BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WASHBURN COUNTY PROFESSIONAL, TECHNICAL & CLERICAL EMPLOYEES LOCAL 2816, AFSCME, AFL-CIO and WASHBURN COUNTY	Case 32 No. 53119 MA-9239

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1993-95 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by the Union on behalf of Jeanette Reitzel, concerning overtime pay.

The undersigned was appointed and held a hearing on February 13, 1996 in Shell Lake, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, the Union filed a reply brief, and the record was closed on June 5, 1996.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement went it refused to pay Jeanette Reitzel for hours worked on behalf of the County?

2. If so, what remedy is appropriate?

The Employer proposes the following:

1. Did the County violate the collective bargaining agreement by not providing the grievant additional compensation over and above her on-call pay for a telephone call taken at her home while on call which did not require her to leave her home?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 12 OVERTIME

. . .

Section 12.02 Professional employees shall receive their regular rate of pay for all hours worked in excess of thirty-seven and one half (37 1/2) hours per week.

Instead of this pay, professional employees may, with the approval of their immediate supervisor, take compensatory time off at the rate of time and one half (1 1/2). Compensatory time shall not accumulate beyond thirty-seven and one half (37 1/2) hours. this may be extended by mutual consent between a given employee and the supervisor. Overtime hours shall be authorized only by the immediate supervisor and the use of compensatory time shall not be unreasonably denied.

Section 12.03. Employees called in to work outside of their regular work shift shall be guaranteed a minimum of two (2) hours pay. Qualified employees may request to share and be entitled to an equal share of department overtime.

. . .

ARTICLE 26 MISCELLANEOUS

. . .

Section 26.03. On Call Pay: Sixty (60) cents per hour for Nurses and Social Workers and Seventy-five (75) cents per hour effective

January 1, 1995.

DISCUSSION:

The facts are undisputed. The grievant is one of five social workers who for many years have rotated the duty of taking calls on an on-call status, at the rate of one employe a week. Estimates of how often the on-call social worker receives phone calls varied; the grievant estimated that she has received one to four calls a week which result in call-ins (i.e. she leaves her home to perform related work). Joan Wilson, another social worker, estimated that she gets "called out" about once every three weeks of on-call service.

Dennis Boland, Director of Social Services, testified without contradiction that the sole work that is supposed to be referred to the on-call system is that which is required by statute, which is juvenile court intake work. All other calls which come outside office hours are considered by the department to be "inappropriate" calls, and the department has worked with the Sheriff's Department to try to keep these to a minimum. Nevertheless, some calls which do not relate to juvenile court intake problems do end up on the telephone of the on-call social worker. These calls typically do not require leaving home, and often are dealt with in a few minutes.

On June 18, 1995, the grievant was the on-call social worker, and received a call at home from the Sheriff's office. The Sheriff's deputy involved requested the grievant to call a man who was concerned with the care his children were getting while living with his wife, an issue which was not related to juvenile court intake. The grievant called the citizen involved and explained what his rights were and how he would have to pursue them, and then called the Sheriff's Department back to relate the substance of the discussion to them. The grievant described this without contradiction in testimony as a "not particularly unusual situation", but also testified that in this instance the call took 20 minutes.

The grievant testified that about April of 1995, another social worker had told her that under the Fair Labor Standards Act, they were being paid the 75 cent per hour rate specified in the Agreement solely for being on call, but that if any actual work took place they were supposed to be paid for that. It is undisputed that the five social workers who worked on call subsequently agreed amongst themselves that they would submit claims for the time if a call or combination of calls exceeded 15 minutes. The grievant's June 18 call is merely the first to arise which met those criteria, and thereby became the test case. Her June 22, 1995 claim for .3 hours at time and one-half for compensatory time was marked at the bottom of the form "phone call time on-call", and was denied by Boland in a June 26 memo. Subsequently, on September 13, 1995, Joan Wilson filed a request for compensatory time for .4 hours for September 2, with the hand-written notation at the bottom "Juvenile in custody - phone time with officer making arrangements for release". Wilson testified without contradiction that she did receive this compensatory time. The following day, Joyce Juza, a third social worker, requested .5 hours at time and one-half (for a resulting .75 hour) for August 25, with the hand-written notation "on-call Juv. ct. intake. Beeped and returned to Sheriff's office. Phone time with referring party and officer". Juza testified that she did return to the Sheriff's office from half-way home, having received the call on the beeper while she was in the car. The work which resulted, however, was on the telephone with a nurse.

Boland testified that he okayed the Juza comp time request because Juza returned to the Sheriff's office, and that in his view this was not simply phone time. Boland acknowledged approving Wilson's request, but stated that he thought at the time it was for a call out and that this was an error on his part. Boland added that he reviewed 168 such slips prior to the hearing, all of which had been filed in 1995, and Wilson's was the only one which approved time for telephone call time. Boland stated that he had approved Wilson's request because he was under the impression that what it referred to was a meeting with a juvenile in custody, adding that he tends to trust the employes to do it right and that he had paid no attention to the fact that both Wilson's and Juza's requests did not claim two hours, which each would have been entitled to for a call-out.

All three of the social workers testifying agreed that prior to about April of 1995, they had all been aware that the County did not pay beyond the 75 cent on-call rate for time spent on the telephone from home while on-call, regardless of the length of the calls. Hartmann testified that at a Personnel Committee meeting on the grievance, he indicated that the Union was not going to claim for every call and that the Union considered 15 minutes a reasonable minimum to claim for.

The Union contends that Article 12.02 clearly requires that "professional employes shall receive their regular rate of pay for all hours worked in excess of 37 and one-half . . ." and that the County has pre-authorized any resulting overtime work by placing the social workers on call. The Union contends that the simple facts of the case are that the grievant spent significant time on the telephone working in this case, and that the County has denied her pay for this work in the face of the clear and unambiguous language of Section 12.02. In its reply brief, the Union contends that the County's argument that there is a binding past practice to the contrary should not be given weight, because the Union is doing nothing more than to attempt to enforce the clear and unambiguous language of the Agreement. The Union notes that in setting a minimum of 15 minutes, the grievant and Union are attempting to be reasonable, and that if the County does not appreciate this, the appropriate answer would be to bill for all such time, even one-minute phone calls. The Union notes that even after being warned in advance that the Union would now take the position that Article 12.02 required such pay, and after denying such pay to the grievant, Boland did pay for telephone time as shown in Union exhibits 1 and 2. The Union contends that the past practice referred to by the Employer is therefore not as clear and consistent as the Employer would argue. The Union requests that the grievant be paid at straight time for the time involved on June 18, 1995.

The County contends that clear and unambiguous contract language supports its position. The County argues that the language in Section 12.02 is merely general language, which is clearly superseded by clauses more specific to on-call and call-in pay. The County argues that with respect to on-call duties, the parties have bargained Section 26.03, which provides 75 cents per hour for all on-call hours. With respect to call-ins to work while on-call, Section 12.03 provides a two hour minimum call-out pay. The County contends that its interpretation of the Agreement gives effect to all of these clauses, while the Union's would make some of them meaningless. The

County further contends that an unequivocal, clearly enunciated and acted upon, and readily ascertainable past practice exists here, which supports the County's view should the contract language be found ambiguous. The County notes that all three social workers to testify admitted that they had never been paid for telephone time while on-call prior to 1995, and that Boland testified to the same effect. The County argues that the fact that the social workers were subsequently able to "slip two requests past" Boland should not change this result. The County argues that Boland could reasonably have interpreted Union Exhibit 1 as a call-out because it contained the phrase "juvenile in custody", while in the Juza incident the phrase "returned to Sheriff's office" indicates a call-out. The County argues that both incidents were clearly "set-ups" because they occurred after the meeting of five social workers during which they decided unilaterally to implement their 15 minute rule. The County requests that the grievance be denied.

I find that the most appropriate way to frame the issue is "Did the County violate the collective bargaining agreement by denying compensation beyond that provided by Section 26.03 of the Agreement to the grievant for telephone time on June 18, 1995?"

I do not find Article 12.02 to have the clear meaning ascribed to it by the Union. If read alone, this clause might indeed be interpreted as providing for compensation beyond thirty-seven and one-half hours at the employe's straight time for anything that could be regarded as "work". Yet the purity of this argument is immediately cast into doubt by the fact that some kinds of "work" are clearly not compensated at straight time beyond thirty-seven and one-half hours. The two obvious examples are call-outs, which in the following section of the Agreement command a two-hour minimum; and the on-call pay of 75 cents per hour. Clearly, it requires some analysis of the meaning of the word "work" to provide any explanation of why there would be a 75 cent per hour rate. If the Union's argument were taken to its logical conclusion, either the Employer is paying 75 cents per hour for nothing (on the assumption that on-call status involves nothing describable as "work" at all), or the straight time rate should be paid for all hours spent on call, on the grounds that this does constitute some form of "work". Both results, of course, would be absurd. It is widely understood that the status of being on-call occupies a kind of intermediate position between working and not working, and the parties have negotiated compensation for this intermediate status.

Reading all of the articles of the Agreement together, therefore, the phrase "hours worked" in Article 12.02 appears not to be taken literally. I find the past practice of the parties to be a reliable guide to the interpretation of the resulting ambiguity.

It is clear from the testimony that until social workers began to believe in the spring of 1995 that phone calls might be compensable beyond the on-call standard rate, they had never been paid for such time. It is also clear that it was a part of both parties' expectations for many years that no such pay would be forthcoming, and I find that Boland's explanations of the two instances in which such time subsequently was paid are credible. In a setting in which 168 such slips are submitted in a single year, with scrawled notations at the bottom, the fact that one or two may be

paid contrary to the general policy is not unheard of. Furthermore, both slips contained remarks which, if specific attention was not drawn to them, could lead the observer to believe that some additional work away from home was involved. Indeed, in one of the two, a reasonable argument could be made that the time amounted to a shift extension, in which the employe clearly did return to the sheriff's department at least briefly. I find the remaining incident to be isolated and not representative of the weight of the past practice.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County did not violate the collective bargaining agreement by denying further compensation to the grievant beyond the 75 cent per hour on-call rate for June 18, 1995.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 23rd day of August, 1996.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator