BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 1947, AFSCME, AFL-CIO

and

MONROE COUNTY (ROLLING HILLS)

Case 126
No. 53651
MA-9414

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Kenneth Kittleson, Personnel Director, Monroe County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned arbitrator to resolve the grievance of Amy Owens Kiernan regarding her wage rate when working out of class. A hearing was held in Sparta, Wisconsin on July 1, 1996, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed briefs by February 24, 1997.

ISSUE:

The issue is:

> Was the Grievant paid the appropriate rate of pay for working as a nursing assistant on August 20, 1995? If not, what is the appropriate remedy?

BACKGROUND:

The parties stipulated to the relevant facts. Amy Owens Kiernan is the Grievant and an employee at the County's nursing and health care facility, Rolling Hills. She was working in the kitchen as a dietary aide. She is certified as a nursing assistant, having previously posted for such a position and worked it for a trial period of 59 calendar days before returning to her kitchen position. She was in the 18-month pay rate while working in her classification in dietary.

On August 20, 1995, Kiernan worked as a nursing assistant for six and one-quarter hours on the PM shift. She was paid at the start or hire rate of grade 3, the grade for nursing assistants. The Union believes she should be paid at the 18-month rate of grade 3 on the wage schedule. The parties agree that the Grievant was paid the shift differential.

Sue Rego was a nursing assistant for 13 years and is now an activity therapy aide. She has almost 17 years of employment at the institution. She still retains her certification for nursing assistant work, and in order to keep such certification, she must work as a nursing assistant once in a while. She did that three times in 1996. She was paid for the nursing assistant work at the 54-month step or top of the pay steps. She also gets the 54-month step for her regular position.

THE PARTIES' POSITIONS:

The Union believes that Rego's testimony shows that the County addressed this issue in the past by paying the rate of pay that an employee has achieved through the steps. Rego was not cut back to a different step but got the top rate of pay. The Union notes that it does not object to employees occasionally working as nursing assistants, and such a policy benefits both parties. The Union objects to the County's interpretation that the steps are for time in a department or classification, rather than time on the job. The contract does not support the County's interpretation. The Union points to the contract's wage schedule and language which refers to wage increases based on the completion of certain numbers of hours, and this language does not say that the hours worked have to be within a classification. If the parties had such an intent, they could have said so.

The County objects to the fact that the grievance appeared to be settled when the Grievant learned from a detailed audit of her payroll check that she was paid the CNA rate and the shift differential, and it notes that the Union has changed the basis for the grievance. The County further notes that the Grievant was working as a casual call CNA, and the County's policy regarding casual call employees is that they are paid at the hire rate for positions they work and get no benefits. The County submits that there are differences between Rego's situation and the Grievant's, because Rego was working to maintain her nursing assistant certification. Rego's testimony should be disregarded. The County says the Union is attempting to apply contract language that governs seniority and benefits to the area of salary progression.

DISCUSSION:

The wage schedule has grades, positions, a hiring rate, a 6-month step, an 18-month step, a 30-month step, a 42-month step, and a 54-month step. Each of the steps after the hire rate has an asterisk next to it, which references the following notation on the bottom of the wage schedule:

> Wage increases for regular part-time employees are implemented upon completion of an equivalent number of hours worked for a full-time employee for each designated step. (6 mo = 1040 hours), (18 mo = 3120 hours), (30 mo = 5200 hours), (42 mo = 7280 hours), 54 mo = 9360 hours).

Article 24, Section 8 states:

> An employee who works on a higher rated job shall receive the going rate of pay of the higher rated job during the period of time so assigned to the higher rate job.

The question in this case is -- what is the "going" rate of pay of the higher rated job? This is a situation where past practice would be helpful, but no strong pattern of past practice is available to help in interpreting what the parties meant by the "going" rate of pay. Rego's rate of pay for working as a CNA would not be helpful here for two reasons. First, she had reached the top step as a CNA previously because she spent 13 years in that position. Secondly, the example of Rego cannot establish a past practice, which needs to be clear and unequivocal, readily ascertainable by the parties, etc.

The County's assertion that the Grievant worked as a CNA from the casual call list and should be paid in accordance with County policy ignores the fact that the Grievant is a regular employee who is a member of the bargaining unit and has rights under it. The Grievant should be paid in accordance with the collective bargaining agreement, specifically Article 24, Section 8. Also, the fact that the grievance changed in mid-stream is of no particular significance, since grievances frequently change and are refined as the parties go through the grievance procedure and learn more about the facts of a case.

The resolution to this grievance lies in the interpretation of Article 24, Section 8 and the meaning of the "going rate of pay of the higher rated job." The better interpretation of this phrase is that the "going rate of pay" is the rate for the step that the employee has achieved through his or her service with the County. If the parties meant to place someone working out of class at the "hiring" rate of pay, they would have said so. Otherwise, an employee who was at a 30 month step or more could be taking a pay cut to work in a higher classification. Surely the parties did not mean that one always steps back into the initial rate of pay, or they would not have used the term "going rate of pay."

The interpretation that would place the Grievant at the 18 month step of grade 3 of the salary schedule is the preferred interpretation, given the fact that when one works out of class into a higher rated job, one usually receives the higher rate for working out of class. This is obviously what the parties meant by the going rate of pay of the higher rated job. In order to place someone at the hire rate or any other place on the salary schedule, the parties would have needed to specify that when one works out of class, he or she gets only the hire rate of pay or the step in accordance with the number of hours worked in that classification.

AWARD

The grievance is sustained.

> The County is ordered to pay the Grievant the difference between the hire rate of pay for grade 3 and the 18 month rate of pay for grade 3 for the hours worked as a nursing assistant on August 20, 1995.

Dated at Elkhorn, Wisconsin this 9th day of March, 1997.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator