BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE ASSOCIATION OF MENTAL HEALTH SPECIALISTS

and

ROCK COUNTY

Case 350
No. 62290
MA-12222

Appearances:

John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appeared on behalf of the Association of Mental Health Specialists.

Thomas A. Schroeder, Corporation Counsel, Rock County, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, appeared on behalf of Rock County.

ARBITRATION AWARD

On April 8, 2003, Rock County and the Association of Mental Health Specialists requested the Wisconsin Employment Relations Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a dispute pending between the parties. A hearing was conducted on June 19, 2003, in Janesville, Wisconsin. A transcript of the proceedings was made and distributed by August 22, 2003. Post-hearing briefs were submitted and exchanged by September 12, 2003.

This Award addresses the applicability of overtime payments to bargaining unit employees engaged in foster parent training.

BACKGROUND AND FACTS

The County and Union are signatories to a collective bargaining agreement applicable to a group of professional employees, including social workers, employed within the County's Human Services Department, which consists, in part, of a Child Protective Services Division

(CPS) and a Juvenile Justice Division. The Substitute Care Unit provides services for both the Juvenile Justice and Child Protective Services divisions. The primary service is the licensing of foster homes, the recruitment, orientation, and training of foster parents. Consistent with that goal, the Substitute Care Unit has provided a training program for foster parents for the past seven years. These training programs have historically been conducted at night.

The employees involved in this dispute typically work the 8:00 a.m. – 5:00 p.m. shift, or a 7:30 a.m. – 6:30 p.m. four-day week. Historically, bargaining unit employees have volunteered to do the after-hour training. They were historically paid overtime for the hours spent in the training. It was typical for the workday to be extended to include the period of training, which runs until 9:30 – 10:00 p.m.

In 2002, the State of Wisconsin required the training of foster parents. The County reviewed a new training model in 2002, and adopted and implemented that model in 2003.

The County is in receipt of a funding grant from the State, which requires that current foster parents have the same opportunity and training that is provided new and/or prospective foster parents. This requirement has created a bulge, and a backlog, in training. The County views this bulge as a three-year phenomena. Once the backlog created by the need to train existing foster parents is addressed, the County envisions a return to the prior schedule of foster parent training, based upon the number of foster parents who are recruited or otherwise come forward.

On or about February 4, 2003, Sally Biddick, the program manager, met with bargaining unit members and advised them that they would be responsible for the training, that the training would occur in the evening, and that their work schedules would be temporarily altered to accommodate that training. On the day training occurs, employees are directed to come in later so that the training is accomplished within an eight-hour day. Evenings were identified as most appropriate for training. The selection of training evenings accommodated employees' personal schedules.

On or about February 5, 2003, the Union filed the grievance which has led to this proceeding. That grievance provides: "Neither the employees nor the Association has agreed to an alteration in hours of work."

ISSUE

The parties stipulated to the following issue:

> Did the County violate the collective bargaining agreement by requiring individual employees to work limited evening hours on a temporary basis to

accommodate the foster parent class schedule? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II – MANAGEMENT RIGHTS

2.01 Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to, the right to hire, the right to promote, demote, the right to discipline or discharge for proper cause, the right to transfer or lay-off because of lack of work, discontinuance of services, or other legitimate reasons, the right to abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work. . .

. . .

ARTICLE XV – HOURS OF WORK, CLASSIFICATION, PREMIUM PAY

15.01 A. Regular Workweek. The regularly scheduled workweek for full-time employees shall be forty hours per week, 8 or 10 designated daily hours (10 hr./day, 40 hr. Monday-Thursday), excluding regularly scheduled hours on Saturday and Sunday. Any permanent change for employee, unit, classification of employees in said hours will be mutually agreed upon by the employee/employees, administration and the union. Any employee may request a flexible change in schedule in any two-week time/pay period with approval from his/her supervisor. This provision shall also apply to part-time employees who have not previously (prior to January 1, 2000) worked Saturday or Sunday hours, but does not restrict the County's right to create or maintain part-time positions that include such hours.

. . .

15.03 Overtime Pay.

1. For employees working an eight (8) hour day, all hours worked in excess of eight (8) hours per day or forty (40) hours per week shall be compensated at the rate of time and one-half the regular rate of pay, or time and one-half compensatory time, at the option

of the employee. If an employee and the employer agree to a flexible schedule within a two (2) week period, which causes the employee to work in excess of eight (8) hours per day, the eight (8) hour overtime provision does not apply.

For employees working a ten (10) hour day schedule, all hours worked in excess of ten (10) hours per day or forty (40) hours per week shall be compensated at the rate of time and one-half the regular rate of pay, or time and one-half compensatory time, at the option of the employee.

. . .

4. Hours beyond the regularly scheduled hours (8 or 10 hour days) shall not be scheduled without the employee's consent in non-emergency situations.

. . .

15.08 An after hours intake procedure for Protective Services and Juvenile Justice and all those employees whose job duties include carrying a pager is established in accordance with the following:

After hours are designated as:

Monday, 5:00pm to Tuesday, 8:00am	(15 hours)
Tuesday, 5:00pm to Wednesday, 8:00am	(15 hours)
Wednesday, 5:00pm to Thursday, 8:00am	(15 hours)
Thursday, 5:00pm to Friday, 8:00am	(15 hours)
Friday, 5:00pm to Saturday, 5:00pm	(24 hours)
Saturday, 5:00pm to Sunday, 5:00pm	(24 hours)
Sunday, 5:00pm to Monday, 8:00am	(15 hours)

. . .

15.09 Call-In After-Hours/Emergency Service Work:

A. When an employee is off duty and directed to report to work outside of his/her regular and normal schedule of daily work hours, he/she shall receive time and one-half of his/her hourly rate of pay for all hours actually worked, provided that in the

event he/she works less than two hours, he/she shall receive time and one-half his/her hourly rate of pay for a two hour period of time.

POSITIONS OF THE PARTIES

In essence, the Union makes three arguments. The first is that the language of Section 15.01(A) does not provide for long-term change because the parties intended that the only changes would be short-term or permanent. Second, any long-term change must be negotiated. Third, the change involved in this proceeding is not a bona fide long-term change, but a prohibited overtime avoidance. The Union also argues that the affected employees should receive overtime for the hours they work outside their regularly-scheduled hours, straight time for their regularly-scheduled hours, and payment for any expenses incurred as a result of the change.

The County contends that the collective bargaining agreement recognizes that the regularly-scheduled workweek is not an absolute. The County contends that while there is a contractual regulation of permanent and voluntary, two-week schedule changes, there is no express prohibition or regulation of temporary schedule changes. As there is no specific provision in the contract limiting the County's authority to make such a temporary change, the Union has explicitly ceded to the County the right to do so in the Management Rights clause. The County did not make the schedule change to avoid the payment of overtime, but rather for the legitimate business reasons related to grant funding and optimum efficiency. It is the view of the County that the grieving social workers have no absolute right to overtime under the terms and conditions of the collective bargaining agreement. The County is not obligated to provide overtime work.

DISCUSSION

As the Employer notes, Article II gives the Employer the right to "plan and schedule work". It is certainly within the scope of the Employer's right to conduct evening training classes. However, the exercise of rights under Article II must be done consistently with the balance of the collective bargaining agreement. That is to say, the right to reschedule and/or modify the workday is subject to the other provisions of the Agreement.

Article XV addresses hours of work. Article 15.01 addresses the workweek, defining it as "forty hours per week. . .", and the work day, which is defined as either "8 or 10 designated daily hours", as is appropriate. The Employer's adjustment of the work day does not modify either the length of the week or the length of the day. Article 15.01 goes on to address a permanent change in hours and also a flexible change in schedule. Neither of those adjustments has occurred in this proceeding. The change involved in this training is temporary. Employees did not agree to have their schedules changed.

Section 15.01 does not specifically define the hours of the day in which the 8 hour schedule (or 10 hour schedule) must fall. It does provide that the hours are "designated". That begs the question as to whether once the hours are designated, the County is free to designate them to an alternative time.

Section 15.03(1) is the overtime provision. It requires the payment of overtime after 8 or 40 hours, respectively. Under the modifications involved in this proceeding, the employees are not directed to work in excess of an 8 hour day, or 40 hour week. If so, they are paid at overtime rates.

I believe that Section 15.09 controls this proceeding. "Off-duty" employees who are "directed to report to work outside of his/her regular and normal schedule of daily work hours" are paid overtime. There is no dispute that the employees involved have been directed to report to work. This was not a voluntary undertaking. The question presented is whether or not the employees are "off-duty" and are required "to report to work outside of his/her regular and normal schedule of daily work hours". This raises the question as to what constitutes "off-duty" and what are the regular and normal daily work hours of the affected employees.

I believe there are two keys as to what constitutes "regular and normal" hours. Section 15.08, which is applicable to the same employees, defines "after-hours" as consisting of those hours other than 8:00 a.m. to 5:00 p.m., Monday through Friday, for intake purposes. This sentence uses the term "after" in reference to the term "hours". The obvious reference is to hours that occur after the workday. I believe that is the plain meaning of the use of the term "after-hours".

Section 15.09 is titled, in part, "Call-In After Hours. . ." As noted, Section 15.08 defines "after hours" to include the time frame in which the foster parent training occurs. The record establishes that employees have historically worked from 8:00 a.m. to 5:00 p.m. in a five-day workweek, or 7:30 a.m. to 6:30 p.m. in a four-day workweek, without exception. Those hours must be regarded as both "regular" and "normal". The sentence would otherwise have no meaning.

What is left for analysis is whether or not employees are "off duty", in light of the Employer's schedule change. Admittedly, there is no emergency at play here. The training is scheduled in advance. However, to conclude that the employee is not "off duty" because the County has modified her work schedule, is to bestow significant control over working hours to the County, in disregard of the longstanding interpretation and application of several provisions of the Collective Bargaining Agreement. I am unwilling to do so. Other than the frequency of training, nothing has changed.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to pay those employees who it assigns to evening training at the rate of time and one-half for all hours worked.

Dated at Madison, Wisconsin, this 21st day of January, 2004.

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

WCH/gjc
6622