BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY SOCIAL WORK PROFESSIONAL EMPLOYEES EMPLOYED IN BROOKSIDE, AGING AND SOCIAL SERVICES DEPARTMENTS, LOCAL 990, AFSCME, AFL-CIO

and

KENOSHA COUNTY

Case 173
No. 55493
MA-10028

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Frank Volpintesta, Corporation Counsel, Kenosha County, appearing on behalf of the County.

ARBITRATION AWARD

Kenosha County Social Work Professional Employees Employed in Brookside, Aging and Social Services Departments, Local 990, AFSCME, AFL-CIO (herein the Union), and Kenosha County (herein the County) were, at all times pertinent hereto, parties to a collective bargaining agreement providing for binding arbitration of certain disputes between the parties. On August 22, 1997, the parties filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration and jointly requested Thomas L. Yaeger be appointed arbitrator. A hearing was conducted on March 24, 1998 and March 31, 1998. The parties waived post-hearing briefs and orally argued at the conclusion of the hearing.

ISSUE

Has the County violated the parties' collective bargaining agreement by not authorizing Social Workers to work overtime for pay or comp time except

when court hearings are held outside normal working hours or when management or the court requests work be completed outside normal work hours?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE I – RECOGNITION

. . .

Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

ARTICLE V – HOURS

Section 5.1. Workday and Workweek – Defined. The standard workday shall not exceed eight (8) hours, and the standard workweek shall not exceed five (5) days, or a total of more than forty (40) hours in any one (1) workweek from Monday to Friday inclusive.

Section 5.2. Compensatory Time Off. Compensatory time off at a rate of time and one-half (1-1/2) shall be allowed for all hours worked in excess of

eight (8) hours on a regular workday (Monday through Friday inclusive) or in excess of forty (40) hours, (for which overtime pay or compensatory time off has not been previously allowed) in any calendar week or pay period.

. . .

ARTICLE IX – OVERTIME

Section 9.1. Outside Shift Hours. Hours worked outside an employee's regular shift shall be paid at a rate equal to one and one-half (1-1/2) times the employees regular rate of pay.

Section 9.2. Weekly. Hours over forty (40) per week shall be paid at a rate equal to one and one-half (1-1/2) times the employees regular rate of pay. Excused absences such as sick leave, vacations, holidays, etc., shall be considered hours worked in computing the forty (40) hour week.

Section 9.4. Call-In Pay. An employee called to work outside of his regular work schedule shall receive a minimum of two (2) hours' work or pay at the required overtime rate.

. . .

BACKGROUND

On June 6, 1997, the Union filed a class action grievance over the County's decision to deny Social Worker requests for overtime pay for work they performed in excess of an eight-hour day and/or forty- hour work week. The grievance alleges that Social Workers were required to work the additional hours to meet the demands of their workload in fulfilling their responsibilities to their clients and the County. The County denied the grievance arguing that overtime had to be pre-authorized by management and employes were not entitled to receive it even if the hours were worked, but not authorized.

Since the mid-1980's, there has been a history of management and the Union following a flex time practice of adjusting the standard eight-hour day, 8:00 a.m. to 5:00 p.m., to accommodate workload, caseload and client needs. The flex time practices have never been contractualized, although the County has proposed doing so in prior negotiations, but never reached agreement with the Union to do so. All Social Workers are eligible to use flex time and many have done so and continue to do so because the County has denied most of their requests for overtime. When the County has approved overtime in the past, it was because court proceedings extended beyond the normal eight-hour day or management had pre-authorized employes to work overtime.

The Union argues Social Workers regularly work more than eight hours in a day and/or forty hours in a week. They are in court after the end of the normal workday, work on reports at home and at the office that need to be submitted within strict time limits, and conduct supervised client visits at night to accommodate the client's schedule. The County, the Union asserts, has steadfastly said to employes flex your schedule, extend your workday, and shorten your work week. The Union points to the Schroeder, February 14, 1995 memo, wherein he defines overtime ("allows an employee to voluntarily work beyond the normal eight (8) hour day and earn 1.5 hours for each hour worked, as either compensatory time or paid time"), as the policy the County is not following. Additionally, the Union asserts the County has paid overtime to the Department's clerical employes, who worked more than eight hours in a day or forty hours in a week, while at the same time denying overtime to professional Social Workers who need to work additional hours to catch up on reports and other paperwork. The Union argues this grievance is driven by employe fears of adverse consequences if the paperwork and forms are not done timely and completely; however, to do so requires that they work additional hours beyond the eight-hour day an/or forty-hour week. The Union also asserts the situation is worsening because of increases in the severity of the cases they handle and complexity of the reports. The end result is that employes are giving away time and working off the clock because, while they are working the necessary additional hours, their workloads do not allow them to flex enough hours to receive additional time off. The Union contends, therefore, because the contract requires premium overtime pay or comp time for hours worked in excess of eight in a day or forty per week, the Employer violates the contract by not paying same to Social Workers. The relief sought by the Union is that the County be directed to allow employes to work overtime to complete their work as the job demands, or that they not be held accountable for not meeting the demands of their job when the County refuses them the overtime necessary to perform their jobs satisfactorily.

The County, however, insists that the flex time practice has been long standing since the early 1980's, and that this grievance is an attempt by the Union to rewrite the practice and the collective bargaining agreement without bargaining. It notes this issue was not raised in the negotiations that were concluded at or near the time the grievance was filed. The County asserts this is an attempt by the Union to permit the employes to manage the Department workload and budget. The County further contends the reason why clerical employes were paid for overtime while Social Workers were not, is because the latter are professionals and they control the quality of their work. Thus, within their discretion is the number of hours they believe they must work beyond eight or forty to achieve a quality work product.

The County also argues that they are required to adhere to the existing flex time past practice, and that failure to do so would have precipitated a different grievance. Furthermore, the Union in the past ten years, has never grieved the administration of the flex time practice. The Employer also insists that the documentary evidence and testimony of Union witnesses established that management has consistently and correctly followed the flex time practice.

The County concludes its arguments by insisting that it is management's right to schedule overtime. The option for paid overtime does not rest with the employe. Therefore, it believes the grievance should be denied and the County be permitted to continue adhering to the flex time practice that is clear, unequivocal and relied upon by both parties. It believes any other result must be negotiated between the parties.

DISCUSSION

The employes' grievance requests a finding that the County has violated the collective bargaining agreement by not authorizing employe requests to schedule overtime and instead directing them to flex their schedules. Article I, Section 1.2, Management Rights, provides that "Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management . . ." This includes the right to ". . . schedule overtime work . . ." The County has asserted that for this reason, the grievance should be denied because to grant the grievance would in essence usurp its authority to determine when and under what circumstances overtime will be worked. The Union countered that Article IX requires that any hours worked outside an employe's regular shift and hours worked in excess of forty be paid at time and one-half.

If the undersigned were to grant the grievance, I would necessarily have to find that the management rights clause granting management the right to schedule overtime does not necessarily preclude an employee, based upon his/her workload demands, from determining that overtime work outside their regular shift and/or workweek is necessary. However, there is no contract language providing for such an exception to management's right to schedule all overtime work. The language of Article IX merely defines what constitutes overtime work and how it is to be compensated and the grievants have not pointed to any other language which would support the conclusion that such an exception exists. Thus, it must be concluded that the decision whether an employe is to work overtime rests exclusively with management. Such a conclusion is also supported by the overtime distribution clause, Section 9.3. Section 9.3 states overtime will be divided as equally as possible. Clearly, management would not be in a position to equitably distribute overtime work if it were left to the employes' discretion as to when it was to be worked.

The County has established that under certain reoccurring conditions an employe will be paid the overtime premium for hours worked outside the standard workday and not be forced to flex his/her hours. One such example is when the court directs the Social Worker to be in court outside the standard workday. Aside from such pre-established circumstances, the County does not pay employes overtime when a Social Worker works more than eight hours in a day, unless someone in management has pre-approved overtime work. The undersigned's reading of Article I and IX together persuades me that the County's refusal to pay overtime

when an employe chooses to work more than eight hours in a day or forty hours in a week, and was not directed by the court or management to do so, does not violate the collective bargaining agreement.

The undersigned is mindful of Social Workers' concerns expressed at the hearing that they may be subjected to discipline and or discharge for unsatisfactory work performance, and that in order to assure themselves that does not occur they are having to work a significant number of hours in excess of forty per week and/or eight in a day. However, the parties have a long-standing practice, initiated in response to employe concerns regarding hours of work, caseloads and overtime of allowing Social Workers to flex their schedules to provide better service, and satisfactorily manage their workloads, without the County incurring overtime costs. It may be, as Union witnesses testified, that the ever increasing complexity of the caseload and reporting requirements make flexing one's work schedule no longer sufficient to meet those demands. While that may suggest changes in the practice are necessary, or the practice needs to be terminated, those decisions are necessarily one for the parties to make, and are not decisions to be unilaterally imposed through grievance arbitration.

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

AWARD

The County has not violated the parties' collective bargaining agreement by refusing to authorize Social Workers to work overtime for pay or comp time except when court hearings are held outside normal working hours or when management or the court requests work be completed outside normal work hours.

Dated at Madison, Wisconsin, this 28th day of May, 1999.

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

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