BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WASHINGTON COUNTY
DEPARTMENT OF SOCIAL SERVICES EMPLOYEES ASSOCIATION,
LOCAL 809 of the
LABOR ASSOCIATION OF WISCONSIN, INC.

and

WASHINGTON COUNTY, WISCONSIN

Case 146
No. 62615
MA-12369

Appearances:

Kevin Naylor, Labor Consultant, Labor Association of Wisconsin, Inc., N116W16033 Main Street, Germantown, Wisconsin 53202, appearing on behalf of the Washington County Department of Social Services Employees Association, Local 809 of the Labor Association of Wisconsin, Inc., which is referred to below as the Association.

Nancy L. Pirkey, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of Washington County, Wisconsin, which is referred to below as the County.

ARBITRATION AWARD

The County and the Association 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 Association requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve grievance number 2003-30, filed on behalf of "the Washington County Department of Social Services Employees Association, Local 809." Hearing on the matter was conducted on November 6, 2003, in West Bend, Wisconsin. On November 19, 2003, Margaret A. Matousek filed a transcript of the hearing with the Commission. The parties filed briefs and reply briefs by January 27, 2004.

ISSUES

The parties did not stipulate the issues for decision. The Association states the issues thus:

> Did the County violate the collective bargaining agreement when it refused to pay Carol Hogan for the overtime she worked on April 25, 2003, April 28, 2003 and June 9,2003?
>
> Did the County violate the collective bargaining agreement when it refused to pay Lori Merrick for the overtime she worked on April 24, 2003, and April 25, 2003?
>
> Did the County violate the collective bargaining agreement when it refused to pay Brenda Stoffel for the overtime she worked on April 15, 2003?
>
> If so, what is the remedy?

The County states the issues thus:

> Did the County violate the collective bargaining agreement when it denied overtime pay to the Grievants for all hours worked?
>
> If so, what is the appropriate remedy?

I adopt the County's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE IX – HOURS OF WORK

Section 9.01 –Workday. The normal workday for full-time employees shall consist of eight (8) consecutive hours, excluding a one-half (1/2) hour lunch period, between the hours of 8:00 a.m. and 4:30 p.m.

Section 9.02 – Workweek. The normal workweek for full-time employees shall consist of forty (40) hours, Monday through Friday.

. . .

Section 9.04 – Scheduling Adjustments. The parties recognize that the nature of the services provided by the Department may require adjustments in employee work schedules to meet the requirements of specific departmental programs, services mandated by law or exceptional circumstances requiring the Department to provide services at times other than normal work hours. Accordingly, the County shall have the right, notwithstanding the provisions of Sections 9.01 and 9.02, to assign different workdays or workweeks to particular employees in order to provide coverage for such situations.

Section 9.05 – Adjustments Within Pay Periods. Notwithstanding the provisions of Section 9.01 and Article X, upon the mutual consent of the employee and his immediate supervisor, hours of work may be adjusted on a straight-time basis within a seven (7) day work period.

ARTICLE X – OVERTIME

Section 10.01 – Overtime. Employees shall be compensated at one and one-half (1½) times their regular rate of pay for all hours worked in excess of forty (40) paid hours per week and in excess of eight (8) paid hours per day. . . .

. . .

Section 10.03 – Computation. For the purpose of computing overtime pay, all hours paid for shall be considered hours worked.

. . .

ARTICLE XXV – MANAGEMENT RIGHTS

Section 25.01 – Rights: The Association acknowledges the sole right of the County to exercise the power and authority necessary to operate and manage its own affairs, but such right must be exercised consistent with the other provisions of this Agreement and Section 111.70, Wis. Stats. Such powers and authority include, but are not limited to, the following:

. . .

E) To maintain efficiency of County government operations entrusted to it.

F) To determine the methods, means and personnel by which such operations are to be conducted. . . .

> **Section 25.02 – Not Inclusive:** The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management.
>
> **Section 25.03 - Exercise of Rights:** The Association and its members agree that they will not attempt to abridge these management rights, and the County agrees that it will not use these management rights to interfere with rights established under this Agreement . . .

BACKGROUND

The Association filed Grievance No. 2003-30 on May 8, 2003 (references to dates are to 2003, unless otherwise noted). The grievance form cites Articles 10 and 25 as the governing provisions, and states that the grievance turns on the experience of Lori Merrick and Carol Hogan "during the pay period beginning April 24 . . . and ending May 7". At the arbitration hearing, the parties stipulated that if similar denials occur, then the determination of Grievance 2003-30 would extend to them. At hearing, the denials specifically focused on Lori Merrick, Carol Hogan and Brenda Stoffel. Each is employed by the County in the classification of Clerk/Typist.

The Department and Departmental Policy

The County Social Services Department (the Department) is physically structured so that one side of its offices houses professional social workers and the other side houses paraprofessional staff. Local 809 represents paraprofessional staff. The paraprofessional staff includes four units: Economic Support Services/Children, supervised by Joanne Faber; Economic Support Services/Adult and Elderly, supervised by Maxine Ellis; Accounting, supervised by Mary Knoeck; and Support Staff, supervised by Kay Lucas. Michael Bloedorn is the Department's Director.

The Department has a long-standing policy governing flexible scheduling. The policy has been in effect since at least August of 1985, and was revised on June 11, 1998 under the heading: "Schedule Adjustment Policy/Approval Procedure" (the Policy). The Policy was distributed to all Departmental employees, incorporated into the County's Handbook, and reads thus:

> This agency has a long-standing history of assigning a manageable workload that usually can be accommodated with the normal work week and flexible scheduling (adjustments within pay periods). Coupled with the manageable workload is the expectation that there is a limited need for paid overtime or accumulated compensatory time, both a financial and workload liability for the agency.

The purpose of this memo is to continue our long standing policy and approval procedure for any schedule adjustments.

Schedule Adjustment Policy/Approval Procedure

- **Flexible scheduling (Straight Time Adjustments Within Pay Periods)**
  Flexible scheduling or straight time adjustments within a pay period must be in writing and approved in advance by your supervisor.
- **Emergencies**
  - Flexible Scheduling. Dealing with emergency situations is a normal and regular part of the work we do with children, families and adults and can usually be accommodated and managed as part of the assigned workload thru flexible scheduling.
  - Overtime/Comp Time. Some emergencies occur late in the pay period and flexible schedule adjustments may not be possible due to prior commitments. Whenever possible, advanced approval should be obtained from your supervisor. If that is not possible, please forward to your supervisor, after the fact, the case situation requiring the need for overtime/comp time.

- **Overtime/comp time during a pay period.**
  (Excludes the assigned Saturday person)
  Work in excess of normal work days and work weeks during a pay period requires advance approval by your supervisor. Submit a written request including a description of the activity and reason current workload assignment requires need for overtime/comp time. If approved, the request needs to accompany your time card.

The County maintains forms entitled "Request For Time Off" to track requests to use flex-time as well as paid leave such as vacation and sick leave. The forms make the requesting employee specify in writing the date, time and type of leave sought. The form also requires the supervisor to approve or disapprove the request in writing.

Under the Policy, there has historically been little, if any, overtime in Lucas' unit. Flexible scheduling is frequently used. The Economic Support units have some overtime, and more frequent use of flexible scheduling. This reflects that Economic Support personnel often interview clients at hours outside of the normal work schedule. Flexible scheduling permits this to occur with a minimum of overtime. Faber testified that she would authorize overtime only if a flexible scheduling arrangement could not be reached and it was impossible for her to cover the work with an employee who would not require payment of overtime. Flexible scheduling is typically done with the agreement of an affected employee and their immediate supervisor.

The County's pay period covers two work weeks, running from a Thursday to the second following Wednesday. Employees fill out time cards that cover the two work week payroll period, and specifically note straight time and overtime hours worked, as well as specifically noting any paid time taken off. The employee's completed time sheet is given to their immediate supervisor, who may make changes. The supervisor signs the card and forwards it to the Accounting Unit, who may make changes, and then turns it over to the Payroll Department for payment. The time cards do not specifically note the use of flex-time, although the break down of numbers recorded may make such usage obvious. Flex-time is used within a single payroll period.

The WiSACWIS Project

The Wisconsin Statewide Automated Child Welfare Information System Project (the Project), came about as a consequence of federal litigation. The Project was mandated by the State of Wisconsin, which reimbursed affected counties for one-half of the cost of creating a database to track child abuse/neglect situations. The creation of the database required a large amount of data entry. Some counties contracted out the data entry. After discussion with Lucas, Bloedorn decided to handle the data entry through the Support Staff Unit. Lucas was convinced the six employees in her unit would appreciate and respond to overtime necessitated by the Project.

Lucas supervises six positions in the Support Staff unit. Five of the positions are Clerk/Typists and one is a Program Support Clerk. The normal workweek for each of these positions is Monday through Friday, 8:00 a.m. through 4:30 p.m., with a one-half hour lunch break. After Support Staff Unit-wide discussions, Lucas changed the work hours to start one hour earlier and end one hour later than the normal Monday through Friday hours. She also created an eight-hour shift for Saturday. The revised hours were to permit the normal workload to be processed with the addition of the data entry required under the Project. Lucas summarized the changes in a memo to the Support Staff unit, dated March 20, which states:

> I have attached monthly calendars for the month of April May & June. As of now, it is my expectation that we will begin doing "manual data entry" April 16th, the day after training. For now, until we get a better feel, I am planning to work 10 hour days (Monday thru Friday from 7:00 a.m. to 5:30 p.m.) and Saturday (8:00 a.m. to 4:30 p.m.).
>
> Please indicate on the attached calendars your availability so that I can plan tohave the MDE completed by the scheduled date.
>
> Please return to me by Monday, March 24, 2003.

Shortly after the data entry began, the Program Support Clerk dropped out of the revised schedule and the Saturday work was reduced from eight to four hours. Clerk/Typists were not required to work all of the hours, but had to advise Lucas of deviations from the revised hours. Lucas routinely approved the deviations.

The Circumstances Prompting Grievance 2003-30

Hogan turned in two Request For Time Off forms on March 21. Lucas approved each. One requested eight hours vacation on April 28, and the other requested the use of flex-time between Noon and 4:30 p.m. on April 25. Merrick submitted two similar forms, one on April 18 and one on April 21. Lucas approved each. The April 18 request sought the use of one and one-half hours of sick leave on April 24, and the April 21 request sought four hours of vacation for April 25. These are the requests noted in the form initiating Grievance 2003-30.

The time card submitted by Hogan for the pay period beginning April 24 and ending May 7, can be summarized thus:

DAY	DATE	STRAIGHT TIME	OVERTIME	SICK LEAVE	VACATION
Thursday	April 24	8	2		
Friday	April 25	4	1		4
Saturday	April 26				
Sunday	April 27				
Monday	April 28	4	1		4
Tuesday	April 29	8	2		
Wednesday	April 30	8	2		
Thursday	May 1	8	2		
Friday	May 2	8	2		
Saturday	May 3		5		
Sunday	May 4				
Monday	May 5	8	2		
Tuesday	May 6	8	2		
Wednesday	May 7	8	2		
TOTALS		72	23		8

The time card submitted by Merrick for the pay period beginning April 24 and ending May 7, can be summarized thus:

DAY	DATE	STRAIGHT TIME	OVERTIME	SICK LEAVE	VACATION
Thursday	April 24	6.5	2	1.5	
Friday	April 25	4	1		4
Saturday	April 26				
Sunday	April 27				
Monday	April 28	8	2		
Tuesday	April 29	8	2		
Wednesday	April 30	8	2		
Thursday	May 1	8	2		
Friday	May 2	8	2		
Saturday	May 3		4		
Sunday	May 4				
Monday	May 5	8	2		
Tuesday	May 6	8	2		
Wednesday	May 7	8	2		
TOTALS		74.5	23	1.5	4

Lucas signed each time card, and forwarded them to the Payroll Department. The Payroll Department modified Hogan's time card to read thus:

DAY	DATE	STRAIGHT TIME	OVERTIME	SICK LEAVE	VACATION
Thursday	April 24	8	2		
Friday	April 25	5			3
Saturday	April 26				
Sunday	April 27				
Monday	April 28	5			3
Tuesday	April 29	8	2		
Wednesday	April 30	8	2		
Thursday	May 1	8	2		
Friday	May 2	8	2		
Saturday	May 3		5		
Sunday	May 4				
Monday	May 5	8	2		
Tuesday	May 6	8	2		
Wednesday	May 7	8	2		
TOTALS		74	21		6

The Payroll Department modified Merrick's time card to read thus:

DAY	DATE	STRAIGHT TIME	OVERTIME	SICK LEAVE	VACATION
Thursday	April 24	8	.5		
Friday	April 25	5			3
Saturday	April 26				
Sunday	April 27				
Monday	April 28	8	2		
Tuesday	April 29	8	2		
Wednesday	April 30	8	2		
Thursday	May 1	8	2		
Friday	May 2	8	2		
Saturday	May 3		4		
Sunday	May 4				
Monday	May 5	8	2		
Tuesday	May 6	8	2		
Wednesday	May 7	8	2		
TOTALS		77	20.5		3

The balance of the background is best set forth as an overview of witness testimony not covered above.

Carol Hogan

Hogan has worked as a County Clerk/Typist since March 18, 1996. Hogan stated that Lucas described the Project as an opportunity for overtime. On April 25, she worked from 7:00 a.m. until Noon. She requested to take eight hours off on April 28 to cover a visit to Minnesota. She returned earlier than expected, and decided to report to work. She did so, working from 12:30 p.m. until 5:30 p.m. She turned her time card for the payroll period into Lucas, who signed it, and sent it to the Accounting unit, where it was modified as noted above. On June 10, Hogan turned in a Request For Time Off Form that sought four hours of vacation time to cover one half of her normal shift, which she spent taking her son to the emergency room on June 9. She had reported for work on June 9 at 7:00 a.m., and worked until she had to attend to her son. She turned in a time sheet for the payroll period covering June 5 through June 18, which noted four hours at straight time, one hour of overtime and four hours of vacation for June 9. Lucas signed the card, which the Accounting unit altered to reflect five hours at straight time and three hours of vacation, with no overtime for June 9. Hogan did not agree to these changes and no one asked her to flex her time prior to the changes.

After the filing of Grievance 2003-30, Lucas informed Hogan that if she submitted a Request For Time Off form, she should work only her normal hours. This did not affect any other Support Staff Unit member who did not claim paid time off and worked hours outside of the normal shift.

Overtime under the Project began on April 21, and continued until the Project's deadline of June 19. Hogan stated that she had not worked overtime prior to the Project and did not expect to work any after it.

Lori Merrick

Merrick has worked as a County Clerk/Typist for roughly six years, and worked no overtime prior to the Project. On April 25, she worked from 7:00 a.m. until Noon, then took the four hours of vacation approved by Lucas on April 21. The Accounting unit altered her time card without asking her to flex her time. Merrick submitted a Request For Time Off form on June 5, which sought forty-five minutes of sick leave on June 12. On the form, Lucas noted her approval and that Merrick would only work her normal work schedule that day. Prior to this discussion, she had not discussed the calculation of daily overtime with Lucas.

Michael Bloedorn

Bloedorn noted that the County seeks to minimize overtime through the use of flexible scheduling. This has not posed an issue in the Support Staff Unit until the Project, since until then there was no overtime. The Policy not only minimized overtime, but provided flexibility to address client and employee scheduling needs. Flex-time is always straight time, and is typically agreed upon between and employee and their supervisor, but Bloedorn believed a supervisor could alter schedules to avoid the payment of overtime.

Bloedorn understood the Policy to preclude the payment of overtime on a day in which an employee used paid time off to fill an eight-hour shift. He has never received a flex-time grievance in his nine month tenure as Director.

Kay Lucas

Lucas has served as a Support Staff Unit Supervisor for thirteen years. She has never asked an employee to flex their time. Employees on her unit use it frequently. Prior to the Project, she had only assigned overtime once, twelve years ago. Project overtime was flexible. Employees could work the revised schedule as they wished, provided they advised her when they would not do so. She notified Merrick when she received the time card noted above that the County would not pay overtime on a day in which she used paid leave. Lucas did agree, however, to sign the card and turn it in for processing. The Accounting Unit made the

alterations, which were approved of and implemented by the Payroll Department. She thought she informed Hogan when she approved her Request For Time Off forms in March that she could not expect overtime to be paid on a day in which she took paid time off. She turned Hogan's time sheets in believing that the overtime would be an issue to be handled by the Payroll Department.

Stoffel reported for work at 7:00 a.m. on May 15. She left at 9:30, feeling ill. Lucas approved the sick leave, without considering the potential impact of overtime. When Stoffel turned in a time sheet stating 1.5 hours at straight time, 1 hour of overtime and 5.5 hours of sick leave for May 15, Lucas informed her that the Payroll Department would not pay it. Lucas ultimately signed the time sheet, turning it over to the Payroll Department, which altered it to state 2.5 hours of straight time and 5.5 hours of sick leave. Stoffel later sought to take fifteen minutes of flex-time on June 3, to go to a medical appointment. Lucas informed her that she could take the fifteen minutes, but could not expect more than forty-five minutes of overtime for that day. Without seeking prior approval, Stoffel reported for work on that day at 6:45 a.m. instead of 7:00 a.m. Lucas decided, however, to approve one hour of overtime for the day. Hogan also used flex-time that day. She flexed forty-five minutes to permit her to take her son to the doctor. She received two hours of overtime because she worked from 7:00 a.m. until 6:15 p.m.

Mary Knoeck

Knoeck has been a supervisor for seven years. Her unit uses flexible scheduling frequently, in increments as small as fifteen minutes. She has not asked employees to flex their time, but believes she has the authority to do so. She has never granted overtime on a day in which the employee did not work a full shift. On October 31, 1996, Patty Peterson, an Account Clerk under her supervision, called in sick, then worked four and one-half hours in the afternoon. She turned in a time card with four hours of sick leave and four and one-half hours of straight time. Knoeck signed the time card, but the Payroll Department altered the sick leave hours claimed from four to three and one-half. Peterson did not grieve this action.

JoAnne Faber

Faber has been a supervisor for twenty-seven years. The ten employees she supervises normally work from 8:00 a.m. until 4:30 p.m. However, to service their clients, her employees frequently flex their schedules. The flexing is done by mutual agreement. This minimizes overtime, but due to a vacancy the caseload in her unit at the time of hearing demanded she authorize an hour or so of overtime for one to two employees per pay period. She will seek alternatives to overtime, including the reassignment of cases. She believes she has the authority to require an employee to flex their time, but has never done so.

On September 24, Faber approved the use of one hour of sick leave for Kay Liesse to

attend a medical appointment on October 8. On October 8, Liesse took the hour, then returned to work, working until 5:00 p.m. Liesse could have claimed seven hours worked, one hour of sick leave and one-half hour of overtime. Faber asked, and Liesse agreed, to submit a time card with seven and one-half hours of work and one-half hour of sick leave, flexing the remaining one half-hour.

She stated she frequently authorizes flex-time at straight time to be taken at a point subsequent to an employee's working a day in excess of eight hours to meet client needs. She documented four such instances for Julie Williamson and two for Sandy Potter. She also permits employees to combine flex-time with paid time off on the same workday, as documented with Julie Fritts in September and October. Similarly, Faber allows employees to combine vacation time with flex-time on the same day, as documented regarding La Verne Schlager in September. When an employee works into an approved vacation leave to attend to an interview, Faber will permit the employee to submit a time card claiming less vacation time than originally approved.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association's Brief

The Association contends that Section 10.03 "clearly requires the County to include paid time off as hours worked when calculating overtime", and is concise and sufficiently clear that it is not "open to more than one interpretation." A detailed review of the documentary evidence confirms this, and a review of the testimony indicates, "several of the County's witnesses have admitted that its actions in the current matter have violated the collective bargaining agreement."

More specifically, the Association argues that the provisions of the labor agreement "clearly require the County to include paid time off in the calculation of overtime." Nothing in the agreement permits the County to "retroactively substitute flex-time for other forms of paid time off." Significantly, actual modification of time cards was "made by individuals who lack the authority to alter time cards".

Nor has the County been able to demonstrate that past practice can justify its actions. Since the governing agreement provisions are clear, recourse to past practice is inappropriate. Even if such recourse was appropriate, to be binding, a past practice must be "mutually accepted and not merely an isolated incident." In this case, the only evidence of practice is the County's alteration of Peterson's time card. Peterson did not grieve this action, but the evidence fails to show other similar actions or any reliable indication that the Association was

aware of the County's action. Nor will the evidence support an assertion that such action has

been frequent, or consistently applied over a considerable period of time. Significantly, testimony of County witnesses establishes that the Project is unique, and thus cannot support the assertion of consistent conduct. In fact, the evidence shows that entry of flex-time on a time card has in the past manifested mutual agreement between an employee and their immediate supervisor.

Since this leaves clear contract language as the only basis for interpretation, the grievance must be sustained. The Association concludes that the County should be ordered to "honor the employee time sheets submitted by Carol Hogan, Lori Merrick and Brenda Stoffel as originally submitted."

The County's Brief

After an extensive review of the evidence, the County contends that the governing agreement language is "clear and unambiguous on its face and must be given its plain meaning." If the language is found unclear, then "the past practice of the parties supports the County's interpretation of the contract language in this case."

Section 9.04 governs work schedules and "is clear and unambiguous." The Project met the conditions set by Section 9.04 to alter the normal work schedule set by Section 9.01. Section 25.01 underscores the authority at issue, since "the County has determined that operations will be conducted more efficiently if the extended hours worked are first paid as flex-time to cover absences due to vacation, illness, or emergency, leaving the remainder of the extra hours worked to then be paid as overtime."

Since 1985, the Department "has enacted a . . . policy of avoiding overtime in favor of flex time". As implemented, the policy "as a general rule" establishes that "the County will not pay overtime on the same day that either vacation time or sick time has been used unless the employee actually worked more than eight (8) hours in one day." Similarly, Section 9.05 permits the adjusting of hours "on a straight time basis" where the employee and immediate supervisor mutually agree.

Section 10.01 cannot persuasively be read to demand the payment of overtime hours for the Grievants. Doing so reads the authority of Section 9.04 out of existence, and overturns the established past practice "of using flex time to avoid overtime, whenever possible." Beyond this, the reference to "paid hours" in Section 10.01 presumes the County's exercise of its management right of "what hours will be included as time paid". Specific examination of the evidence establishes that the County appropriately exercised its unambiguous contractual authority to deny overtime pay to each Grievant.

Even if the contract is considered ambiguous, consistently followed past practice

establishes that the County's denial of overtime was appropriate. That practice is to deny overtime except "when an employee has not worked in excess of eight (8) hours in one day." Sick leave and vacation cannot be combined with work time to reach the eight-hour threshold permitting overtime payment. Evidence regarding Peterson, Williamson and Potter establishes this point. Beyond this, the County flexes hours worked outside of the normal schedule to leave "employees' sick banks intact for future use." Evidence regarding Liesse and Fritts establishes this point, as well as establishing that the supervisor unilaterally determined to flex the time. Evidence regarding Oilschlager establishes that the County will offset vacation time claimed with time worked outside of the normal schedule, "within the same pay period." Evidence concerning Peterson establishes that the Department will not approve overtime "when an employee combines hours worked with sick time".

The County concludes that the evidence demands "that the grievance be dismissed with prejudice in its entirety."

The Association's Reply Brief

The Association contends that many of the County's arguments "conflict with testimony". More specifically, the Association argues that although it is undisputed that "economic support specialists use flex-time in order to accommodate the needs of clients who are unable to meet during normal business hours", this grievance "involves an entirely different set of facts." Unlike other cases, the Project increased the number of work hours. Had the hours not been increased, "the project could not have been completed by the State mandated deadline." Thus, there can be no persuasive assertion that there is a consistent past practice. Witness testimony confirms that the policy was not followed during the Project. If the County wished to avoid overtime, it could have denied employees permission to "come in early or stay late on days they requested to use paid time off."

To permit the County to retroactively alter time cards reads Section 10.03 out of existence. To permit employees to secure supervisory approval to take time off, and then to permit the Payroll Department to recharacterize the hours guts the overtime provisions.

That the Association has never grieved the use of flex-time, where an employee and a supervisor mutually agree cannot be extended to conclude the Association has acquiesced in the use of flex-time to avoid the payment of overtime. It follows that the "Arbitrator (should) reject the County's attempt to circumvent the collective bargaining process and . . . uphold the grievance."

The County's Reply Brief

Since the County "has the management right to dictate who administers the collective bargaining agreement, it follows that Payroll Department personnel can retroactively recharacterize time cards. The County has chosen not to vest that authority exclusively in departmental supervisors. Section 25.01 leaves that authority with the County.

Section 9.04 may not, standing alone, authorize the retroactive designation of time paid as flex-time, but it does govern adjustments in work schedule. This has a direct bearing on "time paid" and "time paid" is a consideration made by the Payroll Department. The evidence falls short of establishing any sort of past practice violated by the Payroll Department. The Association's contentions threaten to blur the necessary line between management and employee regarding "who has the authority to determine the hours paid in a given pay period." An examination of the record establishes that "(n)either the individual employee nor the unit supervisor has the authority to make this final decision on the appropriate hours worked and paid for that particular pay period." Rather, that final determination is made in the Payroll Department. Nor does the citation of the unique nature of the Project alter this. Increased hours under the project did not demand overtime. Rather, they established the opportunity for overtime. The project did not void County policy or past practice.

In sum, the grievance cannot persuasively be characterized as a necessary interpretation of "whether the County has the right to retroactively adjust hours paid" as the Association asserts. The County's right to determine proper payment is the issue, and the evidence establishes it determined the proper payment at the Payroll Department level.

Section 10.03 does not govern the grievance, because "the hours in question were never considered overtime." Rather, the County determined the hours were "extra hours worked to first be flexed to offset the use of vacation and sick time." Under Sections 9.04, 9.05 and 25.01, they "were never eligible for overtime." Since the County has the right to adjust the hours worked to avoid the payment of overtime, the provisions of Section 10.03 never come into play, and the Association's attempt to undermine the procedures by which the hours were adjusted must be rejected.

The Association's arguments regarding past practice must be rejected. Past practice can be used to supplement the agreement where it may be silent or ambiguous, as in the case regarding which department "has the authority to designate hours worked and hours paid". That a practice must be mutually agreed to underscores the significance of the evidence of Association acquiescence regarding the adjustment of hours to avoid overtime. Nor can the consideration of past practice ignore that such evidence extends to "the entire bargaining unit", not just Clerk/Typists. Viewing the record as a whole, the County concludes that "the grievance (should) be dismissed with prejudice in its entirety."

DISCUSSION

The parties did not stipulate the issues. I have adopted the County's statement. Each party's broadly puts the "collective bargaining agreement" at issue. The County's statement, however, focuses the interpretive issue on "all hours worked." This points the analysis to Section 10.03, but the County's statement of the issue succinctly points out that examination of this section draws in other contract provisions and past practice.

Section 10.03 defines "all hours paid for" as "hours worked." The reference to "hours worked" calls in the provisions of Section 10.01, which provides time and one half for "all hours worked . . . in excess of eight (8) paid hours per day." Standing alone, these provisions, as the Association points out, can be considered clear. The provisions do not, however, stand alone. Section 9.04 permits the County to adjust work schedules and Section 9.05 recognizes the extensive flexing of hours "on a straight time basis" that is codified by the Policy and Departmental practice. Even if part of this web of contract provisions is clear, their relationship is not.

As the County views the grievance, the interpretive issue is whether these provisions establish a system by which the County determines which hours are eligible for overtime calculation under Section 10.03 and payment under Section 10.01.

On the facts posed by this grievance, this view is unpersuasive. To accept it reads Section 10.03 out of existence, and each contract provision must be given effect. Under the County's view, "hours paid" on an eight-hour day cannot include vacation, sick leave or flex-time. This means that "hours paid for" is identical to "hours worked." If that is the case, there is no role for Section 10.03.

This broad statement of the conclusion obscures the interpretive difficulty posed by the grievance, and thus requires some elaboration. The fundamental difficulty turns on the extensive use of flexible scheduling that characterizes the bargaining relationship. This dilemma cannot be resolved in the abstract. Rather, its impact must be minimized by restricting the broad conclusion stated above to the facts posed by the grievance.

The Project is contractually and factually unique. Factually, it is unique because its fundamental impact was on the Support Staff Unit, and it represents the only significant overtime opportunity in the work experience of each grievant. This has a contractual and policy bearing. The Policy is directed primarily at the Economic Support Services Unit. The "normal work week" of a Support Staff Unit employee has historically reflected Sections 9.01 and 9.02. The "normal work week" of an Economic Support Services Unit employee cannot be as easily standardized, given the need for direct client contact. Beyond this, the normal Economic Support Services Unit workload will, with some frequency, pull an employee outside of a normal eight-

hour workday and forty-hour workweek. The Project squarely posed the need for the County to

alter the "normal" schedules for Support Staff Unit employees set by Sections 9.01 and 9.02 to allow necessary data entry. Unlike the ongoing caseload addressed in the Economic Support Services Unit, the alteration caused by the Project increased the normal workload for a clearly identifiable period of time. On a contractual level, Section 9.05 recognizes the flexible scheduling system, but bases it "upon the mutual consent of the employee and his immediate supervisor."

To read the Articles IX and XXV as broadly as the County seeks thus risks upsetting a consensually developed series of practices that implement the broad provisions of Sections 9.01, 9.02 and 9.05. Bad facts can make bad law. In this case, unique and non-recurrent facts should be treated as the unique events they represent rather than as a basis for setting Department-wide precedent. The flexible scheduling system under the Economic Support Services Unit has limited direct bearing on the Project. Outside of the Project, the flexible scheduling system used in the Support Staff Unit has uniformly involved the substitution of straight time hours. Only with the Project did the flexing of a straight time hour to avoid the payment of an overtime hour, without the mutual agreement of employee and supervisor, become an issue.

Unlike the County's view, the Association's grants meaning to the governing contractual provisions. The Project permitted the alteration, under Section 9.04, of the normal work schedules set by Sections 9.01 and 9.02. Flexible scheduling was still possible under Section 9.05, but only "upon the mutual consent of the employee and his immediate supervisor." Section 10.03 has meaning because "all hours paid for" are considered "hours worked," granting Section 10.01 meaning by permitting the overtime payment for "all hours worked . . . in excess of eight (8) paid hours per day." It is evident that the Grievants sought to maximize the overtime opportunity, as evidenced by Hogan's reporting to work unexpectedly on April 28, and Stoffel's reporting to work earlier than expected on June 3. These incidents do not, however, pose a significant issue regarding supervisory approval of overtime. Lucas approved each employee's actions.

The incidents do, however, pose an interpretive issue concerning the conclusions stated above. On April 28, Hogan did not work a full eight hour shift. Rather, she used vacation to count toward the overtime she claimed. Due to the dispute on overtime calculation, Lucas forwarded Hogan's time sheet to the Payroll Department, which unilaterally altered it. After the April and May incidents prompted Grievance 2003-30, Lucas took care not to authorize overtime on days in which an employee took paid leave and could not otherwise fill an eight-hour shift. Thus, on June 3, Lucas required both Hogan and Stoffel to work a full eight hours to claim the overtime. From the County's perspective, this addressed the Policy, since neither employee used paid time off as a basis to fill the eight-hour shift that makes overtime payment possible. From the perspective of the conclusion stated above, Lucas withheld approval of overtime, thus posing an issue regarding flexible scheduling. Hogan and Stoffel, on June 3, accepted the flexible

scheduling arrangement to secure the payment of overtime. Unlike the prior incidents, the Payroll Department did not unilaterally alter their time sheets. The Association does not challenge the

County's authority to approve overtime prior to an employee claiming it. Thus, the June 3 incidents must be treated, as an interpretive matter, as an example of consensual flexible scheduling under Section 9.05 rather than an issue of non-consensual alteration of an overtime calculation under Section 10.03.

In sum, the grievance narrowly poses the contractual validity of the Payroll Department's unilateral alteration of certain April, May and June time sheets. That action has no evident support under Section 9.05 and violates Sections 10.01 and 10.03.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The provisions of Article XXV afford limited assistance in the resolution of the grievance. The general authority stated in that provision must, by its own terms, be exercised consistently with other agreement provisions. Section 10.03 specifically permits "all hours paid for" to be considered "hours worked" in the calculation of the time and one half premium established in Section 10.01. Citation of the general authority to make County processes efficient under Article XXV cannot be used to invalidate specific provisions governing overtime payment under Sections 10.01 and 10.03.

Testimony of supervisory personnel on whether they followed the contract or the Policy has no bearing on the conclusions stated above. Even if it is concluded that supervisors admitted a contract violation, such an admission has little persuasive force. To give force to a supervisory admission of violation implies contrary testimony is similarly binding. Neither is, because the issue remains the interpretation of the labor agreement. The Association and the County created the labor agreement. None of the testifying supervisors played any role in the negotiation process, and thus none can be considered to have meaningful insight into what County or Association negotiators intended when they created the provisions of Articles IX and X.

Nor can Lucas' approval of the April and May time sheets afford guidance in the interpretation of the labor agreement. On this issue, the provisions of Article XXV play a role. Under Article XXV, who exercises binding payment authority is the County's determination, and there is no reliable evidence that the County authorized Lucas to exercise binding authority by signing a time sheet. Rather, the evidence is that Lucas, when confronted with the interpretive dilemma regarding the calculation of overtime, sought direction from her supervisors, and was informed to pass the problem to the Payroll Department.

The County's assertion that it can determine which hours are eligible for overtime seeks to preserve the viability of the Policy. It does so, however, at too great a contractual cost by reading Section 10.03 out of existence. The County's authority to authorize overtime is a more contractually sound basis to address the scope of the overtime payment obligation. In this case,

the authority to approve overtime, which the Association does not dispute, was not brought to bear until after the filing of the grievance. Restricting the conclusions stated above to the unique facts

posed by the grievance should minimize the risk of damaging the flexible scheduling process. In any event, a grievance arbitration award is not an appropriate vehicle to turn the consensual processes of Section 9.05 into a binding exercise of County authority.

The parties have not raised any issue regarding remedy. The Award entered below states a broad make whole remedy. The Award essentially orders the County to pay the time sheets as originally submitted by the Grievants. Doing so will throw each Grievant's paid leave balances off to the extent the County originally altered them. The Award permits the County to make the necessary readjustment. The parties stipulated that the Award could impact facts not brought forward during the arbitration hearing. This determination must be left to the parties.

AWARD

The County did violate the collective bargaining agreement when it denied overtime pay to the Grievants for all hours worked.

As the remedy appropriate to the County's violation of Sections 10.01 and 10.03, the County shall make the Grievants whole by paying each Grievant the difference between the amount actually paid by the County for the time sheets submitted by each Grievant for the April 24 – May 7; the May 8 – May 21; and the June 5 – June 18 payroll periods and the amount the County would have paid had it not altered those time sheets. The County may adjust the paid leave balances of each employee to the extent necessary to make payment of the amount noted above consistent with each Grievant's paid leave balances.

Dated at Madison, Wisconsin, this 10th day of June, 2004.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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