BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY PROFESSIONAL EMPLOYEES UNION
LOCAL 2698-A, AFSCME, AFL-CIO

and

COLUMBIA COUNTY

Case 222
No. 61953
MA-12114

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, by **Mr. James R. Macy**, appearing on behalf of the County.

ARBITRATION AWARD

Columbia County Professional Employees Union Local 2698-A, AFSCME, AFL-CIO, hereafter Union, and Columbia County, hereafter County or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance. Coleen A. Burns was so designated on February 26, 2003. A hearing was held in Portage, Wisconsin on March 4, 2003. The hearing was transcribed and the record was closed on May 27, 2003, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issue. The County frames the issues as follows:

> Is the grievance timely in accordance with the requirements of Section 5.5 of the collective bargaining agreement?
>
> If so, did the County violate Section 17:4 of the bargaining agreement when it denied mileage and parking to the Grievant for his attendance at a conference on May 15, 2002?

The Union frames the issues as follows:

> Did the Employer violate the collective bargaining agreement when it denied the Grievant compensation for mileage and parking for a conference held on May 15, 2002?
>
> If so, what is the appropriate remedy?

The undersigned finds the following statement of the issues to be appropriate:

> Is the grievance timely filed?
>
> If so, did the County violate Section 17:4 of the bargaining agreement when it denied the Grievant compensation for mileage and parking for his attendance at a conference on May 15, 2002?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 – GRIEVANCE AND ARBITRATION PROCEDURE

5:1 Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

. . .

5:3 Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacation, etc., these limits may be extended by mutual consent in writing.

5:4 Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in movement of the grievance from one step to the next.

5:5 Steps in Procedure:

Step 1: The employee shall submit his/her grievance to his/her supervisor in writing no later than ten (10) days after he/she knew or should have known of the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The supervisor shall within five (5) days, orally inform the employee of his/her decision.

. . .

ARTICLE 14 – MANAGEMENT RIGHTS

14:1 The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract 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;

C) To manage and direct the workforce, to make assignments of jobs, to determine the size and composition of the workforce, to determine the work to be performed by employees, and to determine the competence and qualifications of employees.

D) To hire, promote, transfer, schedule and assign employees to positions within the County;

E) To suspend, demote, discharge and take other disciplinary action against employees for cause;

F) To relieve employees from their duties because of lack of work, lack of federal or state funding of their positions, or other reasons;

G) To maintain efficiency of departmental operations;

H) To take whatever action is necessary to comply with state or federal law;

I) To introduce new or terminate existing methods or facilities;

J) To change existing methods or facilities;

K) To determine the kinds and amounts of service to be performed as pertains to County government operations; and the number and kinds of classifications to perform such services; and the number of employees in each classification;

L) To contract out for goods or services; the Employer agrees to bargain the effects of the decision to subcontract if employees are laid off as a result thereof;

M) To utilize part-time seasonal or temporary employees, but not for the purpose of eliminating existing full-time positions or reducing existing full-time positions;

N) To determine the methods, means and personnel by which County operations are to be conducted;

O) To take whatever action is necessary to carry out the functions of the County in situations of emergency;

14:2 Nothing contained in the management rights clause shall be used for the purpose of divesting the Union of any rights under the Wisconsin Statutes.

. . .

ARTICLE 17-MISCELLANEOUS

. . .

17:4 Mileage: Columbia County will reimburse employees at the rate set by the County Board for the operation of an employee's motor vehicle for work required by the Agency. This rate will not be reduced during the term of this agreement. The Union and the Employees will be notified when the rates are adjusted.

. . .

RELEVANT BACKGROUND

On January 20, 1993, the County Board adopted Ordinance No. 187-93, which states in relevant part:

32.01 PURPOSE

Section 59.13(3) of the Wisconsin Statutes provides that the County Board may reimburse persons for expenses incurred in the discharge of County duties. This Ordinance is adopted to establish in advance a fair and uniform method of making such reimbursement.

32.02 PERSONS ELIGIBLE

Members of the County Board, County elective officials and their deputies, members of committees, boards and commissions, department heads, and such other employees as are expressly authorized by their respective department heads shall be entitled to reimbursement for travel expenses and other expenses as provided herein.

32.03 AUTO TRAVEL

Persons eligible shall be reimbursed for automobile travel at the rate established by Resolutions presented by the Finance Committee and approved by the County Board for travel directly related to County business. All such travel shall be by direct route.

In the event more than one eligible person is traveling to the same destination, such persons should share a car or cars to reduce travel expenses. In such case, mileage shall be paid to the eligible person actually providing the automobile transportation. In the event a number of persons claim mileage in violation of this car-sharing rule, the Finance Committee may pro-rate reasonable mileage allowance or it may disallow all such claims.

. . .

Eligible persons attending a conference, convention, or out-of-county meeting shall be reimbursed for mileage to and from their home to the conference or meeting site.

Eligible persons shall receive full reimbursement for parking charges outside Columbia County upon presentation of a receipt or actual cost expended on parking meters.

. . .

32.07 CONVENTIONS AND CONFERENCES

Attendance by department heads and employees at conventions, conferences, seminars, and training sessions shall be approved prior to attendance by the governing committee. . . .

Eligible persons shall be entitled to reimbursement for expenses incurred for conventions and conferences within the State. Registration and conference fees shall be reimbursed, together with mileage, lodging, and meals, subject to the rules herein. . . .

. . .

Subsequently, County Director of Human Services Tom Pink issued the following:

MEMO

TO: ALL STAFF
FROM: TOM PINK, DIRECTOR
DATE: SEPTEMBER 7, 1999
RE: AGENCY CAR USAGE

It has come to my attention that the agency vehicle has not been utilized to the fullest extent possible. Though I would be very reluctant to do so, a continued lack of full utilization of the vehicle may lead to disallowances or reductions in reimbursement for mileage claimed during a period of time that the vehicle sat idle. Please determine the availability of the agency vehicle prior to leaving the building for business. Thank you in advance for your cooperation.

David White, the Union's AFSCME Staff Representative, responded with the following letter dated October 7, 1999:

Re: Agency Car Usage

Dear Mr. Pink:

I have been given a copy of your memorandum of September 7, 1999 regarding "agency car usage." As I understand it, you are interested in having the County's vehicle used whenever possible for travel by department employees on department business. This poses several questions, one of which deals with insurance:

> In the event of an accident which is deemed to be the employee's fault, or if the other driver is at fault and is un/underinsured, whose insurance pays – the County's liability insurance or the employee's?

If the answer is the County's insurance, please provide me with the language of the County's liability insurance policy which states that this is the case. If the answer is "b," please understand that employees may be legitimately reluctant to operate a vehicle under such circumstances, when they are unfamiliar with the vehicle and lack knowledge of its maintenance history.

Second, I would like to address your statement that "a continued lack of full utilization of the vehicle may lead to disallowances or reductions in reimbursement for mileage claimed during a period of time that the [County's] vehicle sat idle." In this regard I refer you to Section 17:4 of the labor agreement which provides:

> 17:4 Mileage: Columbia County will reimburse employees at the rate set by the County Board for the operation of an employee's motor vehicle for work required by the Agency. This rate will not be reduced during the term of this agreement. The Union and the Employees will be notified when the rates are adjusted.

As you can see from this language, the County is not permitted to "disallow" or "reduce" the mileage reimbursements for the use of an employee's vehicle for "work required by the Agency."

Please be advised that in the event any such disallowances or reductions take place, we will have no choice but to file a grievance.

If you would like to discuss this matter with me, please call.

Pink responded to White with the following letter dated October 15, 1999:

> Thank you for your letter of October 7 posing several questions regarding employees utilization of County owned vehicles. I will attempt to address your concerns one at a time.
>
> 1.) Liability Insurance. A Health & Human Services employee operating a County vehicle is viewed no differently than a sheriff's deputy in a squad car or a highway employee in a County truck. The county's insurance provides full coverage. The attached letter from Aegis Corp. dated May 11, 1994 should clarify this point. The employee's own coverage is primary only when operating his or her own vehicle.
>
> 2.) Familiarity with County Vehicles. If any employees are reluctant to use a County vehicle because they are not familiar with it's [sic] operation they should inform their supervisor. Arrangements have been made with the Sheriff's Department to have a deputy instruct these employees in the safe and proper operation of these vehicles.
>
> 3.) Maintenance of Vehicles. These former squad cars continue to be serviced per law enforcement standards. They are safely inspected and serviced every 3000 miles. At 30,000 mile intervals a complete bumper to bumper inspection is completed and any deficiencies corrected. A complete vehicle history is maintained covering the life of the vehicle and is available from the provider.
>
> 4.) Mileage Reimbursement. When employees are required to use their own vehicles in the course of their duties, the contract language will be honored. If they are not required to do so the proposed policy outlined in my memo of September 7 may be implemented. Should this become necessary and there is disagreement as to the contracts meaning a grievance would be the appropriate method to settle the issue.
>
> I hope this letter addresses your concerns. Should you require any additional documentation or information please let me know.

White responded with the following letter dated October 20, 1999:

Re: Agency Car Usage

Dear Mr. Pink:

Thank you for your response to my letter of October 7. I will be sharing your correspondence with the Union leadership. There may be some follow-up questions and/or concerns.

In the meantime, I would like to point out that in your 4th numbered paragraph you appear to be asserting (incorrectly) that mileage reimbursement is applicable only when the Employer requires the employee to utilize his/her personal vehicle. In fact, the contract language provides that the reimbursement is to be paid when the employee uses a personal vehicle for required work. This is quite different and means that the County cannot refuse to reimburse mileage for required work because the employee chooses not to use the County vehicle.

Subsequently, a grievance was filed on the denial of mileage to County employee Weaver. Weaver and White met with the County's Human Resources Committee at the Third Step of the grievance procedure on May 2, 2001. The minutes of this May 2, 2001 meeting include the following:

> **Grievance** David White, representative of the AFSCME, AFL-CIO, Local 2698-A, Professional Union addressed the committee regarding a grievance filed, regarding travel and mileage reimbursement. Discussion. It was decided that David White and Brent Miller would meet to discuss future pre-approval of travel plans and other travel issues specific to the Health and Human Services Department.

At some point after this meeting, Weaver received the remedy requested in her grievance, i.e., the mileage reimbursement that had been previously denied, and Pink issued the following:

MEMO

TO: DIVISION ADMINISTRATORS
DATE:(SIC) TOM PINK, DIRECTOR
DATE: DECEMBER 19, 2001
RE: MILEAGE REIMBURSEMENT

The following language is now incorporated in two of our union contracts and will be adopted as a county ordinance in the near future. You may begin applying this language now paying attention to the "normal business hours"

language. Division Administrators will continue to be responsible for verification of the claims.

> "Mileage Reimbursement – Authorized use of an employee's vehicle for County Business shall be reimbursed at the current rate per County Board Resolution.
>
> 1. Mileage computation for all business travel during the employee's normal business hours shall use the employee's workplace or the point of origin (origin shall mean travel from a person's place of residence) whichever is less. If the return trip is outside normal business hours, mileage shall be paid to the employee's workplace or to the employee's home whichever is less.
>
> 2. No employee may claim mileage to their regular workplace if it is the first stop of the day, or from their workplace if it is the last stop of the day.
>
> 3. For trips that commence and terminate during non-business hours, the actual point of origin shall be used to compute mileage.
>
> 4. If traveling by bus or other means of transportation, the appropriate fare will be reimbursed by the County.
>
> 5. When work for the County entails home visits to clients, the policy for verifying mileage shall be determined by the individual department's committee and Department Head."

White responded with the following:

Re: Your Mileage Reimbursement Memo of 12/19/01

Dear Mr. Pink:

It has been reported to me that you have issued a memorandum in which you state that certain language changes have taken place in "two of our union contracts." I'm not sure which two you are referring to, but on the odd chance that you may have been referencing an AFSCME bargaining unit, please note

> that no changes in mileage reimbursement has been agreed to by the Union. We therefore expect that the *status quo* will be preserved with respect to the administration of this benefit until such time as the parties have agreed otherwise.

On May 14 and 15, 2002, Terry Bartels, a certified Social Worker employed by the County's Department of Human Services, attended a conference in Madison, Wisconsin. Bartels attended this conference in the place of another employee.

During the first day of this conference, Bartels observed that Monica Becker, another employee of the County's Department of Human Services, was also attending this conference.

Bartels drove his personal vehicle to and from the conference on May 14 and again on May 15, 2002. On his April and May 2002 expense report to the County, Bartels requested reimbursement for mileage and parking costs for May 14 and 15, 2002. On May 24, 2002, Dennis Wittig, Administrator for the Division of Supported Living and Bartels' immediate supervisor, discussed this reimbursement request with Bartels. During this discussion, Wittig advised Bartels that, inasmuch as Becker and Bartels were attending the same conference, they should have ridden together. Bartels responded that he did not know that Becker was attending the conference until he observed her on the 14th. Wittig then told Bartels that he was denying the parking and mileage reimbursement request for May 15th because Bartels knew that the other employee would be there on that day and Bartels should have ridden with that employee.

By e-mail dated May 28, 2002, Wittig advised Bartels of the following:

> I did not approved (sic) the mileage and parking for May 15, 2002. The policy is to ride together when going to the same meeting. You knew that Monica was going to the meeting the second day. You should have made arrangements to ride together. Further, Monica had the agency car.

By letter dated May 30, 2002, White advised Wittig of the following:

> **Re: Long Term Support Meeting, May 29 2002**
>
> Dear Mr. Wittig:
>
> It has been reported to me that the agenda for a meeting conducted by you with employees represented by AFSCME Local 2698-A, included the following item:

> 5. *Reminder, when more that* [sic] *one person are going to the same training, they must ride together. Further the county care* [sic] *must be used. If the car is not available I will only pay mileage for one car.*

I have corresponded with the Department on this matter previously, and I was under the belief that we had worked through these questions. That the above-quoted item appeared in the agenda of your meeting suggests otherwise.

First, please note that Section 17:4 of the labor agreement between Columbia County and Local 2698-A provides as follows:

> 17:4 Mileage: Columbia County will reimburse employees at the rate set by the County Board for the operation of an employee's motor vehicle for work required by the Agency. This rate will not be reduced during the term of this agreement. The Union and the Employees will be notified when the rates are adjusted.

As you can see from this language, there is no provision which permits the County to avoid its obligation to reimburse for mileage expenses because an employee drove his/her own personal vehicle. The availability of the Department vehicle is irrelevant. The statement that you will only pay mileage for one car if the Department car is unavailable is likewise without foundation in the contract. Such a blanket rule is unreasonable on its face. Whether one car is taken or two (or perhaps more) should depend on a variety of different factors: 1) the number of riders; 2) the sizes of the riders relative to the size of the vehicle; 3) medical conditions of the riders; 4) differences in arrival/departure times of riders; and 5) any other considerations that might be unique to the circumstances.

In summary, please note that we consider your item #5 from your agenda to be null and void.

Please let me know if you have any questions or concerns in this regard.

Bartels, in his capacity as Vice President of the Union, and Susan Brown, in her capacity as President of the Union, were cc'd on this letter, as was County Personnel Director Brent Miller and Pink.

Bartels, who started a vacation at the end of the workday on Friday, May 24, 2002, did not read the May 28th e-mail until he returned from vacation on June 3, 2002. Bartels discussed this denial with Becker and was advised that, while Bartels was on vacation, this mileage issue had been discussed at a staff meeting and that it was the subject of correspondence between the Union and the County. Concluding that this correspondence could result in his payment for mileage and parking on May 15, 2002, Bartels did not file a grievance at that time.

Bartels resubmitted his request to be paid mileage and parking for May 15, 2002 on his June 2002 expense report. This report was submitted on or after June 21, 2002, the last day for which a reimbursement was requested. On June 24, 2002, Wittig told Bartels that he would deny this resubmitted request.

On June 27, 2002, Bartels, hereafter Grievant, filed a written grievance with Wittig. This grievance alleges, *inter alia*, that the date of the alleged infraction was 5/28/02 and 6/24/02 and states:

> Mileage and parking for a training attended on 5/14 + 5/15 was denied for 5/15. A response was made by the Union representative, David White, stating that the denial was an error. Hearing nothing further, I felt the way was clear to resubmit the mileage and parking on the subsequent report on 6/24. Supervisor stated it was being denied again.

The grievance further alleges that the denial of mileage and parking violates Section 17:4 of the agreement and requests, as a remedy, "To be compensated for the mileage and parking fee on 5/15/02 which has been denied."

Wittig denied the grievance at Step 1 of the grievance procedure and the grievance was appealed to Step 2. Pink's Step 2 response, dated June 27, 2002, states: "Denied. Employee not Required to Use Personal Vehicle Per Sec. 17:4. Timely?"

The grievance was appealed to Step 3 of the grievance procedure, i.e., the County Board's Human Resources Committee. On August 7, 2002, White met with the Human Resources Committee to discuss the grievance at Step 3. The minutes of this meeting, includes the following:

> **Grievance** Professional contract, AFSCME, Local 2698 grievant, filed regarding mileage reimbursement for an employee attending an approved two-day conference. The employee was compensated mileage expenses for one day, and denied compensation the second day. Two employees attended the conference, the first day neither was aware of the others attendance thus mileage compensation was granted. It is the policy of Health and Human Service to

> have employees ride together in a County-owned vehicle when attending the same training/conference consequently the second day of mileage was denied. David White, union representative, referenced Article 17, Section 17.4 of the Professional Contract: *Columbia County will reimburse employees at the rate set by the County for the operation of an employee's motor vehicle for work required by the Agency*. County Ordinance addresses in Chapter 3 – Expense Reimbursement, Auto Travel, Section 5 – 3 - 3(b) Mileage proration. The issue of mileage and ride sharing has been addressed in writing and at meetings by Health and Human Service Director and Division Administrator regarding policy. Discussion. Motion by Ross/Curtis to uphold supervisors denial of mileage reimbursement. Motion carried unanimously.

The grievance was subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The County's time limits objection is without merit. First, the record shows that, prior to the date of hearing, the County did not clearly state an objection to the initial filing of the grievance on timeliness. Under arbitral opinion, the County's failure to raise and preserve the timeliness objection during the processing of the grievance bars the County from advancing such an objection at the arbitration hearing.

Additionally, within two days of Wittig's May 28, 2002 denial of the Grievant's original reimbursement request, the Union raised an objection to Supervisor Wittig's statements regarding the payment of mileage in such circumstances. The Grievant was copied on the letter and, therefore, justifiably held the belief that the matter was being corrected. By filing the grievance within three days of the denial of his re-submitted reimbursement claim, the Grievant filed his grievance within "ten" days after he knew, or should have known, of the cause of such grievance. The cases cited by the County to justify its timeliness argument may be distinguished on the facts.

Assuming *arguendo*, that the grievance was not timely filed and the County's timeliness objection has not been waived, forfeiture is not the remedy for a late filing. There is no forfeiture provided in the Agreement and, under arbitral principles, forfeiture should not be read into the Agreement.

The record evidence does not support the County's claim that the parties previously settled the issues raised by this grievance. Nor is there merit to the County's claim that the Union seeks to gain in arbitration that which it did not obtain in contract negotiations.

Section 17:4 of the agreement clearly and unambiguously provides the Grievant with the right to be reimbursed for his mileage and parking expenses of May 15, 2002. By arguing that the County is obligated only to pay mileage that is required by the agency, the County interprets out the word "work" out of Sec. 17:4.

Inasmuch as the County's management rights are subject "to the provisions of this contract and applicable law," the County is not at liberty to modify or nullify Sec. 17:4 through the promulgation of County policy. To the extent that County policy requires employees attending the same training or conference to travel in the same vehicle and permits the disallowance of mileage payments for multiple drivers, it is in violation of the agreement. The Union has consistently defended the reimbursement of employees for mileage precisely as called for in the labor agreement and has never acquiesced to any diminution in the collectively bargained benefit set forth in Section 17:4.

Union President Susan Brown testified, without contradiction, that in her experience within the Department, the Department has not required employees to use an agency vehicle; has not required employees attending the same conference or training to ride together; and has not denied mileage reimbursement to employees who rode separately to trainings or conferences. The County's action in singling out the Grievant for disparate treatment is plainly without justification and an abuse of management discretion. The grievance must be sustained and the remedy set forth in the grievance ordered.

County

The collective bargaining agreement contains a grievance procedure. Under this grievance procedure, the Step 1 grievance must be filed no later than ten days after the Grievant knew, or should have known, of the cause of the grievance and this time limit can only be extended by mutual agreement of the parties in writing. No request for an extension to file the grievance was made to the County and the parties had no written agreement to extend the time limit for filing this grievance.

The Grievant knew about the cause of the grievance, i.e., the denial of parking and mileage for May 15th, before the end of May 2002, but did not file his grievance until June 27, 2002. Director of Human Resources, Thomas Pink, expressly noted, on the original grievance form, that the grievance was untimely. The grievance is not timely and, therefore, should be dismissed.

In the alternative, the grievance should be denied as this matter has been previously grieved and settled by the parties in the past. Within that settlement, the County agreed to pay the grievant the mileage and to work with the Union to develop a pre-approval form so as to avoid miscommunication. In return, the Union agreed to follow the Ordinance in regards to

transportation in the future. The purpose of the prior settlement was to fully and finally resolve all issues dealing with this exact situation. Accordingly, this grievance is not arbitrable and should be dismissed.

Section 17:4 of the collective bargaining agreement indicates that, when a bargaining unit member is required to use their own personal vehicle for County business, the County will reimburse that employee for mileage. The Grievant was not required to use his personal vehicle for County business. Denial of the mileage reimbursement is not prohibited by any terms of the agreement.

The parties have negotiated a Management Rights clause. This clause includes, *inter alia*, the right to assign employees and to establish reasonable rules and regulations.

In 1993, the County passed an Ordinance regarding a number of issues dealing with mileage, use of vehicles, and transportation. Within this Ordinance, the County directed that, when several employees of the County are attending the same conference, they should travel together as opposed to driving independently. More particularly, this Ordinance expressly states that, in the event that a number of persons claim mileage in violation of this car-sharing rule, the Finance Committee has the right to prorate reasonable mileage allowance, or to disallow all such claims.

Reading the mileage language in coordination with the Management Rights language, the Agreement reserves to the County the right to deny mileage when an employee is not required to use their own vehicle for work. Union President Brown's testimony clearly establishes that mileage reimbursement is not a benefit contained specifically in the Agreement, but rather, remains vested within the discretion of the County as a management right.

Within the Human Services Department, supervisor Wittig has periodically informed bargaining unit members at staff meetings of the need to follow the County transportation policy. The Grievant acknowledges that he had prior notice of this ordinance.

The Grievant in the instant case elected, for his own convenience, to travel to and from the conference in his personal vehicle, rather than to rideshare with a fellow employee in a County owned vehicle. The Grievant did not seek, or obtain, prior approval for this use of his personal vehicle.

In applying the travel Ordinance, County supervisors have utilized their discretion to approve or not approve individual travel to conferences where multiple employees are attending. The promulgation of this Ordinance and the application of this Ordinance are consistent with the County's contractual management rights.

As acknowledged, the Union considered proposing language to gain the right and benefit to drive separately and be paid, but elected not to propose it. The Union cannot gain in arbitration that which it considered, but did not even propose, and therefore did not gain in negotiations.

The Grievant does not have a right to be reimbursed for his mileage and parking costs. Nonetheless, upon hearing the Grievant's claim that, prior to the first day of the conference, he did not know that a fellow employee was in attendance, Wittig allowed the mileage and parking costs for the first day of the conference. Wittig did not abuse management's discretion when he denied mileage and parking costs for the second day of the conference. If the grievance is found to be arbitrable, it should be denied on the basis that it is without merit.

DISCUSSION

The initial issue to be determined is whether or not the grievance is timely filed. The County, contrary to the Union, claims that the grievance is not timely because it was not filed within the ten day time limit set forth in Sec. 5.5 and no extension was requested, or agreed to, as required by Sec. 5.3 of the parties' collective bargaining agreement.

Under Section 5.5, Step 1, the Grievant is required to submit his written grievance no later than ten (10) days after he knew or should have known of the cause of such grievance. The "cause" of this grievance is Administrator Wittig's denial of the Grievant's request for mileage and parking for May 15, 2002.

Wittig's testimony establishes that, on May 24, 2002, Wittig told the Grievant that he would deny this request. On May 28, 2002, Wittig sent an e-mail to the Grievant confirming this denial. The Grievant acknowledges that he read this e-mail when he returned from vacation on June 3, 2002. Inasmuch as the Grievant filed his written grievance on June 27, 2002, the Grievant did not file his written grievance within the ten-day time limit set forth in Step 1 of Sec. 5.5.

As each party recognizes, Article 5 does not express a penalty for failing to file a grievance within the ten-day time limit set forth in Step 1 of Sec. 5.5. Each party has cited arbitration decisions to support its argument regarding the effect of the failure to express such a penalty. These other arbitration decisions are not binding upon this arbitrator.

In this Arbitrators' view, the failure to express such a penalty does not mean that an arbitrator may not conclude that, by failing to comply with the ten day time limit for filing a grievance, an employee has forfeited his/her right to have the merits of the grievance decided by an arbitrator. Rather, it means that an arbitrator has discretion to review the circumstances of the case to determine whether or not such forfeiture is warranted.

The Grievant states that it was possible that the County raised the issue of timeliness, but does not recall that this occurred. (T. at 52; 56) Wittig recalls that he discussed timeliness of the grievance filing with Human Services Director Tom Pink and Human Resources Director Brent Miller, but does not state that he discussed this issue with the Grievant and denies that he discussed this issue with any Union representative. (T. at 24)

Pink wrote "Timely?" on his response to the written grievance. This notation is sufficient to indicate that Pink was questioning whether or not the grievance was timely, but it is not sufficient to provide the Grievant, or any Union representative, with reasonable notice that the County was asserting a position that the grievance was untimely.

Debra Wopat, a member of the County Board's Human Resources Committee, recalls that the County's Personnel Director raised the issue of timeliness with the Committee, but asked, as a courtesy, that the grievance be placed on the Committee's agenda. Wopat also recalls that the Committee did not rule on the timeliness issue, but rather, considered the "bigger issue," *i.e.*, that the supervisor had treated the Grievant fairly. (T. at 38-39)

The minutes of the County Board's Human Resources Committee Step 3 meeting with White do not state that the issue of timeliness was raised or discussed with White during the Step 3 meeting. White states that these minutes accurately reflect the statements and arguments that were made by the parties. (T. at 66-67)

As the County argues, Sec. 5.3 provides that, when it is impossible to comply with the time limits, the time limits may be extended by mutual consent in writing. However, neither this provision, nor any other provision relied upon by the parties, precludes the County from waiving its right to assert that a grievance is not timely filed.

In summary, the record establishes that, prior to the meeting of the County's Human Resources Committee, County representatives discussed among themselves that the grievance was not timely filed. The record, however, does not establish that these County representatives provided the Grievant, or the Union, with reasonable notice that the County objected to the grievance on the basis that it was not timely filed. Additionally, having knowledge that there may be an issue as to whether or not the grievance was timely filed, the County's Human Resources Committee chose not to consider this issue, but rather, chose to address the grievance on its merits.

The County's conduct during the processing of this grievance persuades the undersigned that the County accepted this grievance, as filed, and that the County has waived its right to assert that this grievance is not timely filed. Under the circumstances of this case, the grievance is timely and the Grievant's failure to file his grievance within the ten-day contractual time limit does not result in the forfeiture of the Grievant's right to have the merits of the grievance decided by this arbitrator.

The County, contrary to the Union, argues that this grievance is not arbitrable because the parties fully and finally resolved all issues dealing with this grievance situation when the parties "settled" the Weaver grievance. According to the County, the Weaver grievance was settled by the County agreeing to pay Weaver the requested mileage and to work with the Union in developing a pre-approval form in return for the Union agreeing to be bound by County Ordinance No. 187-93.

Corporation Counsel Ruf was involved in the processing of the Weaver grievance and was present at the Step 3 meeting. According to Ruf, this grievance dealt with an identical issue; that the County committee decided to reach a settlement of this grievance and that the terms of the settlement were that Weaver would receive her requested mileage reimbursement and that Miller and White would meet to work out "the specifics of the deviations from the ordinance." (T. at 91) In subsequent testimony, Ruf states that, in exchange for the payment of mileage reimbursement, the Union accepted that the County's travel ordinance had application to their membership. (T. at 94) During cross-examination, after having had an opportunity to review the minutes of the Step 3 grievance meeting, Ruf modified his initial testimony by stating that the decision of the Committee was to have White and Miller meet on issues directly related to the Weaver grievance. (T. at 97)

Wopat's testimony indicates that the County committee intended to settle the Weaver grievance by paying the requested reimbursement in return for an agreement from the Union on carpooling and the use of agency vehicles. (T. at 101) However, upon reviewing the minutes of the Step 3 grievance meeting, Wopat acknowledged that, at the Step 3 meeting, the only agreement reached between the Union and the County was to have White meet with Miller to try and resolve various travel issues. (T. at 102 - 103) This testimony of Wopat's is consistent with White's recollection of the Step 3 meeting (T. at 105; 108-109). As are the minutes of the Step 3 meeting, which state as follows:

> **Grievance** David White, representative of the AFSCME, AFL-CIO, Local 2698-A, Professional Union addressed the committee regarding a grievance filed, regarding travel and mileage reimbursement. Discussion. It was decided that David White and Brent Miller would meet to discuss future pre-approval of travel plans and other travel issues specific to the Health and Human Services Department.

White testified, without contradiction, that on several occasions following this Step 3 meeting, White asked Miller to address the travel issues, but that these discussions did not advance very far. (T. at 106) Neither White's testimony, nor any other record evidence, warrants the conclusion that White did not make a good faith effort to meet with Miller to try and resolve the various travel issues. Thus, under the facts presented at hearing, the Union cannot be held responsible for the fact that such discussions were not productive.

It is undisputed that, at some point after the Step 3 meeting, Weaver was paid the mileage requested in her grievance. Ruf and Wopat recall discussions that Weaver would be paid her requested remedy as a "quid pro quo" for a Union agreement on travel issues. White states, however, that, when he left the Step 3 meeting, he did not understand that Weaver was going to receive the remedy requested in her grievance. (T. at 108) Given this testimony of White, as well as the fact that the Step 3 minutes do not reflect any decision to pay Weaver the remedy requested in her grievance, the undersigned is persuaded that the "quid pro quo" discussions recalled by Ruf and Wopat occurred outside the presence of the Union.

County witnesses acknowledge that the remedy requested in the Weaver grievance was "nominal" (T. at 91; 101) Thus, the fact that the County paid the remedy requested in the grievance is not sufficient, *per se*, to demonstrate that the Union must have agreed to a "quid pro quo."

In summary, the most reasonable conclusion to be drawn from the evidence of the Weaver grievance is that the County intended to "settle" the Weaver grievance by paying the remedy requested in the grievance in return for a Union agreement on travel policies; that this "settlement" was not communicated to the Union; that the Union did not reach any agreement with the County other than to have White meet with Miller to try and resolve various travel issues; and that the remedy requested in the Weaver grievance was not paid as a "quid pro quo" for a Union agreement to be bound by County Ordinance No. 187-93, or for any other Union agreement.

According to White, when he subsequently learned that Weaver had been paid the remedy requested in the grievance, he concluded that there was nothing more to pursue. (T. at 105-107) Under Sec. 5.4 of the contractual grievance procedure, "Dissatisfaction is implied in movement of the grievance from one step to the next." Under the facts of this case, the Union's failure to purse the Weaver grievance to arbitration does not establish abandonment of this grievance, but rather, establishes that the Union reasonably concluded that the grievance had been resolved to its satisfaction.

Contrary to the argument of the County, the Weaver "settlement" did not fully and finally resolve the issues raised in this grievance. The evidence of the Weaver "settlement" does not warrant the conclusion that the instant grievance is not arbitrable, or that the arbitrator is otherwise precluded from determining the merits of this grievance.

Having rejected the County's arguments that the grievance is not timely, or is otherwise not arbitrable, the undersigned turns to the merits of the grievance. The Union maintains that, under the clear language of Sec. 17:4, the payment of mileage is required whenever an employee operates his/her personal vehicle for work required by the County. The Union argues that, inasmuch as the Grievant operated his personal vehicle for work required by the

County, the Grievant is entitled to be reimbursed his parking and mileage costs of May 15, 2002.

The County maintains that the language of Sec. 17:4 indicates that mileage is due only when the County requires the employee to operate his/her own vehicle. The County argues that, inasmuch as the Grievant was not required to operate his/her own vehicle to attend the conference, the Grievant is not contractually entitled to be reimbursed his mileage of May 15, 2002.

Sec. 17:4 of the parties' collective bargaining agreement provides as follows:

> 17:4 Mileage: Columbia County will reimburse employees at the rate set by the County Board for the operation of an employee's motor vehicle for work required by the Agency. This rate will not be reduced during the term of this agreement. The Union and the Employees will be notified when the rates are adjusted.

Under the plain language of Sec. 17:4, the only condition precedent to receiving mileage reimbursement is that the employee operates his/her vehicle for "work required by the Agency." Thus, it is employee performance of required work and not County authorization to use a personal vehicle that creates the County's duty to reimburse mileage.

Human Services Director Pink's December 19, 2001 memo establishes that two of the County's union contracts contain the following language: "Mileage Reimbursement – Authorized use of an employee's vehicle for County Business shall be reimbursed at the current rate per County Board Resolution." It is evident, therefore, that, when the County intends to limit mileage reimbursement to instances in which the County requires the employee to use his/her personal vehicle, the County is capable of clearly stating such intent. Notwithstanding the County's argument to the contrary, it is not reasonable to construe Sec. 17:4 as limiting mileage reimbursement to instances in which the County requires a bargaining unit member to use his/her own car.

The County does not argue, and the record does not demonstrate, that the Grievant's attendance at the conference on May 14 and 15, 2002 was not work related. Thus, by operating his vehicle for the purpose of attending the conference on May 14 and 15, 2002, the Grievant operated his vehicle for "work required by the Agency." Under the plain language of Sec. 17:4, the Grievant has a contractual right to be reimbursed for his mileage on May 15, 2002.

As the County argues, the parties have negotiated a Management Rights clause. As the County further argues, this clause, which is contained in Article 14 of the parties' collective bargaining agreement, provides the County with the right to "establish reasonable work rules."

The County argues that it is a reasonable work rule for the County to require employees who are attending the same conference to ride together and to use an agency vehicle when one is available. The County asserts, therefore, that its denial of the Grievant's reimbursement request on the basis that the Grievant did not comply with this work rule is within the discretion reserved to management under Article 14.

Article 14 contains the following:

> 14:1 The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. . . .
>
> . . .
>
> 14:2 Nothing contained in the management rights clause shall be used for the purpose of divesting the Union of any rights under the Wisconsin Statutes.

As a review of the above demonstrates, the County has specifically agreed that its management rights are subject to the other provisions of the contract and applicable law. Thus, a "work rule" that negates another provision of the contract is not reasonable.

The "work rule" relied upon by the County, as applied to the Grievant, negates Sec. 17:4 because it denies the Grievant the reimbursement that is required by Sec. 17:4. Thus, this "work rule" is not reasonable.

As with the "work rule" discussed above, the application of Ordinance No. 187-93 to the Grievant's reimbursement request denies the Grievant the reimbursement that is required by Sec. 17:4. To permit the County to nullify a negotiated contract term through the unilateral adoption of a County Ordinance would be to divest the Union of rights under Wisconsin Statutes, contrary to the express terms of Sec. 14:2 of the collective bargaining agreement. Thus, the promulgation and application of this Ordinance is not consistent with the County's contractual management rights.

In summary, under the plain language of Article 14, the County has not reserved its management right to deny the mileage reimbursement claimed by the Grievant for May 15, 2002. Rather, under the plain language of Article 14, the incorporation of Sec. 17:4 into the parties' collective bargaining agreement expressly divests the County of such a management right. The undersigned turns to the issue of whether or not the evidence of the parties' conduct establishes that the parties' mutually intended any result other than that which is reflected in the plain language of the parties' collective bargaining agreement.

Wittig states that County Ordinance No. 187-93 was enacted prior to the time that the County Board provided Human Services with County owned vehicles. (T. at 32) Wopat states that, from the time that the County provided Human Services with County owned vehicles, issues seemed to keep rising about the use of vehicles in carpooling, but that the first grievance that came before the County was the Weaver grievance. (T. at 100-101)

As discussed above, the Weaver "settlement" did not result in any Union understanding other than that White would meet with Miller to try to resolve travel issues. Contrary to the assertions of the County, the Weaver "settlement" did not include a Union agreement to allow Ordinance No. 187-93 to control all future requests for mileage. Nor did it produce any other mutual understanding, or agreement, with respect to the Grievant's right to be reimbursed for mileage and parking on May 15, 2002.

Union President Brown has worked in Human Services for at least 12 years. Brown states that, generally speaking, different departments within Human Services have different rules and that some supervisors require or encourage strongly that their employees use agency cars, while others don't. (T. 78) This testimony, standing alone, provides support to the County's argument that, in the past, County supervisors have exercised management discretion to approve, or to not approve, the use of personal vehicles. However, Brown's statement regarding general practices must be balanced against her testimony regarding her specific experiences.

With respect to these specific experiences, Brown states that she has not been required to use an agency vehicle; that she has not used an agency vehicle in over five years; that, on some occasions, agency vehicles have been available but she has chosen to use her own vehicles; that in such cases, she has not been denied payment for mileage and parking; that other people have not been denied payment for mileage and parking when they have not used an available agency vehicle; that there are occasions when employees double up, in personal as well as in agency vehicles, to attend seminars; and that employees have been encouraged, but not required, to ride together when traveling to the same conference. (T. at 78-81) Brown also states that she is vaguely aware of the County travel ordinance and agrees that employees have to abide by County ordinances that do not violate the collective bargaining agreement. (T. at 84)

As the County argues, Brown acknowledges that County supervisors have the right to exercise discretion and that the County has a right to provide cars to employees. (T. at 82-83) Brown, however, does not acknowledge that these County rights extend to denying the mileage reimbursements requested in this grievance; to requiring County approval of the use of personal vehicles; or to requiring the use of the County vehicles that are provided by the County. Nor does Brown's testimony demonstrate any understanding that an employee's right to receive mileage reimbursement is controlled by County Ordinance No. 187-93.

In summary, although Brown has the opinion that some supervisors require employees to use agency vehicles, she did not identify these supervisors or provide any specific example of a when a supervisor denied an employee either the right to use a personal vehicle or mileage reimbursement for the use of a personal vehicle. Brown's experience is that employees decide whether or not to use a personal vehicle and those employees who choose to use a personal vehicle have not been denied reimbursement for mileage and parking. Brown's testimony concerning mileage reimbursement practices does not demonstrate a well-established and mutually accepted practice that the right to approve, or disapprove, the operation of an employee's motor vehicle for work required by the Agency, or that the right to allow, or disallow, mileage reimbursement when an employee operates his/her personal vehicle for work required by the Agency remains vested within the discretion of County management.

At hearing, Brown stated that, in Union meetings, union members discussed clarifying the mileage benefit, but that the Union did not pursue such clarification. Brown also acknowledged that, if the Union thought that the mileage benefit was not clear, the Union had the opportunity to pursue clarification in contract negotiations. (T. at 84-85) Inasmuch as the Union did not pursue the clarification of Sec. 17:4 in contract negotiations, the most reasonable conclusion to be drawn from Brown's testimony is that the Union did not consider Sec. 17:4 to be unclear.

Notwithstanding the County's argument to the contrary, Brown's testimony does not establish that the mileage benefit requested in this grievance is not specifically contained in the parties' contract, or that the Union is attempting to gain in arbitration that which it did not receive in contract negotiations. Nor does Brown's testimony provide any reasonable basis to conclude that the parties have any mutual understanding, or agreement, that the Grievant's right to receive mileage is not governed by the plain language of Sec. 17:4

According to Wittig, the County travel Ordinance applies to all County employees; he has tried to apply that policy to his staff; and he periodically discusses this policy at staff meetings, including the need to carpool to save money. (T. 19 - 21). However, Wittig does not identify any instance in which attempts to apply this Ordinance to his staff have been successful. Indeed, the only specific instance of Wittig denying an employee request for reimbursement of mileage and parking is the instant grievance. On balance, Wittig's testimony supports Brown's testimony, i.e., employees have been encouraged, but not required, to follow County travel policies.

Wittig's testimony does not demonstrate a well-established and mutually accepted practice that either the right to approve, or disapprove, the operation of an employee's motor vehicle for work required by the Agency, or the right to allow, or disallow, mileage reimbursement when an employee operates his/her personal vehicle for work required by the Agency remains vested within the discretion of County management. Nor does Wittig's

testimony provide any reasonable basis to conclude that the parties have any mutual understanding, or agreement, that the Grievant's right to receive mileage reimbursement is not governed by the plain language of Sec. 17:4

Wittig's testimony that he has "tried" to apply the County Ordinance to his employees is consistent with the evidence of the correspondence and/or memos issued by County managers, which establishes that the County has consistently maintained that it has certain rights to "disallow" or "reduce" mileage for the use of an employee's personal vehicle, including the right to disallow the Grievant's mileage on May 15, 2002 because the Grievant did not carpool with another employee in a County owned vehicle. White's testimony, however, establishes that, when he has learned that the County was either requiring employees to use agency vehicles, or requiring employees to carpool, he has consistently responded with correspondence that maintains that the County does not have such rights. (T. at 67-68) In this correspondence, White relies upon the language of Sec. 17:4 and specifically objects to the County's assertion of a right to deny mileage reimbursement for personal vehicles when a County vehicle was available (U Ex. 2; Er. Ex. 4); to any assertion that mileage reimbursement for personal vehicles is only applicable when the County requires the employee to use his/her own personal vehicle (U Ex. 4); and to the assertion that mileage can be denied if the employee could have carpooled with another employee. (Er. Ex. 4)

In summary, the evidence of the prior conduct of the parties does not demonstrate a Union agreement to allow Ordinance No. 187-93 to control requests for mileage. Nor does it demonstrate any other Union agreement that the right to approve, or deny, the mileage and parking reimbursements requested by the Grievance is vested within the discretion of the County as a management right. Rather, the most reasonable construction of the evidence of the parties' prior conduct is that they have been disputing mileage reimbursement rights for years and have not reached any mutual understanding or agreement with respect to mileage reimbursement other than that which is reflected in the plain language of Sec. 17:4.

Sec. 17:4 addresses mileage and does not address parking costs. Brown's testimony establishes that, in the past, the County has paid parking costs. The County does not argue that the Grievant's right to be reimbursed for parking costs is distinguishable from his right to receive mileage reimbursement.

Under the facts of this case, the Arbitrator concludes that the County violated Sec. 17:4 of the parties' collective bargaining agreement when it denied the Grievant compensation for mileage and parking for his attendance at a conference on May 15, 2002. The appropriate remedy for this contract violation is to order the County to make the Grievant whole by immediately compensating the Grievant for the mileage and parking costs incurred as a result of his attendance at the May 15, 2002 conference. As set forth in the Grievant's expense reports, the incurred mileage is 77 miles and the incurred parking cost is $6.00.

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

AWARD

1. The grievance is timely filed.

2. The County violated Section 17:4 of the bargaining agreement when it denied the Grievant compensation for mileage and parking for his attendance at a conference on May 15, 2002.

3. In remedy of this contract violation, the County is to immediately make the Grievant whole by compensating the Grievant for the mileage and parking costs incurred by the Grievant as a result of his attendance at the conference on May 15, 2002.

Dated at Madison, Wisconsin, this 30th day of October, 2003.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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