issue:

> Did the County violate the contract, specifically Article 12, B when it took into consideration other wages earned in calculating the grievant's worker's compensation payment? 1/ If so, what is the appropriate remedy?

The parties requested that the Arbitrator frame the issue in the Award. The Arbitrator hereby adopts the Union's suggested framing of the issue as his own.

PERTINENT CONTRACT PROVISIONS

The parties' 1994-95 collective bargaining agreement contained the following pertinent provisions:

> ARTICLE 12.
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> WORKER'S COMPENSATION:
> A. The Employer agrees that in the event that any employee is disabled and thereby prevented from performing his usual duties for Douglas County as the result of an injury or occurrence arising out of his duties as a paramedic, the employee shall continue to be paid his/her full salary for a period not to exceed one (1) year from the date of such injury or disability; provided, however, that the

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1/ The phrase "worker's compensation payment" (which the Employer used in their framing of the issue) usually refers to payments made to employes by the State worker's compensation fund. When the Employer used the phrase though, it was not referring to payments made to an employe by the State worker's compensation fund, but rather was referring to payments made to employes by the County (and its third party administrator) pursuant to Article 12, A.

employee has at least one (1) year of departmental seniority. For eligible employees, absence from work for up to 1 year shall not be charged against accrued sick leave.

B. If the employee is eligible for the above full salary (e.g. based on previous 52 weeks of earned wages and according to the State Worker's Compensation compensation formula) for one (1) year and receives an additional payment for Worker's Compensation, the full salary amount (per the above section 1) shall be reduced by the amount of Worker's Compensation payments.

C. Disabled employees may be required to perform such other duties as the Administrator may provide. Preference will be given to light duty assignments at the normal worksite.

D. An injured employee with either less than one (1) year of department seniority or an injured employee who exceeds one (1) years of disability shall have the choice of one of the following methods of payment while on Worker's Compensation:

1. shall receive their Worker's Compensation payment only; OR

2. shall receive their Worker's Compensation payment and upon request shall be issued a supplemental check for an amount totalling the employee's normal full wages. This supplemental payment shall be charged against the employee's accumulated sick leave and shall be paid only to the extent of eligible sick leave.

. . .

ARTICLE 26.

SHORT AND LONG TERM ABSENCES:

. . .

Section 2. Personal Leave of Absence. A personal leave of absence is defined as an authorized absence from work by a regular full time or part time employee, which is not covered by paid sick

> leave, vacation, holidays or any other reasons provided for in the attendance policy.
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> . . .
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> During the period of absence, the employee shall not engage in gainful employment. Failure to comply with this provision shall result in the complete loss of seniority rights.
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> . . .

BACKGROUND

As one of its governmental services, the County previously provided paramedic services to County residents with County employes. These paramedics were represented by the Union. Effective December 31, 1995, the paramedics were privatized and the paramedic bargaining unit ceased to exist. The instant grievance was filed and processed before the paramedic bargaining unit ceased to exist.

FACTS

Linda Salveson began her employment as a paramedic with the County in 1981. In December, 1994, Salveson injured her back while performing her duties as a paramedic. This injury subsequently resulted in her being unable to perform her duties as a paramedic. She ceased working as a paramedic for the County on a date not identified in the record. Salveson started receiving payments pursuant to Article 12, A of the labor agreement effective April 11, 1995. These payments were made by the County and its third party administrator (Crawford Insurance Company); these payments did not come from the State worker's compensation fund.

Beginning April 13, 1995, Salveson worked as a licensed practical nurse (LPN) at Superior Memorial Hospital. She worked at the hospital in this capacity from that date till August, 1995. The hospital ultimately paid Salveson $5,155.33 for her work during this time frame (i.e. April to August, 1995). Insofar as the record shows, Salveson did not work as a paramedic for the County during this five month time frame.

In mid-May, 1995, Salveson discovered that the County and Crawford Company were offsetting the payments they were making to her pursuant to Article 12, A by her earnings from the hospital. Since Salveson was ultimately paid $5,155.33 by the hospital, the County and Crawford ultimately offset that same amount from the payments they made to her. If the County and Crawford had not offset the payments they made to Salveson by her hospital earnings, they would have paid her $18,586 (i.e. her annual salary) pursuant to Article 12, A. However, because they offset her hospital earnings, the County and Crawford ultimately paid Salveson

$13,004.

Salveson grieved the offsetting on a date not identified in the record. In a June 16, 1995 letter responding to the grievance, County Personnel Director John Mulder asserted that the grievance was untimely.

At a date not identified in the record, Salveson returned to work for the County in a light duty capacity. She subsequently resigned that position and completely severed her employment with the County sometime prior to the arbitration hearing.

The record indicates that Salveson was off work for four months in 1994 and three months in 1988 due to work related injuries. On both occasions she had outside employment and earnings while off work. The outside employment was that she worked as a paramedic instructor at Wisconsin Indianhead Technical College (WITC). The money that she earned from WITC was not offset against the payment she received from the County pursuant to Article 12, A. Thus, she got her full salary from the County while off work due to her work related injuries and the money she earned from WITC was not offset against same.

The record also indicates that two other paramedics in the department have held other employment while off work due to work related injuries. One employe (Jim Springsteel) worked in a family owned greenhouse and the other employe (Chuck Pettengill) worked as the Douglas County Medical Examiner. The money that each earned from their other employment was not offset against the payment each received from the County pursuant to Article 12, A. Thus, both got their full salary from the County while off work due to their work related injury and the money they earned from their other employment was not offset against same.

The instant situation with Salveson is the first time the County and its worker's compensation third party administrator have offset the payment made to a paramedic pursuant to Article 12, A by the paramedic's earnings from another job. Conversely, it is also the first time a paramedic who was off work due to a work related injury did not receive their "full salary" from the County.

POSITIONS OF THE PARTIES

The Union initially contends that the grievance was timely filed and therefore is procedurally arbitrable. In its view, it complied with the contractual grievance procedure. In the alternative, the Union asserts that the grievance alleges a continuing violation of the contract. It therefore requests that the arbitrator address the merits of the grievance. With regard to the merits, the Union's position is that the money Salveson earned from working at the hospital should not be offset against the Employer's payments under Article 12, A. To support this premise, the Union relies on the phrase in Article 12, A that provides: ". . . the employee shall continue to be

paid his/her fully salary for a period not to exceed one (1) year . . ." According to the Union the phrase "full salary" is clear and unambiguous in mandating that the Employer is to pay the employe's full salary when the employe is off work due to a work related injury. Thus, the Union reads the phrase "full salary" to not allow an offset for outside wages. The Union also notes that this is the way Article 12, A has been previously applied when other bargaining unit employes were off work due to work related injuries (namely, that their outside earnings were not offset against the Employer's Article 12, A payments). The Union therefore contends the Employer violated Article 12, A when it did not pay the grievant her full salary during the time that she was unable to perform her duties as a paramedic as a result of an injury arising out of her duties as a paramedic. In order to remedy this alleged contractual breach, the Union asks the arbitrator to uphold the grievance and make the grievant whole by paying her the money which the Employer previously offset. The Union further asks the arbitrator to retain jurisdiction over the matter until the Employer has complied with the award. To support this request, it notes that the bargaining unit ceased to exist on December 31, 1995.

The Employer's position is that it did not violate the contract when it offset the money Salveson earned from working at the hospital against the payments it made to her pursuant to Article 12. It makes the following arguments to support this proposition. First, it contends it would be poor public policy to grant the grievance. In the Employer's view, allowing employes to go and find second employment while receiving payments from the Employer pursuant to Article 12, A "would encourage employes to get a work related injury so they could then receive their full salary from the County while going out to earn a second salary." Second, it also cites the portion of Article 12, B which provides that payments for worker's compensation will be "according to the State worker's compensation formula." It then goes on to cite a provision in the State Worker's Compensation Act, namely Section 102.43(6)(c), which provides that wages ". . . from other employment obtained after the injury occurred shall be considered in computing benefits for temporary disability." According to the Employer this provision mandates that it count outside income in determining Salveson's payments under Article 12. Next, it calls the arbitrator's attention to the fact that it does not allow employes on leaves of absence to work. It notes that the contractual basis for same is Article 26, Section 2, which states: "During the period of absence, the employee shall not engage in gainful employment." The County reasons that since it does not allow employes on leaves of absence to work elsewhere, employes off work due to work related injuries should not be allowed to work either and "receive an economic windfall by double dipping." Finally, the County contends that no binding past practice exists relative to an employe who suffers a work related injury and then goes out and finds other employment while on a temporary disability. The County argues in the alternative that if a past practice is found to exist, the scope of that practice should be narrowly construed by the arbitrator. The Employer distinguishes the fact that it did not offset the outside wages of employes Springsteel and Pettengill on the grounds that their outside employment preceded the date of their injury, while Salveson's employment at the hospital occurred after her work related injury. In conclusion, the Employer submits that it did not violate the contract by offsetting the payment it made to Salveson pursuant to Article 12 by her earnings from her hospital employment. It therefore asks that the grievance

be denied.

DISCUSSION

Procedural Arbitrability

The record indicates that when County Personnel Director Mulder initially responded to the grievance, he asserted that it (i.e. the grievance) was untimely. Subsequently though, the matter of timeliness was never raised again by the County. Specifically, it was not raised as an issue at the hearing and the County did not address timeliness in their brief. Since the County did not raise timeliness as an issue at the hearing or address it in their brief, the undersigned finds that any timeliness objection by the Employer to the grievance has been waived. It is therefore held that the instant grievance is procedurally arbitrable and properly before the arbitrator.

Merits

The factual context for this matter is as follows. The grievant injured her back while performing her duties as a paramedic. This injury subsequently resulted in her being unable to perform her duties as a paramedic. She therefore ceased working as a paramedic for the County. While she was off work due to her work related injury, the County paid her pursuant to Article 12, A. While drawing this payment, she worked at a local hospital as an LPN.

The initial focus of inquiry is whether Salveson could work elsewhere when she was off work due to her work related injury. Some labor agreements specifically prohibit employes who are off work due to work related injuries and being paid by their employer from working elsewhere and in essence drawing a second salary. The instant labor agreement does contain a prohibition against working elsewhere while on a leave of absence. This provision is found in Article 26, Section 2 where it states: "During the period of absence, the employee shall not engage in gainful employment." However, the instant labor agreement does not contain a similar prohibition against working elsewhere while off work due to a work related injury. The absence of a contractual prohibition against working elsewhere while off work due to a work related injury (like the one that exists in Article 26, Section 2 prohibiting working while on a leave of absence) means that employes are not contractually precluded from working elsewhere while off work due to work related injuries. Consequently, Salveson was not contractually precluded from working at the hospital while she was off work from her job as a paramedic due to her work related injury.

It is the County's view that if an employe works elsewhere while off work due to a work related injury (as happened here), it can offset the employe's outside earnings against the payment it makes to the employe pursuant to Article 12, A. That of course is what the County did here, specifically offsetting the amount of money it paid Salveson by her earnings from the hospital. At

issue is whether this offset comports with the labor agreement or violates same. The Employer argues the former, the Union the latter.

In the discussion that follows, attention will be focused first on the applicable contract language. If the language does not resolve the matter, attention will be given to evidence external to the agreement, namely an alleged past practice.

Both sides agree that the contract language applicable here is Article 12 entitled "Worker's Compensation." The record indicates this language has been in the parties' labor agreement since at least 1981. An overview of that article follows. Section A provides in pertinent part that if an employe with at least one year of seniority is disabled and "thereby prevented from performing his usual duties . . . as a result of an injury . . ., the employee shall continue to be paid his/her full salary for a period not to exceed one (1) year from the date of such injury or disability." This section establishes that employes with at least one (1) year of seniority who have a work related injury which prevents them from working as a paramedic will still be paid their "full salary" for a period of one (1) year from the date of the injury. Put another way, if an employe with at least one (1) year of seniority is injured on the job, the employe will continue to be paid their full salary for a period of one (1) year from the date of the injury. In essence, this is a supplemental pay provision. The salary paid to employes pursuant to this section is paid by the Employer (i.e. the County); not the State worker's compensation fund. Section B provides that if the employe is eligible for the "full salary" referenced in Section A (i.e. the supplemental pay) and also "receives an additional payment for worker's compensation, the full salary amount (per the above Section 1) shall be reduced by the amount of worker's compensation payments." Although the phrase "worker's compensation" is not defined, it is implicit that it refers to payments received from the State worker's compensation fund; not payments received from the County (as is the case with Section A). Section B therefore establishes that if an employe receives worker's compensation from the State worker's compensation fund in addition to his/her full salary from the County, then their full salary will be reduced by the amount of their worker's compensation payments. In other words, the employe's worker's compensation payments will be offset against their full salary so that they don't get both worker's compensation benefits and supplemental pay. Section C provides that those employes with a work related injury "may be required to perform . . . light duty assignments." Finally, Section D establishes a procedure for compensating injured employes with less than one (1) year of seniority or who have an injury which lasts longer than one (1) year.

Sections C and D are inapplicable here because this case does not involve either light duty assignments (Section C) or an employe with less than one (1) year of seniority (Section D). Additionally, Section B is inapplicable here because the payments which the grievant received were from the County; not from the State worker's compensation fund. 2/

2/ Since the payments which the grievant received were not from the State worker's compensation fund, the State Worker's Compensation Act is not applicable here either.

This leaves Section A as the provision applicable here. A review of that section reveals that it does not mention whether outside wages earned while the employe is off work due to a work related injury are to be offset or not. The article simply does not say one way or the other. Thus, Section A is silent on this specific point. 3/

Given this contractual silence concerning whether an employe's outside wages can be offset from the Employer's payments under Section A, attention is turned to other evidence in the record to help fill this gap in the language. That evidence involves an alleged past practice. Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract language contains gaps or is silent on a particular point. In order to be binding on both parties, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

The undersigned is satisfied that a practice exists here. The record indicates that on at least four prior occasions, paramedics who were off work due to a work related injury had earnings from other employment. In all four instances their outside earnings were not offset against the Employer's payment to them pursuant to Article 12, A. The Employer attempts to distinguish two of those situations from that present here. In this regard, it notes that the outside employment of Springsteel and Pettengill preceded the date of their injury while Salveson's employment at the hospital occurred after her work related injury. The undersigned does not find this factual difference sufficient to distinguish what happened there from what occurred here. However even if it was, the grievant's previous experience is directly on point. Prior to this she was twice off work due to work related injuries and had outside earnings both times. Her outside earnings were not offset against the payment which the County made to her pursuant to Article 12, A. Thus, she drew her "full salary" from the County both times and her outside earnings were not offset. The undersigned believes it is noteworthy that the Employer does not even attempt to distinguish her

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3/ As previously noted, Section B provides for offsetting, and that is what the Employer relies on to justify offsetting the grievant's hospital wages. The problem with this contention though is that what is offset under Section B are the worker's compensation payments received from the State worker's compensation fund; not payments received from the County. Here, the payments the grievant received were from the County, not the State worker's compensation fund. Thus, any offsetting of outside wages permitted by Section B does not apply to Section A and the payment made by the County pursuant thereto.

prior experiences from what happened here. It is therefore held that these four instances establish a binding past practice. This practice demonstrates the way Article 12, A has come to be mutually interpreted, namely that if an employe is off work due to a work related injury and works elsewhere while off work, the employe's outside earnings are not offset against the payment made by the County to the paramedic pursuant to Article 12, A.

Application of that practice here means that the County should not have offset the grievant's earnings from the hospital against the payment it made to her pursuant to Article 12, A. However since the Employer so, it violated Article 12, A as interpreted by the parties themselves via their past practice.

In summary then, it is held that Article 12, A is silent concerning whether an employe's outside wages can be offset from the Employer's payments to the employe under Article 12, A; that a past practice exists concerning same; and that the practice is that employes who are off work due to a work related injury and have outside earnings do not have the outside earnings offset against the Employer's payment to them pursuant to Article 12, A. This past practice establishes how Article 12, A has come to be interpreted by the parties themselves. Applying that interpretation here, it has been held that the Employer should not have offset the payment it made to Salveson pursuant to Article 12, A. Instead, she should have received her "full salary." While the County argues this result makes "poor public policy," it is emphasized that this conclusion has not been based on public policy determinations, but rather on the contract language as supplemented by the parties' past practice.

In order to remedy its contractual breach, the Employer is directed to pay Salveson the amount it previously offset. The record indicates that the amount offset by the County was $5,155.33. The County shall pay that amount to Salveson. Since the paramedic bargaining unit has ceased to exist, the undersigned will retain jurisdiction for at least sixty (60) days from the date of this Award in order to resolve any disputes concerning the implementation of this Award or other remedial issues.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County violated the collective bargaining agreement by not paying the grievant her full wage as a paramedic during the time she was unable to perform her duties as a paramedic due to an injury on the job. In order to remedy this contractual breach, the County shall pay the grievant the amount it offset (i.e. $5,155.33).

The undersigned will retain jurisdiction for at least sixty (60) days in order to resolve any disputes concerning the implementation of this Award or other remedial issues.

Dated at Madison, Wisconsin, this 30th day of May, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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