BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MONROE COUNTY ROLLING HILLS
EMPLOYEES, LOCAL 1947, AFSCME, AFL-CIO

and

MONROE COUNTY

Case 130
No. 54060
MA-9535

Appearances:

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

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

ARBITRATION AWARD

Monroe County Rolling Hills Employees, Local 1947, AFSCME, AFL-CIO and Monroe County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator from its staff to resolve the Sue Rego grievance. The Commission appointed Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on August 8, 1996, in Sparta, Wisconsin. The parties filed post-hearing briefs by March 3, 1997.

ISSUE:

The Union frames the issue as:

> Did the Employer violate the collective bargaining agreement when it scheduled the grievant to work 32 hours, receive eight hours holiday pay, and have two rest days during the week of December 31, 1995 through January 6, 1996?
>
> If so, what is the appropriate remedy?

The County frames the issue as:

Did the County violate the collective bargaining agreement when it gave the grievant a day off during a holiday week so that the employe's hours did not exceed forty (40) hours for that week?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as:

Did the County violate Article 5 - Hours of the 1995-96 collective bargaining agreement by not scheduling the grievant for five days of work during the week December 31, 1995 through January 6, 1996? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS

The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

B. To establish reasonable work rules and schedules of work;

. . .

J. To determine the kind and amount of service to be performed as pertains to county government operations; . . .

. . .

L. To determine the methods, means and personnel by which county operations are to be conducted.

. . .

ARTICLE 5 - HOURS

Section 1. The standard work day for all employees shall be one consecutive eight (8) hour shift, except where noted below. The standard work week shall be five (5) work days; forty (40) hours each week, and the standard work week shall be Sunday through Saturday. . . .

. . .

ARTICLE 7 - HOLIDAYS

Section 1. The holidays will be: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. There shall be, in addition to the eight (8) above, up to two (2) floating holidays, one (1) each year and one (1) additional in even numbered years, to be taken at the employee's discretion with prior approval by the Administrator or designee. Employees shall be compensated at the regular rate of pay for the holiday when it falls on his/her regular scheduled day off.

. . .

BACKGROUND:

The basic facts of this case are not in dispute. Rego began working at Rolling Hills Nursing Home as a Nursing Assistant on October 29, 1979. On December 1, 1991, the grievant transferred to the Activity Department as an Activity Aide.

The work week at Rolling Hills starts on Sunday and ends on the following Saturday. The grievant usually worked Monday through Friday, except when she worked on Saturday. This usually occurred every third Saturday. When the grievant is scheduled to work on a Saturday, she is scheduled to be off on the previous Monday. During the week of December 31, 1995 through January 6, 1996, the grievant was scheduled off on Sunday, December 31; Monday, January 1 and Wednesday, January 3; and scheduled to work on Tuesday, January 2; Thursday, January 4; Friday, January 5; and Saturday, January 6. The grievant received holiday pay for Sunday, New Year's Day, a scheduled off day.

Rego filed a grievance because she was scheduled off on Wednesday, not a normal day off

in a week when she works Saturday. Although she received forty (40) hours pay for that week, she believed she was entitled to be scheduled to work on Wednesday and receive forty-eight (48) hours pay in that week. The County denied her grievance, claiming the Activity Department, unlike the Nursing Department where she previously worked, did not operate on holidays. It concluded thirty-two (32) hours of work and eight (8) hours holiday pay was a normal week under those circumstances. The Union appealed the grievance to arbitration.

POSITION OF THE UNION:

The Union asserts that, previously, when the grievant has been scheduled to work on a Saturday, she was off on the prior Monday. Therefore, since she was scheduled off on Monday, January 1, 1996, she would normally have worked from Tuesday, January 2, 1996 through Saturday, January 6, 1996. However, because a holiday fell within this week, the County scheduled her off, without pay, on Wednesday, January 3, 1996. This resulted in the grievant receiving forty hours of pay rather than forty-eight hours of pay during this holiday week.

The grievant argues that she is entitled to the additional eight hours of pay because she normally received the extra eight hours when previous holidays fell on her scheduled day off. To prove this, the Union submitted ten of the grievant's previous pay stubs from 1991 through 1995 which showed that she received pay for the holiday rather than being scheduled for an additional day off. The Union asserts that the County established a past practice, which it now has violated by not scheduling Rego for five (5) work days in that week, and paying her additional holiday pay, as in the past, unless she requested otherwise.

In addition, the Union argues that the County's action violated Article 5, Section 1 of the collective bargaining agreement which states that the standard work week will be five work days. The grievant was only scheduled to work four days during the week in question, not five days, as required by Article 5.

Last, the Union contends that since both the Nursing Department and the Kitchen Department employes were not given an alternative day off during a holiday week, it is unfair to do the same to Rego. Thus, it requests the grievance be sustained and Rego be awarded eight (8) hours pay.

POSITION OF THE CITY:

On the other hand, the County argues that the ten pay check stubs which showed an additional eight hours of pay over a four-year period may not have been holiday pay after all. The County asserts that the additional hours may have been pay for hours that she worked as an on-call Certified Nursing Assistant. The County relies on the grievant's testimony that she could not

remember which pay check stubs included hours worked as a Nursing Assistant.

The County also maintains that there were previous instances when the grievant would work thirty-two hours, receive eight hours of holiday pay and be scheduled for a second day off during a holiday week. However, on those occurrences, the grievant did not file any grievances.

Furthermore, the County relies on Article 5, Section 1 of the collective bargaining agreement, "The standard work day for all employees shall be one consecutive eight hour shift, except where noted below. The standard work week shall be five work days; forty hours each week, and the standard work week shall be Sunday through Saturday." According to the language in the contract, the grievant had worked eight hour shifts, was paid for five days and forty hours for the week of December 31, 1995. Therefore, there was not a violation of the contract.

Similarly, the County also relies on the Management Rights clause in Article 3 of the collective bargaining agreement. The Management Rights clause gives the Activity Director the authority to establish reasonable work rules, schedule and assign employes, determine the kind and amount of services to be provided in the Department and determine the methods, means and personnel to provide these services. Therefore, the Activity Director had the discretion to schedule employes to work overtime or assign them to additional days depending on the workload and the availability of other Aides. The County, therefore, asserts that when the grievant previously received an additional eight hours of pay, it was an exercise of the Management Rights clause, and an evaluation of its workload needs.

The County also asserts that past practice is only relevant when the collective bargaining agreement is unclear. The County believes the agreement is clear and unambiguous. Article 5, Section 1 clearly states that the standard work week is 40 hours; the agreement also clearly states that there is a managerial and contractual right to schedule the grievant for more than 40 hours in a holiday week. However, the agreement does not state that the grievant is entitled to receive pay for 48 hours; and the grievant does not have a contractual right to more than 40 hours in any week, unless it complies with Article 6 - Overtime. Thus, the County believes the Arbitrator should deny the grievance.

DISCUSSION:

The threshold issue in this case is whether Article 5, Section 1 of the collective bargaining agreement or past practice guarantees employes that they will be scheduled for five days of work during a standard work week. The question presented in this case has also been confronted by other arbitrators. They have, over the years, concluded that the customary contractual description of a normal work day or work week does not constitute a guarantee. Anchor Hocking Corp., 81 LA 502 (Abrams, 1983); Carobe Circuit Breaker Co., 63 LA 261 (Pollock, 1974). Rather, there must be explicit language to that effect.

The undersigned also does not believe that the language of Article 5, Section 1 of the subject contract guarantees an employe will be scheduled for five days of work in every work week. Rather, it merely states what the normal work week can be expected to be. The word "normal," or "standard" which is what appears in Article 5, Section 1 is not synonymous with guarantee or promise. Instead, the language sets forth what can be anticipated to usually be the case. Thus, if the County were to alter the normal 40 hour work week on such a regular basis that it could no longer be said that 40 hours was the "standard" work week, such action would be in conflict with Article 5. However, an occasional deviation is not precluded by the language of Article 5, Section 1.

Additionally, Article 3 - Management Rights provides:

> The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following: . . .
>
> B. To establish reasonable work rules and schedules of work; . . .

The undersigned believes that the language of Article 3 and Article 5, Section 1, taken together, permit the County to alter an employe's work schedule during a week in which a paid holiday falls. Libby, McNeill & Libby, 11 LA 872 (Fleming, 1948). Therefore, it was within the County's discretion whether the grievant received five work days in addition to the holiday pay.

The Union also asserts that a past practice developed over the years wherein Rego had been paid for holidays that fell on her off day, and rather than being given an additional day off during the work week, was scheduled for five (5) work days. The County argued that no binding practice was established. If these prior instances are found to have risen to the level of a binding past practice, it would, in essence, be a guarantee of 40 hours of work in addition to holiday pay in any week where a paid holiday falls. The undersigned is persuaded that the evidence of what has occurred in the past is not sufficiently clear and convincing to lead to the conclusion such a guarantee has arisen out of practice. The grievant herself could not be certain that in every case where she only worked four (4) days in the week in which a holiday fell whether she had requested to be off or was scheduled off. Additionally, there was evidence of other instances when five work days were not always scheduled in a holiday week. Also, in none of the instances where Rego didn't receive five work days in addition to the holiday pay was a grievance filed. Activity Department Director, Greeno, testified that normally if holidays fall on a Saturday or Sunday (non-work day), the employe receives holiday pay and an additional work day off. The

exception would be where the workload dictates that the employe is needed for forty (40) hours of work in addition to receiving the holiday pay. Greeno also testified that on the week in question the grievant was scheduled off on Wednesday because only one Activity Aide was needed to work that day. She stated that if the Activity Department operational needs would have required the grievant to work 40 hours that week or any week in which a holiday falls, the grievant would have been scheduled to work 40 hours and also received an additional 8 hours of holiday pay. Clearly, these facts do not support a finding of the existence of a binding past practice as alleged.

Thus, the undersigned is persuaded there is no contractual language, nor binding past practice guaranteeing employes 40 hours of work in any week in which a paid holiday falls, in addition to receiving 8 hours of holiday pay. Rather, management, based upon its needs, can schedule an employe to work 32 hours during a holiday week as was done in the instant case.

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

AWARD

The County did not violate Article 5 - Hours of the 1995-96 collective bargaining agreement by not scheduling the grievant for five days of work during the week of December 31, 1995 through January 6, 1996. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 6th day of August, 1997.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator