BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CLARK COUNTY COURTHOUSE EMPLOYEES,
LOCAL 546-B, AFSCME, AFL-CIO

and

CLARK COUNTY

Case 88
No. 52282
MA-8899

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appeared on behalf of the Union.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, #205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the County.

## ARBITRATION AWARD

On February 24, 1995, Clark County Courthouse Employees, Local 546-B, AFSCME, AFL-CIO and Clark County filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint one of two of its members to hear and decide a grievance pending between the parties. The matter was assigned to Karen J. Mawhinney, a member of the Commission's staff, who engaged in an unsuccessful effort to mediate the dispute. Thereafter, the matter was assigned to William C. Houlihan, another member of the Commission's staff, who engaged in a second unsuccessful effort to mediate this dispute. On July 17, 1995, the Commission appointed the undersigned to hear and decide the matter. A hearing was conducted on April 22, 1996, in Neillsville, Wisconsin. Briefs and reply briefs were filed and exchanged by June 18, 1996.

There is a dispute as to scope of this proceeding, but it essentially addresses the right of the employer to determine the hours of work assigned to part-time Rehabilitation Supervisors.

## BACKGROUND AND FACTS

The Union and the County are signatories to a collective bargaining agreement, a portion of which establishes the terms and conditions of employment of bargaining unit members titled Rehabilitation Supervisors. The Rehabilitation Supervisors, also referred to as Job Coaches, work at the Adult Development Services (ADS), a state-mandated, county-operated vocational rehabilitation facility located in Greenwood, Wisconsin. The mission of the ADS is to provide vocational education, training and employment opportunities for adults with disabilities. ADS uses

two service models: sheltered employment (facility-based) and supportive employment (community-based). Sheltered employment requires that work be brought to the facility to be performed by client workers. Supportive work requires that jobs be found for the clients in the community. Approximately one-third, or 35, of ADS clients are employed under the supportive work model.

Phyllis Goeke, director of the ADS, testified that the community-based initiative is the preferred, and growing model. Goeke testified that in order to develop community work opportunities she approaches businesses and essentially markets the program. As a part of her outreach initiative, she meets with potential host employers, and with their participation develops jobs. Of necessity, jobs must be suited to both the needs of the host business and to the needs and abilities of clients. Once a job has been created, a coach, or Rehabilitation Supervisor, is assigned. It is the coach's role to train, supervise, and support client workers in their job setting. The supported work model has existed in Clark County since 1985.

One factor in the development of a community-based job is hours of work. Goeke testified that client preference essentially dictates when the hours will be available for the client workers. There is evidently some negotiations which occur, but her testimony was that ultimately the employer's needs dictate the hours of work.

The collective bargaining agreement, the relevant portions of which are set forth below, contains a number of provisions, including provisions which define hours of work of bargaining unit members. As a practical matter, the record in this proceeding establishes that hours of work for Rehabilitation Supervisors have been regularly-scheduled with little or no regard for the contractual provisions. A number of work schedule exhibits indicate that hours are regularly scheduled outside the parameters of any contractual definition of hours of work. This evidence is corroborated by testimony coming from both management and bargaining unit member witnesses, all of whom indicated they regularly work outside the parameters of the contractually defined work day. These scheduling practices have existed for years with no formal complaint, or grievance. They essentially reflect an environment where the employer and employes have worked together to provide the service as all of them understood the service to require.

This dispute arose over the hours of work assigned to certain Rehabilitation Supervisors in connection with a supported employment contract the County secured with the Weather-Shield Company. That contract called for supported workers to sweep 80,000 square feet of floor space. The Company wanted and secured an agreement that the work be done at night. The contract took effect on September 6, 1994, was for five days per week beginning at approximately 4:30 p.m. and finishing around 9-9:30 p.m. The ending time was late, even measured against the informal standards of the workplace. The work supported 45 client hours, 4-5 clients, and approximately 15 Rehabilitation Supervisor staff hours. Three bargaining unit employes, Dave Larson, Sue Karo and Sheri Trunkel, were assigned to the project. Trunkel and Karo are grievants in this proceeding.

Both Trunkel and Karo objected to the late night hours of the Weather-Shield project.

Each of them asked that they not be assigned these hours and each of their requests were denied. Initially, members of the management team asked that they give the project a chance and see how it would work for a short term. Both agreed to do so. At some point in time, both Trunkel and Karo determined that the assignment was not temporary, and in fact would become permanent. On November 4, 1994, approximately 60 days after the initiation of the Weather-Shield contract, Trunkel and Karo filed a joint grievance protesting the hours of their assignment. The grievance sets forth a number of allegations including allegations that the grievants are being coerced, are being verbally abused, that they are being required to work split shifts, that the employer refuses to bargain with the Union with respect to hours of work, and that the hours they are being obligated to work are not consistent with the terms of the Union contract. The grievance was denied and the employes were directed to continue to work their scheduled hours.

On or about November 10, 1994, Ms. Karo advised her supervision that she was no longer able to work the late night hours. A discussion ensued between Karo and Goeke wherein Goeke advised Karo she was a probationary employe and subject to a "work now, grieve later" rule. Goeke indicated that she also advised Karo that she should learn more about her contract and protect herself. Ultimately, Karo indicated she simply could not do the job, and was terminated. This conversation occurred in the presence of Union president Jim Wann. Karo grieved her termination on November 14, 1994. The text of her grievance reads as follows:

> Management abruptly terminated grievant without just cause. The Grievant was verbally abused by her supervisor, threatened with unjustified discipline if she would not work a permanent split shift, night hours not consistent with Union contract. No attempt was made by management to notify the Union or the grievant that these changes would be made.
>
> Management refuses to recognize the Union as the exclusive bargaining agent for the purpose of conferring and negotiating wages, hours and conditions of employment. Management forced grievant to work night shift, under threats of discipline without notice to Union or to grievant. The County does not have the right to institute split shifts. Management did, with premeditation, violate Article 1.1 and Article 6, 6.2(A), thereby causing and inflicting grievant with great mental anguish and suffering. Management, with aforethought, breached the Union contract as stated above and any other applicable provisions. The grievant shall be made whole in all aspects, including reinstatement, without prejudice, wages and benefits. All benefits and wages lost by grievant shall be returned to grievant.

In what appeared to be virtually simultaneous transactions, the County Board denied the

Karo grievance in its January 30, 1995 meeting, and the Union withdrew the grievance. The County's rejection of the grievance was communicated to the Union by letter dated February 1, which provided as follows:

> On January 30, 1995, the personnel committee denied the Sue Karo grievance on the grounds that as a probationary employee, she has no recourse to the labor contract's grievance procedure.

In what appears to be a virtually simultaneous correspondence, the Union, in a letter dated January 31, 1995, advised the County of the following:

> Please be advised of the Union's desire to withdraw the above-referenced grievance (the reference is to the Karow 11/14/94 grievance). However, be further advised of our intention to address this problem as part of the remedy we will be seeking in the work schedule grievance (11/4/94).
>
> We believe that Ms. Karo was discharged as a direct result of her unwillingness to agree to the contractually improper work hour assignment by the employer which the Union has challenged and the work schedule grievance (please note that she was one of the grievants in that particular matter).

After several efforts at settlement the matter proceeded to hearing and is pending before me for decision.

ISSUE

The parties were unable to stipulate to the issue. The parties disagree as to the scope of the proceedings. The Union believes the issue to be:

> Did the Employer violate the collective bargaining agreement when the Employer required part-time Rehabilitation Supervisors to work outside 10:15-4:15 work day? If so, what is the appropriate remedy?

The County believes there are four issues framed by this proceeding:

1.) Is Sue Karo an appropriate grievant with respect to the hours of work grievance?

2.) Have the parties established a past practice with respect to

assigning split shifts and/or assigning a part-time Rehabilitation Supervisors' hours of work?

3.) If so, did the County violate that practice with respect to the assignment of work to the grievant Sheryl Trunkel?

4.) If so, what is the appropriate remedy?

This Award will address the foregoing issues.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II - MANAGEMENT RIGHTS

2.1 Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.

2.2 Without limiting the generality of the foregoing, this includes:

. . .

D. The determination of the size of the work force; the assignment of work of workers; the determination of policies affecting the selection and training of employees and the right to hire, recall, transfer, promote, lay off, suspend or dismiss employees for just cause.

. . .

G. The scheduling of operations and starting time of shifts;. . .

. . .

Provided, however, the Union does not waive the right to bargain the impact or the exercise of these management rights on wages, hours, and conditions of employment.

. . .

## ARTICLE III - GRIEVANCE PROCEDURE

3.1 A grievance is defined to be any matter involving an alleged violation of this Agreement by the County as a result of which an aggrieved employee(s) maintains that their rights or privileges have been violated by reason of the County's interpretation or application of the provisions of this Agreement.

3.2 A grievance shall not be considered if based upon a condition or event that has not occurred or existed, or if the employee knew or reasonably should have known to exist, during the ten (10) working days immediately prior to the date on which the grievance is first presented. Grievances affecting an employee, or group of employees, may be filed by the Union.

The arbitrator shall be notified of his/her selection by a letter from the County or the Union requesting that he/she set a time and place for the hearing, subject to availability of the County and the Union Representatives, and the letter shall specify the issue(s) to the arbitrator. The arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of this Agreement. He/she shall consider and decide only the particular issue(s) presented to him/her in writing by the County and the Union, and his/her decision in writing shall be based solely upon his/her interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of this Agreement, the arbitrator shall so rule in his/her award. The award of the arbitrator shall be final and binding on the County, Union and the employee or employees involved. . .

3.4 . . .In the event of a grievance, the grievant shall continue to perform his or her assigned tasks and grieve the complaint later, provided there is no danger to the health and safety of the grievant.

. . .

3.7 The foregoing procedure shall govern any claim by any employee that he/she has been disciplined without just cause.

. . .

## ARTICLE IV - SENIORITY

4.1 Seniority Defined: Seniority is the continuous service of an employee with the Employer since the last date of hire. The Employer recognizes the principles of seniority and such principles shall be considered when applicable, provided that the employes involved in any decision to which the principle of seniority is applicable meet any necessary qualifications as established by the Employer. Part-time employees shall earn seniority on a pro rata basis.

. . .

4.3 All new employees shall serve a probationary period of twelve (12) months or 2080 hours for part-time employees, during which time they may be discharged by the County without recourse to this Agreement or the grievance procedure. For the purpose of this and other sections of this Agreement, a new employee shall be defined as a person newly hired by the County. Upon satisfactory completion of said probationary period, the employee's seniority shall date back to his/her original date of hire.

. . .

## ARTICLE VI - HOURS OF WORK

6.1 As long as required by the FLSA, this Article is intended to define the normal hours of work and shall not be construed as a guarantee of hours per day or per work period, or as a guarantee of days of work per work period.

6.2 The hours of work shall be as follows:

A. Forty (40) hours per week, Monday through Friday.

. . .

Adult Development Services:
(Full-time) Greenwood: 8:00 a.m. - 4:30 p.m. (1/2 hour unpaid lunch)

| | |
|---|---|
| Janitor/Driver: | 12:00 noon - 8:00 p.m. including a 20-minute paid lunch. |
| Custodian/Maintenance: | 11:30 a.m. - 8:00 p.m. (1/2 hour unpaid lunch) |
| Bus Driver: | 6:15 a.m. - 8:15 a.m. |
| Rehab. Supervisor: | 10:15 a.m. - 4:15 p.m. |
| Rehab. Supervisor - Weekend: | 8:00 a.m. - 2:00 p.m. |

Starting times and finishing times may be adjusted due to emergencies and scheduling needs. This language is not intended to circumvent overtime provisions or give the County the right to institute split shifts. Permanent changes will be negotiated.

These employees will qualify for overtime pay only if they work more than eight (8) hours a day or forty (40) hours a week.

POSITIONS OF THE PARTIES

It is the Union's position that it has demonstrated several flagrant contract violations in this proceeding. In that context, the Union contends that in many respects the only matter for decision is the appropriate remedy. The Union points to Article 6.2(A) and notes that that provision provides as follows: "The hours of work shall be" from 10:15 a.m. to 4:15 p.m. during the week and 8:00 a.m. to 2:00 p.m. on weekends. According to the Union there is no dispute that employes Trunkel and Karo were part-time Rehabilitation Supervisors, subject to these hours of work provisions. There is no reasonable contract construction which permits permanent hours being established beyond 4:30 p.m.

The Union contends that the hours at the Weather-Shield project began at 7:00 p.m. and continued until 10:30 p.m. This occurred after the employes had spent several hours during the work day. Not only is this several hours after 4:15, it also clearly constitutes what is commonly termed a "split shift". Article 6 does permit flexible scheduling. However, it does so on a temporary basis only. It also rather succinctly prohibits split shifts. The Union cites Roberts Dictionary of Industrial Relations (Third Edition, p. 679) for the following premise:

> "A daily work schedule which is not continuous when split into two or more working periods with a substantial time interval between the two" is a split shift.

Trunkel and Karo worked in the daytime, and were then required to return in the evening for the disputed hours. According to the Union, this fits the dictionary definition of a "split shift" like a glove.

The Union contends that the contractual language is clear and unambiguous and cites arbitral authority to the effect that clear and unambiguous language be given effect. The Union suggests that my duty is to apply the language as written. The Union cites further authority to caution me that past practice ought not be used to alter the meaning of clearly-defined contractual provisions. The Union takes issue with the Employer's characterization of its historic practice. The Union contends that what the Employer demonstrated at hearing was a practice of mutually agreeing with individual employes to work hours which deviated from the contract.

The Union contends that the real issue in this proceeding is the remedy. It argues that if I simply direct the Employer to cease and desist violating the contract, the relief would be meaningless and wholly inappropriate. The appropriate remedy, argues the Union, is at a minimum, that employe Karo be reinstated with full back pay and benefits for refusing to be party to the contract violation. Furthermore, the Union argues that employe Trunkel should be paid at a premium rate for all hours worked in the evening for the inconvenience and suffering she has been forced to endure in her private life. The Union contends that a cease and desist order is appropriate as a part of the overall relief. The Union contends that I have wide latitude in formulating remedy and cites arbitral authority to that effect.

The Union contends that the Employer had alternatives which it chose not to pursue. Specifically, the Employer did not have to accept the Weather-Shield contract, the Employer could have assigned a different employe and/or employes to the work site, the Employer could have employed LTEs or temporary employes to perform the work. The Union contends that the Employer was dishonest in initially framing the assignment to Karo and Trunkel as temporary. Finally, the Union notes that employe Karo had been a 13-year employe of the County at the point of her discharge. 1/ It notes the definition of probationary employe makes reference to employes newly-hired.

The Employer contends that Sue Karo is not an appropriate grievant. The Employer contends that Karo was advised, at the point of hire, that her part-time Rehabilitation position required flexibility. She accepted the assignment on that condition. The Employer points to Goeke's testimony as to the conversation between Karo and Goeke and concludes that Karo had

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1/ Karo transferred into her position from another County position.

refused to perform her assignment, and was consequently discharged. Ultimately, the Union dropped her discharge grievance. At no time had the County agreed to fold the termination grievance into the hours of work grievance. The County argues that Karo's refusal to perform assigned work did not fall within any exception to the "work, then grieve" rule. It cites arbitral authority for safety and health hazard exceptions and concludes that no such exception existed.

The Employer contends that the assignment of hours to part-time Rehabilitation Supervisors falls within the County's management rights. The County addresses Section 6.2(A) of the parties' agreement, and notes that the Rehabilitation Supervisor positions involved in the grievance are not full-time positions, and therefore not subject to the 8:00 a.m. to 4:30 p.m. work day. The Employer then points to director Goeke's testimony that the part-time Rehabilitation Supervisory hours of 10:15 a.m. to 4:15 p.m. was a provision bargained expressly for a single part-time Rehabilitation Supervisor, who worked on a pizza-making project. Goeke testified that the work was performed on site at the ADS facility in Greenwood, and that the position was eliminated prior to 1990. She further testified that the 10:15 a.m. to 4:15 p.m. work schedule did not apply to any other part-time Rehabilitation Supervisor positions. The Employer concludes that Article 6 is inapplicable to the part-time Rehabilitation Supervisor positions. Thus, under Article 2 of the parties' collective bargaining agreement the County has the unilateral right to determine services, to assign work and to establish hours of work.

The County contends that the parties' past practice support its position. The record establishes beyond doubt that the County has had a practice, since 1985, of scheduling the hours of work for part-time Rehabilitation Supervisors on a flexible basis, including split shifts. This grievance represents the first time since the advent of community-based supportive work programs in 1985 that the Union has challenged the County's authority with respect to how to schedule hours of work.

In its reply brief, the County cites arbitral authority for the proposition that the failure to act on a right by a party be considered, along with the evidence, to help establish the intent of the parties. The County argues that the Union's failure over the course of many years to bring forth this argument in the face of the Employer's consistent scheduling outside of the contractual hours reflects a mutual agreement that the language does not mean what the Union contends it says.

The County points out the fact that the Union originally alleged a violation of the 8:00 a.m. to 4:30 p.m. provision. The Union later subsequently amended that position, claiming that the 10:15 to 4:15 provision was violated. The County notes that a number of Union witnesses were unclear as to which provision they believed were violated. The County concludes that the confusion on the Union's part with respect to which of the two provisions it believes controls this proceeding undermines its contention that the language is clear and unambiguous as applied to the facts.

The County contends that if the Union should prevail, and ultimately the contract be

construed so that part-time Rehabilitation Supervisors hours are limited to 10:15 a.m. to 4:15 p.m., it would destroy the viability of community-based employment.

The County also takes issue with the propriety of the Union-proposed remedies, and with the authority of this arbitrator to grant such relief.

DISCUSSION

The parties disagree as to the scope of this proceeding and have raised a number of competing issues for decision.

The first question, posed by the Union, is did the Employer violate the collective bargaining agreement? The answer is clearly that it did. Article 6.2 is clear and unambiguous. The Article begins with the declaration, "The hours of work shall (emphasis mine) be as follows. . ." It continues on to specifically address the Rehabilitation Supervisor, whose hours are set forth as "10:15 a.m.-4:15 p.m." The provision goes on to provide "This language is not intended to circumvent overtime provisions or give the County the right to institute split shifts. Permanent changes will be negotiated." All of these provisions have been violated. Rehabilitation Supervisors were regularly and continuously scheduled outside the 10:15-4:15 work day. Violations occurred at both ends of the work day. They occurred with numerous employes involving numerous job assignments. The Employer caused employes to work during the day, and then involuntarily assigned them to work at night. There was a break between the employment periods, thus creating a classic split shift. There were no negotiations with the Union over these altered hours.

The Article does provide that "Starting times and finishing times may be adjusted due to emergencies and scheduling needs." The work assignment to the Weather-Shield project can hardly be regarded as an emergency. The Article does go on to provide some latitude for "scheduling needs". It is unclear to me what the reference to 'scheduling needs' allows. Certainly the Employer and employes have demonstrated a considerable amount of flexibility with respect to the starting and stopping times of their workday. While I regard the term as somewhat ambiguous, I do not regard it as repealing all that goes before and after. That is, the adjustment for scheduling needs flexibility does not repeal the Hours of Work provision set forth above. Nor does it waive the proscription on split shifts and the requirement that permanent changes be negotiated. The Weather-Shield arrangement is as permanent an assignment as is available under the supportive employment model. As such, its hours must conform to the relevant provisions of the collective bargaining agreement. The Employer is not free to unilaterally implement hours outside of those mandated by contract.

Goeke testified that Article 6.2 was negotiated to be applicable to a single individual, who oversaw the pizza-making operation. Her testimony is that that individual left County employment prior to 1990. While her testimony may accurately portray the historical origin of the language,

the language is not, on its face, limited to a single position. The contractual reference to Rehabilitation Supervisor is no more specific than are any other provisions in Article 6.2. On its face, it appears to be applicable to all Rehabilitation Supervisors. The context in which the term is found is as a part of an article, each of whose provisions have general application. Had the parties intended this reference to be to a single position, a more specific reference would have been appropriate. The fact that this provision has survived in the contract after the position it was allegedly created for disappeared, creates an inference that it has an application beyond that single position. According to Ms. Goeke, the position was eliminated some six years prior to the hearing date. It is in essence her testimony that the contractual provision has been surplusage for a number of years. If that is truly the case, the words should have been eliminated. In essence, I am being invited to subtract certain words from the Agreement. Article 3 directs me not "to amend, modify, nullify, ignore. . ." provisions of the Agreement.

The Employer points to Article 2, Management Rights, in support of its claim that it possesses the authority to assign the workforce and the hours of work of employes. That clause would control in the absence of other provisions more specifically to the contrary. Here, I regard Article 6.2 as specifically governing the hours of work of Rehabilitation Supervisors. Thus construed, Article 6.2 controls over the more general residual management's rights contained in Article 2.

The County notes that there was considerable confusion over which provision allegedly controlled this proceeding. The County's contention in this regard is true. Both grievant's documents, and hearing testimony were confused as to whether the applicable hours were 8:00 a.m. to 4:30 p.m. or 10:15 a.m. to 4:15 p.m. I assume that this confusion derives from the fact that the parties regularly ignored the provisions of the contract. It appears to me that both supervisors and bargaining unit employes worked to accommodate one another in their perceived needs of the agency. I believe that hours were scheduled and worked largely without regard or reference to the collective bargaining agreement. However, the fact that people were largely unaware of the contractual provisions do not mean those provisions cease to exist.

The second question, advanced by the County, is whether or not Sue Karow is an appropriate grievant relative to the hours of work grievance. I believe the answer to this question is "yes". This grievance was filed on November 4, 1995. Karow, then an employe, was subjected to an assignment she believed violated the contract. She co-signed the grievance. As of November 4, 1995, there can be no doubt that Karow was an appropriate grievant. Her termination occurred on November 10, 1995. Her prior claim is not erased by virtue of her subsequent termination. I believe the real question to be whether or not her subsequent grievance over her discharge remains viable. That question is appropriately addressed as a part of the remedy portion of this proceeding.

The third question, also advanced by the Employer, is whether or not the parties established a past practice with respect to assigning split shifts and/or assigning part-time

Rehabilitation Supervisors' hours of work. The answer is yes, they have. All of the elements of a practice are present. The Employer regularly assigned employes hours of work outside the contractually provided work day. This was done on an ongoing basis and without consultation with the Union. There was no bargaining over these deviations from the contractualized work schedule. The scheduling practices were pervasive. While there was no declaration of rights made, the scheduling practices affected every bargaining unit employe subject to the contractual provision. All employes were on actual notice. I believe the practice was readily ascertainable over a long period of time, some 10 years.

The Union claims that the evidence demonstrated a series of mutually-agreed upon deviations from the contractual work schedule. That claim is not persuasive. The record demonstrates that the Employer scheduled the hours. I have no doubt that employes accommodated the scheduled hours in order to get the job done. I also have no doubt that the Employer merely scheduled the hours without regard for the provisions of the contract.

Having determined that a long-standing practice exists, I believe a question arises as to the relationship between the long-standing practice and the clear and unambiguous provisions of the contract. I believe the contractual language to be too specific and too clear to be overcome by even a long-standing practice. Each of the parties has advanced arbitral support for their respective positions. That is, the Employer has supplied authority for the premise that a long-standing practice can either override a contractual provision or estop a Union from asserting contractual rights. The Union has advanced arbitral support for the proposition that clear and unambiguous contract language supersedes even a long-standing practice. However, Article 3 directs me to apply and to not modify the words of the contract. I am not free, under Article 3, to conclude that an unwritten practice has amended and deleted the specific hours of work provisions of this contract.

The fourth question, raised by the County, is whether or not the County violated the practice. My answer is that the County did not violate the practice, but rather violated the contract, which, as I have indicated above supersedes the practice.

Finally, both parties have asked what is the appropriate remedy. I am prepared to address the remedy, should that become necessary. In its reply brief, the County invites me to direct the parties to return to the bargaining table to fashion their own remedy, with me retaining jurisdiction during the interim. I believe that to be a constructive suggestion. The parties are far more fit and capable than I am to create a comprehensive remedy to this multi-faceted and complex dispute.

## AWARD

The grievance is sustained.

## REMEDY

I hereby direct the parties to immediately enter into negotiations to create a remedy consistent with the terms of this Award. I will retain jurisdiction in the interim. I will issue a remedy portion to this Award sixty (60) days from the date of this Award unless I am directed to the contrary by the parties, or unless there is a mutually-agreed upon extension of that date.

Dated at Madison, Wisconsin, this 20th day of September, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

## REMEDY

The Employer is hereby directed to cease and desist from scheduling Rehabilitation Supervisors outside the scope of the hours created by Article 6.2. This relief is to be prospective only. The Union has historically acquiesced in the practice of scheduling outside the contractual hours for years. Before the Union is free to terminate this long-standing practice, it must put the Employer on notice. I believe that the grievance and the dispute arising over the Weather-Shield contract leading to this proceeding is sufficient notice. There is no indication of notice prior to that time. The Notice must come from the Union; it is not sufficient for two employes who object to their hours of work to create such Notice. The Employer is free to maintain those hours which existed outside the contractual hours as of the date of the filing of this grievance. That includes the hours worked at Weather-Shield. The Employer is not free to add to those hours, nor to expand hours and existing contracts beyond November 4, 1995.

I do not regard Sue Karow's termination as a part of the November 4 grievance. Her termination was addressed by a subsequent, and independent grievance filed on November 10. That grievance was dropped. There is no indication in the record that the Employer agreed to consolidate the grievances. To the contrary, the only witness testifying in this matter, Personnel Director Renne, testified that there was no agreement to consolidate. On November 4, the grievants complained about the hours of work assigned. As of November 4, there had been no discharge, and so discharge could not be fairly considered a part of the hours of work grievance. Article 3.2 limits grievances. Specifically, it provides that a grievance may not be considered if it is based upon an event that has not occurred. As of November 4, the filing date of the grievance, no termination had occurred. At its inception, the hours of work grievance did not include Karow's termination. The Union dropped Karow's grievance on January 31, 1996, two and one-half months after it was filed. Karow's grievance raised independent claims, issues and defenses. Specifically, it claimed an improper discharge, there was a "work now, grieve later" defense, and there was a dispute as to whether or not Karow was a probationary status employe. I am not prepared to conclude that the Union is free to unilaterally fold all of these matters into a pre-existing grievance.