BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DANE COUNTY**

and

**SEIU, DISTRICT 1199W/UPQHC, AFL-CIO, CLC**

Case 178
No. 62582
MA-12352

(Wage Rate Grievance)

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**Appearances:**

LaFollette, Godfrey & Kahn, S.C., by **Attorney Jon E. Anderson**, One East Main Street, P.O. Box 2719, Madison, WI 53701-2719, on behalf of the County.

Cullen, Weston, Pines & Bach, S.C., by **Attorney Linda L. Harfst**, 122 West Washington Avenue, Suite 900, Madison, WI 53703, on behalf of the Union.

## ARBITRATION AWARD

Dane County (County) and District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC (Union) have been parties to a series of collective bargaining agreements including the effective labor agreement in this case, the 1998-99 contract. The parties jointly requested that Sharon A. Gallagher, a member of the Wisconsin Employment Relations Commission staff, act as impartial arbitrator regarding three After Hours Clinics which ran past the normal time of the clinics and whether the Public Health Nurses who held those clinics should have received overtime for the hours in excess of the schedule. Hearing on the matter was held at Madison, Wisconsin, on May 12, 2004. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs, two copies to the Arbitrator for her exchange post-marked June 11, 2004. The Union advised in its initial brief that it would not file a reply brief. On June 30, 2004, the County advised it would not file a reply brief, whereupon the record was closed.

**ISSUES**

The parties stipulated that the following issues should be determined herein:

Did the Employer violate the 1999-2001 labor agreement when it denied overtime to Public Health Nurses who worked extra time because public health clinics unexpectedly ran beyond the advertised clinic schedules? If so, what is the remedy?

**RELEVANT CONTRACT PROVISIONS**

ARTICLE VIII - WORK SCHEDULES, HOURS OF WORK

8.01 Workday.

(a) For PHN, PT, OT and the Dental Health Coordinator, the workday shall consist of eight (8) hours work to be completed in not less than eight and three-quarters (8 3/4) consecutive hours.

. . .

8.02 Workweek.

. . .

(b) The normal workweek for remaining collective bargaining unit employees shall consist of forty (40) hours within the period Monday through Friday and for part-time employees whatever hours scheduled during such period.

. . .

8.04 Scheduling.

(a) The Employer shall continue the current method of establishing work schedules. Work schedules for Badger Prairie Health Care Center bargaining unit employees shall be posted at least two (2) weeks in advance. No changes shall be made to the posted work schedule without the employee's request or consent. However, if there is a need to change the method of scheduling work, the Employer will institute such changes in a reasonable and timely manner.

(b) Employees may request a specific day off. Such requests, if made at least seven (7) days prior to the development of the schedule will be granted whenever possible. Such requests will not be unreasonably denied.

. . .

ARTICLE XVI - CLASSIFICATION AND COMPENSATION

. . .

16.05 Overtime. Bargaining unit employees will be paid at a rate of one and one-half times for all hours worked in excess of 8 hours per day; more than 40 hours per week and for holidays worked. As to compensatory time, at the option of the employee, such shall be granted at the rate of one and one-half times the hours worked in excess of 40 hours per week or 8 hours per day. Such compensatory time shall be taken at a time mutually agreeable between the employee and his/her supervisor. Employees shall be permitted to accumulate up to 24 hours of overtime (36 hours converted) as compensatory time in a "comp time bank".

. . .

MEMORANDUM WORK SCHEDULES AT PUBLIC HEALTH

1. Employees may request alternative work schedules. Management's approval or disapproval will be indicated in writing with an opportunity for the employee to meet with management to discuss any denial and its basis. An alternative work schedule is defined as any regular work schedule which deviates from the working hours of 7:45 a.m. to 4:30 p.m., Monday through Friday, but which still equals a pay period of 80 hours for full-time employees, not including the unpaid lunch period of 45 minutes per day. Examples of alternative work schedules are: (a.) four ten-hour days per week; (b.) four nine-hour days and one four-hour day per week; (c.) five eight-hour days one week of the pay period and four ten-hour days the other week of the same pay period; and (d.) five eight-hour days one week of the pay period, and four nine-hour days and one four-hour day the other week of the same pay period. This is not intended to exhaust the possibilities for alternative work schedules for full-time or part-time employees. The accrual of compensatory time and payment of overtime shall not apply where an employee on an alternative work schedule agrees to work more than eight hours in one day so long as that employee's hours do not exceed 80 hours in the paid period. Employees who have received approval to work their assigned hours in fewer than five work days may, at management's

discretion, be required to resume a traditional five day work week for a specified period of time in order to ensure adequate coverage when other employees are on vacation, extended sick leave or when other factors create short-term demand for improved coverage.

2. Employees who volunteer to work hours outside of the traditional working hours of 7:45 a.m. to 4:30 p.m. or who are given at least thirty (30) days notice (per paragraph 5 below) will flex their hours. An example of flex time is an employee would work longer one day to meet County needs and then take that time back during the same pay period, or, a person could arrange to come in late one day and work longer on another day in anticipation of an evening clinic or Saturday clinic. The accrual of compensatory time and payment of overtime shall not apply where an employee volunteers to flex their time or is given at least thirty (30) days notice (per paragraph 5 below). Employees who schedule meetings, clinics, home visits or other work-related activities without prior supervisory authorization will be considered to have volunteered to flex their time.

3. A part-time position will be considered for any bargaining unit member who makes such a request. Employees may request changes to their FTEs in a manner that will continue to provide coverage and enhance the agency's programs. An example of how such changes might work without negatively impacting the County's ability to provide services would be four employees requesting to work FTEs of .8 per week, thereby creating a new .8 position. The ability of four employees to work part-time thus would not have to diminish the total number of hours available to the County. It is understood that such a reduction to part-time is a permanent decision unless reversed by mutual agreement with availability of appropriate position authority.

4. It is the goal of the parties to promote voluntary agreements on schedules between employees and management under paragraph (1), (2) and (3) above. However, nothing in this section modifies management or employee rights under the collective bargaining agreement concerning management's right to schedule hours or employee compensation for work.

5. After Hours Clinic Premium. Employees who work a clinic which extends beyond 4:30 p.m. or occurs on a Saturday (not to exceed six Saturday clinics unit-wide over the term of this Memorandum) shall flex their schedules within the pay period to cover the time of the clinic without creating overtime or compensatory time liability on the part of the County. The County agrees that employees who work at such a clinic shall be given at least thirty (30) days notice of such clinics and will be paid a premium of $2.00 per hour for time worked beyond the later of 4:30 p.m. or the

employee's normal workday hours under an alternative work schedule or time and one-half of base pay on a Saturday. (The Saturday premium shall only apply to employees hired prior to June 1, 1998.) Clinic assignments, to the extent reasonably possible, shall be rotated among employees by seniority. Employees who volunteer for a late clinic will not be involuntarily assigned to another late clinic until a complete rotation among qualified employees has occurred.

6. Except as provided in 5. above, employees who do not voluntarily choose to flex their hours, but who are assigned to work outside of their standard work hours will not be prohibited from collecting compensatory time or overtime pay as per Article 16, Section 16.05 of the collective bargaining agreement.

7. No employee shall be treated differently or discriminated against for choosing or not choosing any of the above options. When a request for a schedule change of any nature is made by an employee, a written response will be provided to the employee within thirty days, including rationale for any denial. The employee or the supervisor may cancel an alternative work schedule with four weeks notice, or earlier by mutual consent.

8. This memorandum shall apply for the term of the 1998-99 agreement. The parties will review implementation of this memorandum in negotiations over the successor agreement. In the event the parties do not agree to continue this memorandum, the status quo will be the memorandum that existed immediately prior to this one.

## BACKGROUND

Dane County (County) has offered immunization clinics (IC’s), serving children who are County residents and under 18 years of age if they are accompanied by their parent or legal guardian who bring their immunization records with them. The immunizations, which are given free to qualifying children, include all those required by law for children to attend school. The County also offers information and referrals, as well as blood pressure, vision, hearing and lead poisoning testing at IC’s. IC’s are sometimes combined with other clinics such as flu clinics and WIC (Women Infants and Children) clinics for efficiency purposes. County clinics, including IC’s, are staffed by County Public Health Nurses (PHNs), one of whom is always designated Clinic Charge Nurse. The Charge Nurse directs the work of the clinic, prepares the clinic report and confers with managers regarding when to close the IC, if there is a question. Other County employees at IC’s include Staff PHNs, Health aides and foreign language interpreters. County IC’s have been held in various public buildings in the County including at City and County Public Health buildings, banks, community centers and churches. As such, these IC’s require set-up and tear-down time whenever they are in non-County facilities as clinic staff must bring all necessary supplies and records.

In the 1970s through the mid-1990s, IC's were held during the PHNs' traditional work hours (7:45 a.m. to 4:30 p.m.). In the mid-1990s Public Health Administrator Garreth Johnson became concerned about the cost of overtime to the County in his department. On February 9, 1994, Johnson issued the following memorandum regarding scheduling to "all Professional Staff, Nursing Section:"

. . .

> As most of you have already heard, I am concerned that we need to reduce the amount of overtime being worked by professional staff. The reason for this is that I do not believe that we are justified in reducing the number of professional hours available to serve the public. When we need to grant 1 ½ hours off for every 1 overtime hour worked, over the course of a year this has a significant negative impact on our ability to provide services. Accordingly, effective the week of February 28, 1994, we will be routinely exercising the flexibility we presently have under the terms of the collective bargaining agreement between the County and the United Professionals for Quality Health Care with regard to scheduling. This agreement states that "the work day shall consist of eight (8) hours to be completed in not less than eight and three-quarters (8 3/4) consecutive hours." It does not specify the starting and ending times.
>
> This means that, when we have a clinic or other activity scheduled at the end of the day that we can reasonably expect to extend past the end our usual workday at 4:30 PM, we will schedule staff who will work that clinic to start work later in the day in order to accumulate a total of 8 hours of work time. This does not preclude the possibility of overtime in the event that a clinic lasts longer than anticipated, or when other unanticipated need arises (e.g., communicable disease outbreak). This will also not impact on our current practice of approving overtime when it is necessary for staff to work a split shift because of late clinics. We most emphatically do not want staff's personal security compromised because they feel they must stay in the office between 4:30 PM and a clinic that starts at 8:00 or 9:00 PM. In the event that such clinics are scheduled, staff approved to work them will work their normal shift at 7:45 AM to 4:30 PM, and receive overtime authorization for the late shift.
>
> This represents a more formal implementation of a scheduling method that has been used in the past. For example, last November, several staff who worked the special HealthCheck clinic at the Lincoln School were scheduled to arrive late so as not to accumulate overtime on the clinic day. If you have questions about this, Joanne, Terry and Peggy should be able to answer them for you.

. . .

On May 2, 1994, PHNs Braun and Talamantes filed a grievance at Step 2 which alleged that the County was "attempting to avoid overtime . . . by mandating changes in employees normal work hours." The grievants sought a make-whole remedy as well as that the County "stop mandating employees to flex their schedules" and return to the practice of seeking "volunteers at overtime/comp time." 1/

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*1/ Both overtime and compensatory time are paid/credited at time and one-half in the County.*

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On June 8, 1994, Helene Nelson, then Director of Public Health for the County, responded to the Braun/Talamantes grievance as follows:

. . .

> I will not sustain this grievance because I do not believe that management violated any aspect of the labor agreement. The normal workday of the PHN still consists of eight hours which occur in a consecutive manner. The normal work week remains at 40 hours. Section 8.04 of the contract requires the department to provide notice of a change in scheduling practice in a reasonable and timely manner. Nursing staff were notified via a memo from the Division Manager, Gareth Johnson of a change in scheduling practice on February 9, 1994 which informed you that the Department would no longer grant overtime pay for pre-scheduled work activities. This was more than two months before any employee was asked to work a periodic staggered work schedule. Further, staff still receive undesirable hours premiums according to Section 16.02 of the contract for any hours work [sic] past 6:00 p.m. Additionally PHNs have continued to be paid overtime for any hours worked over eight hours in any given day per Section 16.05 of the union agreement.
>
> I am willing, over time, to comsult [sic] with Public Health staff and management further about management's decision in this matter. I understand, as I know that you do, that clinics need to be scheduled after regular work hours so that working parents are able to bring their children in for immunizations. Further, the Department needs to be able to staff those clinics in a cost effective manner which does not subtract from our overall staffing capacity. Sometime in the next month I will request a meeting with you and Health Division management to discuss options to achieve these goals which staff and management can agree are reasonable. While I do not believe the labor contracts prohibit management from changing your schedules, I do believe your input on schedules should be seriously considered.

. . .

After this denial issued, Union and County representatives began meeting on June 20, 1994, to determine whether the parties were interested in negotiating a Memorandum of Understanding (MOU) concerning PHN scheduling. A draft Agenda listed discussion topics/elements of a potential MOU as follows:

. . .

> -Who is covered? Management is assuming staff in Public Health only, those scheduled as 1.0 FTE staff not part-year or part-time staff at this point.
>
> -Management assumes no compromise of management right to determine basic work schedules and to give prior authorization to any overtime hours.
>
> -To what extent can voluntary flextime schedules (individual employee option with approval by management) meet program goals and individual employee needs?
>
> -If management had the option to determine whether overtime were paid in cash versus taken as compensatory time, management would be more open to scheduling overtime such as for immunization clinics. We are open to discussing how clinics are scheduled and when they might be overtime. To what extent is this a helpful element to resolve differences?
>
> -What other elements might be in a mutually acceptable MOU?
>
> -Is it desirable to attempt to resolve the May 10 grievance as part of this process?
>
> 5. General conclusions - Is there mutual interest in an MOU? How shall we proceed from here?

The parties met over a one-year period , exchanging many proposed drafts of the MOU. 2/

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***2/ The Union made three written proposals regarding the PHN Scheduling MOU dated September 13 and 23, and November 4, 1994.***

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At some point during this process, Union representative Kris Penniston sent the following undated memo to the County:

**JUSTIFICATION FOR THE UNION'S
PROPOSED MEMORANDUM OF UNDERSTANDING
REGARDING WORK SCHEDULES AT PUBLIC HEALTH**

. . .

We understand the public health clinics need to be scheduled after normal working hours to accommodate **working people**. As **health care professionals** committed to the provision of health care for Dane County, we support efforts to improve services. **We are also working people**, and many of us have children or other family demands on our time and energy. We want very much to accommodate the County's need for expanded services and to accommodate our own needs for manageable and predictable work schedules. We believe it is in our **mutual interest** to solve this contradiction.

1. **Alternative Work Schedules**.
   We believe that the creation of alternative work schedules for those employees who desire them is one piece of the solution. Alternative work schedules may allow for an employee to work more than eight hours a day on a regular basis without the collection of overtime pay or accrual of comp time. The employee who agrees to work an alternative work schedule may be able to provide immunizations, for example, at an evening clinic at no extra cost to the County and at no disadvantage to the employee.

2. **Flexible Hours**.
   Allowing employees to voluntarily flex their hours, not unilateral imposition of such, would help employees cover County needs. When an evening clinic is scheduled, for example, the County could call for anyone who wants to flex their hours to accommodate the clinic to step forward. An employee choosing to flex her/his schedule could determine for herself/himself the potential disruption to family and personal demands and thus plan for it in advance. An employee could work ten hours one day in order to accommodate an after-hours clinic, for example, and then work six hours another day that week. Allowing employees this flexibility would be good for morale and would allow employees input on their schedules. Involuntary imposition of flex time, however, poses great problems for many employees, especially those with family demands on their personal time and does little to ensure an amicable and cooperative work environment.

3. **Comp Time and Overtime**.
   Given points #1 and #2 above, we believe the accrual of comp time and the payment of overtime could be curtailed or controlled. We know this is an important consideration for the County. We doubt that any one plan could

be developed which would eliminate the need for overtime pay and comp time accrual completely, especially in a crisis management situation such as an outbreak of some sort. We think the points outlined in the draft Memorandum of Understanding, however, move us towards a solution which could be agreeable by employees and employer.

4. **Part-Time Work**.
   Most of the positions represented by 1199W/UP within the Public Health department are full-time positions. More part-time positions would be a piece of the solution, in our estimation, as we believe the County would benefit by exploring the creation of part-time employment opportunities for those that want them. Those with part-time hours may be able to be more flexible in their working hours than those who are full-time. We feel strongly this is an idea to be pursued.

In essence, we think scheduling at the Public Health department can both meet the County's needs and have the full support of the staff represented by 1199W/UP. Many of our members are long-time County employees. All of our members are dedicated to public health and committed to serving the County. Our input into the scheduling of our work makes us more satisfied on the job and in control of our lives.

The MOU regarding PHN work schedules that the parties ultimately agreed upon was effective from November 15, 1994, to March 30, 1995, read as follows:

In recognition of the County's need to provide services outside the period between 7:45 a.m. and 4:30 p.m., Monday through Friday, and for manageable and predictable working hours for employees in the bargaining unit represented by 1199W/United Professionals for Quality Health Care, the parties agree:

1. Employees may request alternative work schedules. Management will solicit such requests once every three months in a formal process tied to scheduling of the Division’s public health programs. Management's approval or disapproval will be indicated in writing with an opportunity for the employee to meet with management to discuss any denial and its basis. An alternative work schedule is defined as any regular work schedule which deviates from the working hours of 7:45 a.m. to 4:30 p.m., Monday through Friday but which still equals a pay period of 80 hours for full-time employees, not including the unpaid lunch period of 45 minutes per day. Examples of alternative work schedules are: (a.) four ten-hour days per week; (b.) four nine-hour days and one four-hour day per week; (c.) five eight-hour days per week of the pay period and four ten-hour days the other week of the same pay period; and (d.) five eight-hour days one week of the pay period,

and four nine-hour days and one four-hour day the other week of the same pay period. This is not intended to exhaust the possibilities for alternative work schedules for full-time or part-time employees. The accrual of compensatory time and payment of overtime shall not apply where an employee on an alternative work schedule agrees to work more than eight hours in one day so long as that employee's hours do not exceed 80 hours in the pay period.

2. Employees may choose to voluntarily flex their hours on an occasional basis at any time during the week in order to meet County public health needs and employee needs with the approval of management. An example of flex time is an employee would work longer one day to meet the County needs and then take that time back during the same pay period, or, a person could arrange to come in late one day and work longer on another day in anticipation of an evening clinic. The accrual of compensatory time and payment of overtime shall not apply where an employee on an alternative work schedule agrees to work more than eight hours in one day so long as that employee’s hours do not exceed 80 hours in the pay period.

3. A part-time position will be considered for any bargaining unit member who makes such a request. Employees may request changes to their FTEs in a manner that will continue to provide coverage and enhance the agency's programs. An example of how such changes might work without negatively impacting the County's ability to provide services would be four employees requesting to work FTEs of .8 per week, thereby creating a new .8 position. The ability of four employees to work part-time thus would not have to diminish the total number of hours available to the County. It is understood that such a reduction to part-time is a permanent decision unless reversed by mutual agreement with availability of appropriate position authority.

4. It is the goal of the Memorandum of Understanding to promote voluntary agreements on schedules between employees and management under paragraph one, two and three above. However, nothing in this agreement modifies management or employee rights under the collective bargaining agreement concerning management's right to schedule hours or employee compensation for work.

5. Employees who do not voluntarily choose to flex their hours but who are assigned to work outside of their standard work hours will not be prohibited from collecting compensatory time or overtime pay as per Article 16, section 16.05 of the collective bargaining agreement. This provision shall only apply to employees hired prior to October 1, 1994.

6. No employee shall be treated differently or discriminated against for either choosing or not choosing any of the above options. When a request for a schedule change of any nature is made by an employee, a written response will be provided to the employee within thirty days, including rationale for any denial. The employee or the supervisor may cancel an alternative work schedule with four weeks notice, or earlier by mutual consent.

7. This Memorandum of Understanding shall apply for the period from November 15, 1994 to March 30, 1995. However, any changes to permanent part-time schedules as per paragraph three shall not be reversed except by mutual agreement and with availability of appropriate position authority. The parties will review implementation of this Memorandum of Understanding by March 30, 1995 and consider whether to extend, modify or terminate this agreement.

. . .

The parties amended the 1994-95 Scheduling MOU in 1995, deleting the following stricken language from the 1994-95 MOU and adding the bracketed language, as follows:

. . .

1. . . . ~~Management will solicit such requests once every three months in a formal process tied to scheduling of the Division's public health programs. . . .~~ [Employees who have received approval to work their assigned hours in fewer than five work days may, at management's discretion, be required to resume a traditional five day work week for a specified period of time in order to ensure adequate coverage when other employees are on vacation, extended sick leave, or when other factors create a short-term demand for improved coverage.]

2. [Employees who volunteer to work hours outside of the traditional working hours of 7:45 a.m. to 4:30 p.m. will flex their hours.] ~~Employees may choose to voluntarily flex their hours on an occasional basis at any time during the week in order to meet County public health needs and employee needs with the approval of management~~. . . .The accrual of compensatory time and payment of overtime shall not apply where an employee ~~on an alternative work schedule agrees to work more than eight hours in one day so long as that employee's hours do not exceed 80 hours in the pay period~~ [volunteers to flex their time.] [Employees who schedule meetings, clinics, home visits or other work-related activities without prior supervisory authorization will be considered to have volunteered to flex their time.]

. . .

7. This Memorandum of Understanding shall not apply for the period from ~~November 15, 1994 to March 30, 1995~~ July 1, 1995 to December 1, 1995. . . . The parties will review implementation of this Memorandum of Understanding by March 30, 1995 and consider whether to extend, modify or terminate this agreement. [At this time, the parties will consider whether to extend, modify or terminate this agreement.]

. . .

Johnson, who was present at all negotiations which lead to the 1994-95 MOU stated herein that he did not recall any discussions at negotiations regarding a 30-minute tear-down time following the close of IC's (if the close of such IC was after PHNs' normal work hours). Johnson also stated that there was no discussion between the parties of overtime as the County was trying to eliminate overtime by entering into the MOU. However, Johnson admitted that in 1994 the County had just begun to experiment with conducting clinics "after hours" and so the parties never discussed clinic starting and closing times during negotiations for the 1994-95 MOU. As the 1994-95 MOU was based upon seeking volunteers to work the clinics, Johnson stated that the County knew that if it did not get enough volunteers (or newly hired staff) to cover the clinics, the County would have to employ grand-fathered PHNs and pay them overtime to work after hours clinics (AHC's).

Local Union representative Christine Palmer stated herein that she was present at all negotiations concerning the 1994-95 MOU. Palmer stated that the parties discussed the 30-minute tear-down time and giving employees 30 days notice during negotiations for the second MOU entered into in 1995, but that nothing was placed in the contract or the MOU regarding clinic tear-down time and that she (Palmer) did not recall that "overtime" was discussed at either the 1994 or the 1995 negotiations.

The parties again amended the Scheduling MOU in 1998 to read as it does in the effective labor agreement (Jt. Exh. 8). In doing so, Union representative John Horn sent two flow charts to County counsel Anderson to be used to help employees understand what they would be paid and their work obligations under the 1998 MOU. The "Second Draft" of the flow chart indicated that when PHNs received 30 days notice of work at a "clinic after . . . normal work hours" "a) You must flex your schedule, no OT/Comp time at 1 ½" and "b) You get $2.00/hour" clinic differential or premium "M-F after 4:30 p.m. or 1 ½ times [sic] on Saturday." This flow chart also stated that "only one differential will be paid . . . [e]xcept nurse charge pay for charge duties will be paid in addition to premium" and that the clinic differential or premium would be "effective on June 7, 1998." It is significant that Union Representative Horn sent Attorney Anderson a first draft of this flow chart which stated that if a PHN received 30 days notice of an AHC "a) You must flex your schedule, no OT/Comp. time at 1 ½" and "b) You get $2.00/hour M-F or 1 ½ times on Saturday." The second draft described previously inserted "after 4:30 p.m." after "M-F."

Palmer stated that the Union never agreed to or signed Horn's flow charts-that they were merely intended for use in implementing the 1998-99 MOU. Palmer, who attended all negotiations thereon, stated that during negotiations over the 1998-99 MOU, the parties talked about the 30-minute tear-down time and giving PHNs 30 days notice of clinic work, but that there was no discussion of any limits on when and how PHNs could flex their schedules. In contrast, Johnson, who was also present for negotiations over the 1998-99 MOU, stated that the parties never agreed to limit flex time to the posted hours of the AHC plus 30 minutes for tear-down. Johnson stated that the County wanted to limit overtime/comp time liability by its agreement to the 1998-99 MOU.

Public Health nursing Director Pat Frazak stated that the 30-minute clinic tear-down time came from the parties' Quality Improvement Team (QIT), which the parties have maintained since 1994 to address issues of concern which may arise during the term of a contract. Frazak stated that on July 12, 2001, the QIT recommended (in a memo) that the parties agree that for scheduling clinics end ½ hour after the clinic officially ends" the one exception being the clinic at Harrambee Center. (County Exh. 13). Frazak stated that management never accepted the above-quoted QIT recommendation and that the 30-minute tear-down time was never intended to be a guarantee, only a guideline. On July 19, 2001, the QIT also recommended the following:

> f) If families are coming in at the end of a clinic, the HA will ask the nurse to assess whether he/she can finish in time (within 30 minutes of official PHC end time - for example a 3-5 clinic staff are expected to stay until 5:30), otherwise the nurse will redirect the family to another clinic. . . . (County Exh. 14)

## **FACTS**

Former PHN Louise Carr (now retired) and current PHN Joanne Sorenson were notified 30 days prior to November 8, 2001, and 30 days prior to December 6, 2001, that they would have to work at After Hours Clinics (AHC's) held on those evenings in non-County buildings in Fitchburg and Middleton, respectively. 3/

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***3/ At the time Mrs. Carr regularly worked Monday through Thursday at 80% of full time. Mrs. Sorenson then regularly worked Tuesday through Thursday at 60% of full time.***

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The Fitchburg and Middleton Clinics were advertised by the County to occur from 3:00 to 5:00 p.m. on the dates in question. Sorenson was the Charge Nurse on November 8th and Carr was the Charge Nurse on December 6th. Based on their past experience with AHC's, Carr and Sorenson expected to have to stay at each clinic until 5:30 p.m. in order to finish clients, pack up supplies and tear-down the clinics.

At the November 8th Fitchburg Clinic, only 6 clients appeared and requested services between 3:00 and 4:00 p.m. but 19 clients appeared and requested services between 4:00 and 5:00 p.m. In the large group were families with children in need of up-to-date immunizations including five Spanish speaking families who had immunization records in the Spanish language (Union Exh. 1). Both Carr and Sorenson stated herein that the Spanish speaking families arrived between 4:00 and 5:00 p.m. 4/ Carr and Sorenson stated that when a child appears for immunization, they must check the record brought in by the child, the proper immunizations must be prepared and administered and the PHN must make a written record thereof for the child and his/her school; and that when the family is Spanish speaking, it takes twice as long to immunize the child because an interpreter must be used to communicate with and to explain matters to the parents and to check the Spanish language records of the child.

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***4/ Generally, school districts issue immunization letters in the Fall, requiring students to show that they are up-to-date on all required immunizations. If students cannot show a Public Health record or a record from their doctor that they have received all required immunizations, the district can refuse to allow the student to attend school until they can produce such a record.***

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Sorenson left a voicemail message, stating that the Fitchburg Clinic would have to go past 5:30 p.m. On November 8th, Carr and Sorenson worked until 6:00 p.m., one hour past the advertised ending time of the Clinic. In a call to Howard at 5:50 p.m. Carr and Sorenson requested one hour of overtime. Sorenson's supervisor, Judy Howard, was not at her desk when Sorenson called. Howard verbally denied the request and then in a memo dated December 3, 2001, Howard denied the request in writing, citing the following language of the then effective Scheduling MOU:

. . .

> "Employees who work a clinic which extends beyond 4:30 p.m. or occurs on a Saturday (not to exceed six Saturday clinics unit-wide over the term of this Memorandum) shall flex their schedules within the pay period to cover the time of the clinic without creating overtime or compensatory time liability on the party of the County."

. . .

Regarding the Middleton AHC held on December 6, 2001, that clinic was also a flu shot clinic which was advertised to occur between 3:00 and 5:00 p.m. Between 3:00 and 4:00 p.m., seven clients were served and between 4:00 and 5:00 p.m., 11 clients appeared for services, including Spanish speaking families. Charge Nurse Carr called Howard at 4:40 p.m.

and told her that the clinic was extremely busy and that it would not be closed by 5:30 p.m. Howard told Carr to close the Clinic at 4:50 p.m. and serve only those who had presented themselves before 4:50 p.m. Carr followed Howard's instructions regarding the immunizations but not the flu shot clients. Carr and Sorenson finished the flu clinic at 5:30 p.m. and the immunization clinic at 5:45 p.m. (Union Exh. 2).

Finally, regarding the Harrambee Clinic held on December 5, 2001, this was an immunization clinic held in conjunction with a WIC clinic. Carr was given 30 days notice of her assignment at Harrambee on December 5th. Carr stated that the Harrambee clinic ran late due to many clients who needed immunizations and that she worked 24 minutes past the 5:30 p.m. tear-down time that night. 5/

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***5/ There is no dispute that the notice of assignment given to Carr and Sorenson was proper. Also, Carr and Sorenson received the appropriate MOU premium pay (for Charge Nurse or Staff Nurse) on the three dates in question.***

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Carr and Sorenson stated herein that they had been instructed that if an AHC was going to close late that they should notify their supervisor; that the normal work hours for PHN's have been 7:45 a.m. to 4:30 p.m. for many years; that when PHN's work AHC's the nurses have no way of knowing how many clients will request services or when they will arrive at the clinic.

Sorenson stated that during her orientation for AHC work, in late 1993, she was told by the non-supervisory PHN performing the orientation that nurses were expected to spend 30 minutes tearing down the clinic after the advertised ending time of the clinic (Union Exh. 5). Sorenson stated that PHNs began working late clinics (3:00-5:00 or 3:00-6:00 p.m.) after the parties agreed to the 1998-99 MOU; that she normally flexed the extra 30 minutes she worked at the AHC's before the date of the clinic. Carr stated that because she regularly worked Monday through Thursday and because County payperiods end on Fridays, she could not flex any time she worked at AHC's after 5:30 p.m. unless she did so in advance.

Both Carr and Sorenson stated that PHNs have other activities and family responsibilities they need to meet after their normal quitting time of 4:30 p.m. 6/; and that when an AHC goes beyond the 5:30 p.m. tear-down time PHNs should receive overtime pay.

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***6/ Sorenson stated that on November 8th her daughter had to wait 45 minutes after her basketball game ended for Sorenson to pick her up.***

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On November 29, 2001, the Union filed the instant grievance on behalf of Carr and Sorenson seeking overtime pay "resulting from clinics running beyond scheduled times (Jt. Exh. 2). Brenda Brown, Associate Director of the County's Department of Human Services responded to the grievance as follows:

. . .

> At the grievance hearing you contended that management violated the following sections of the collective bargaining agreement between Dane County and 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO:
>
> Memorandum - Work Schedules at Public Health
> Article XVI - Classification and Compensation, Section 16.05
>
> At the heart of the grievance are three immunization clinics that ran beyond the scheduled clinic end times. These clinics were held on November 18, December 5 and December 6, 2001. Nurses Louise Carr and Joann Sorensen, Charge Nurse, contend that management had been inconsistent in directions regarding whether they have to take consumers up to the stated clinic end time. Further, the nurses contend:
>
> 1. Originally they thought they could leave messages on voice mail to request overtime.
> 2. There was a heavy influx of consumers close to clinic closings.
> 3. All cases that come into the clinic are complex cases.
> 4. They do not control who and how many consumers arrive for clinics.
> 5. Since some clinics were eliminated in various communities, this has increased the demand on the remaining clinics.
> 6. They had been previously told to take consumers right up to the end of the clinic.
> 7. They did attempt to telephone their supervisor and did leave a voice mail message that the clinic was running over.
> 8. School immunizations are what pushed the November 8, 2001 clinic over. If the children had not been immunized, they would not have been able to attend school the next day.
> 9. The stated goal time for being able to completely finish a clinic has been a moving target. At first it was 15 minutes after the end of a clinic, then 30, and now they are not getting finished up to 45-60 minutes after a clinic close time.
> 10. Somewhere they believe this should push them into overtime status because when they agreed to flex their schedule, they agreed to flex by no more than one hour (between 4:30 - 5:30 p.m.) for each clinic.

11. In the case of the December 5, 2001 clinic at Harambee, the WIC clinic was extended into overtime by the WIC supervisor. This had the effect of extending the immunization clinic as well since Immunizations receive referrals from WIC into the immunization clinic.

The grievance is denied. The MOU - Work Schedules at Public Health - does not specify specific clinic end times. It does indicate "Employees who work a clinic which extends beyond 4:40 p.m. or occurs on a Saturday (not to exceed six Saturday clinics unit-wide over the term of this Memorandum) shall flex their schedules within the pay period to cover the time of the clinic without creating overtime or compensatory time liability on the party of the County." It goes on to say, "the County agrees that employees who work at such a clinic shall be given at least thirty (30) days notice of such clinics and will be paid a premium of $2.00 per hour for time worked beyond the later of 4:30 p.m. of [sic] the employee's normal workday hours under an alternative work schedule or time and one-half of base pay on a Saturday. (The Saturday premium shall only apply to employees hired prior to June 1, 1998.)" As you are aware, each clinic requires both set-up and teardown time. I understand that when the clinics were originally schedule [sic] the "working goal was to have the clinics run no more than 30 minutes past the posted clinic end time including clinic teardown." In the case of the three clinics identified in this grievance there was a large influx of consumers towards the end of the clinics which extended the clinics beyond the 30-minute goal.

a.) Determination of clinics likely to be heavily attended
b.) Assuring staffing commensurate with anticipated vs. actual demand for services.
c.) Determination of customer service philosophy and expectations for communication of that philosophy on printed material, as well as at individual clinics.
d.) Clarification of roles and responsibilities of the charge nurse or lead worker at all clinics;
e.) Review, clarification and consistent enforcement of what the process is to:
   - Determine whether or not all customers can be served even though they arrive before the end time advertised for the clinic.
   - Assure appropriate compensation of staff when an unusual situation occurs.
   - Clearly define and communicate what, if any, situations are unusual and will result in additional compensation (other than what is already addressed in the MOU).

> Within the Public Health division all overtime must have prior supervisory approval and cannot be accrued by leaving voice mail messages. Nurses are aware that if they cannot reach their supervisor they can reach another member of the Public Health Nurse Management team to request overtime approval.
>
> . . .

The Union then brought this grievance forward to arbitration. 7/

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*7/ There are no procedural/ timeliness issues before this Arbitrator.*

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## POSITIONS OF THE PARTIES

### The Union

The Union argued that in this case the labor agreement contains clear overtime language which the Union urged must be applied in the situations where the MOU and the contract are silent. Here, no reference was made in the contract to either a tear-down time or to what would happen if a clinic went beyond the posted or scheduled time of the clinic. The Union noted that the MOU gives examples when PHNs must flex their time — either before or after an AHC — to make up the time they have worked at an AHC which was beyond their regular schedules so as to avoid overtime liability. The parties' recognition in their MOU's of PHN normal or traditional work hours (7:45 a.m. - 4:30 p.m.) and the fact that PHNs were allowed to flex their time either before or after an AHC showed that the parties believed/intended when they reached agreement on the 1998 MOU, that AHC's would have set ending times (which were known in advance) around which PHNs could flex their time. Thus, the Union argued that the record facts demonstrated that the Union never agreed to an unlimited waiver of overtime pay where AHC's went beyond the advertised clinic ending time plus the 30-minute tear-down time.

Concerning the tear-down time, the Union asserted that the evidence showed that a 30-minute tear-down time has become a past practice, as acknowledged by all witnesses at the instant hearing, by a November 8, 2001 e-mail on the subject and by the content of orientation programs regarding AHC's presented by County in the past. The Union also observed that the February 9, 1994 Johnson memo specifically left open the idea that if a clinic lasted "longer than anticipated" overtime could be earned therfor; and that the first MOU between the parties acknowledged that the goals of the MOU were to provide "predictable and manageable work hours" for PHNs while allowing the County to provide Public Health services outside the PHNs' normal work hours without incurring overtime liability.

As the contract and the MOU are silent regarding time worked beyond the "time of the clinic(s)" the Union urged that parole evidence, such as the February 9th Johnson memo and the preamble language of the first MOU should be admissible to show the parties' true intent. Furthermore, because the MOU creates an exception to the clear requirements of the labor agreement regarding overtime pay, that exception should be read narrowly by the Arbitrator.

The record showed that AHC's which have gone beyond the 30-minute tear-down time have been unusual. However, the County should not be given *carte blanche* to work PHNs past the 30-minute tear-down time following a clinic without paying time and one-half for the excess time. This, the Union argued, would constitute an absurd result. The Union also contended that there was no consideration given for such an unlimited waiver of the right to overtime, making the County's arguments in this case untenable.

The Union therefore sought a make-whole remedy for Carr and Sorenson (time and one-half pay for the time they worked after the 30-minute tear-down time of the clinics held on November 8, December 5 and 6, 2001, and a cease and desist order instructing the County to pay time and one-half (or comp time at time and one-half) to employees who work at AHC's beyond the 30-minute tear-down time following the advertised end time of the clinics.

**The County**

The County argued that Section 16.05 of the labor agreement (Overtime) is clear and unambiguous and that the only exception to it is paragraph 5 of the MOU. The County noted that the Union failed to prove that Grievants Carr and Sorenson worked more than 8 hours/day or 40 hours/week because of their assignment to the AHC's on November 8, December 5 and 6, 2001, as both of them were less than 1.0 FTEs at that time.

The County asserted that the phrase "to cover the time of the clinic" must vary and it therefore must mean as much time as is necessary to complete an AHC assignment. The County argued that the PHNs agreement to flex their hours for AHC work beyond their normal 4:30 p.m. quitting time, the County's agreement to pay them a $2.00/hour premium and to allow them to have alternate work schedules, suspended the County's obligation to pay time and one-half pay or comp time for all AHC work.

The County observed that it never officially adopted the 30-minute tear-down time as a policy; that the AHC hours are set for the benefit of clients, not the PHNs and staff; that the language of the MOU could have but does not support the Union's arguments in this case regarding the posted/scheduled hours of clinics. In any event, the County noted that it has never scheduled open-ended clinics.

The County pointed out that it was the County's consistent goal/intention across years of bargaining regarding the MOU to be able to staff AHC's without incurring overtime/comp time liability. The County asserted that its arguments herein are supported by the flow charts

crafted by former Union representative John Horn. Finally, the County urged that the Union's evidence purporting to show that PHNs have received overtime pay for working AHC's in the past was not sufficiently detailed to prove why the PHNs listed received time and one-half pay, as such pay could have been triggered by the PHNs having failed to receive 30 days notice of their AHC assignments.

In all of these circumstances, the County urged the Arbitrator to deny and dismiss the grievance.

## DISCUSSION

Several preliminary matters must be dealt with before the merits of this case can be determined. First, the parties have argued strongly regarding the nature/status of the 30-minute tear-down time that PHNs have regularly worked at the end of all AHC's. The Union has acknowledged that although this 30-minute period is not mentioned in the Scheduling MOU or the labor agreement, it has been consistently used/needed by PHNs who work AHC's so that it has become essentially a past practice between the parties. In this regard, the Union has noted that the County has given new employee orientations concerning AHC's in which PHNs representing the County have stated that PHNs are expected to spend 30 minutes tearing down clinics after the advertised closing time of the clinic. The County has argued that the 30-minute tear-down time has never been adopted by the County as policy and that neither the language nor bargaining history of the Scheduling MOU supports the Union's argument on this point.

Initially, I note that Union witness Palmer stated that during negotiations over the first MOU, she recalled discussing the scheduled clinic times and tear-down time in 1994 but she did not recall whether "overtime" ever came up during those negotiations. Palmer recalled that the 30-minute tear-down time was discussed later in negotiations for the 1995 and 1998-99 MOU's; and that the parties also discussed giving PHNs 30 days notice for PHNs to work a non-voluntary AHC and premium pay for PHNs given such notice. However, Palmer did not recall any specifics of these discussions and she admitted that nothing was ever placed in the MOU regarding a 30-minute tear-down time and that the 30-day notice and premium pay for clinics was not codified into the MOU until the parties agreed to the 1998-99 MOU.

County witness Johnson stated that in the 1994 negotiations, there was no discussion of tear-down time and no discussion of the starting and ending times for clinics because the parties were then experimenting with late clinics and they did not know what form these might take. Johnson stated that there was also no discussion of overtime during the 1994 negotiations. Johnson stated that the County specifically stated at the bargaining table that the County intended to reduce overtime by agreeing to the MOU.

PHN Director Franak stated that the parties' Quality Improvement Team (a labor/management group which meets during the term of the contract regarding issues of interest) had discussed the 30-minute tear-down time for AHC's. In 2001, the QIT recommended that the parties formally recognize this 30-minute period. However, nothing ever came of these discussions or the QIT's recommendation — no agreement was ever reached thereon.

The above evidence shows that no definitive bargaining history exists herein regarding the substantive issues before me. Here, the evidence showed that the parties never mentioned the 30-minute tear-down time that PHNs use/need after AHC's in their contracts or MOU's, nor did the parties agree at any time to place specific AHC starting and ending times in their contracts or MOU's. The only reference to the time of the clinics is found in the MOU at paragraph 5 which states that PHNs ". . . shall flex their schedules within the pay period to cover the time of the clinic without creating overtime or compensatory time liability on the part of the County. . . ."

The question arises what the parties meant by "the time of the clinic." This phrase is not defined in the MOU or the contract and neither party presented any evidence herein regarding what the parties understood this phrase to mean when they negotiated it into the MOU. Therefore, in this context, this phrase is ambiguous and past practice and bargaining history are relevant to determine what the parties meant by the use of this phrase. As noted above, there appears to be no useful bargaining history in this case.

The County argued that the phrase, "the time of the clinic" must mean the time needed to finish all AHC work no matter when the clinic is scheduled. The County noted however, that it has never scheduled open-ended clinics (and expected PHNs to staff them) and that since 1995, AHC's that have gone over time have been limited to the three involved in this case. 8/

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***8/ The record evidence showed that at all relevant times AHC's have been advertised to the public and held from 3:00 to 5:00 p.m. with the exception of those at Harrambee which close at 6:00 p.m. Changes in clinic closing times after 2002 are not before me.***

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The Union argued that it never intended to agree to an unlimited waiver of overtime pay when AHC's go beyond the 30-minute tear-down time following the advertised ending time of the clinic and that because the contract and the MOU are silent on the subject, Articles VIII and XVI of the labor agreement must control, requiring the County to pay overtime for any excess time worked by PHNs beyond the 30-minute tear-down time of each clinic. In support of this argument, the Union pointed to Union representative Penniston's memo stating the goals of negotiating the first MOU — that Union members wanted to have manageable and predictable work schedules, while accommodating the County's need for

expanded services and controlling or curtailing overtime costs. The Union also asserted that language contained in Johnson's February 9, 1994 memo supports a conclusion that the County never intended to disallow overtime/comp time for all clinic work.

In this Arbitrator's view, given the fact that the County has trained nurses to expect to work 30 minutes tearing down each clinic and that PHNs have consistently done so and they have included this time in the time that they have flexed to avoid overtime/comp time for their work at these AHC's over a period of years, it is reasonable to conclude that "the time of the clinic" has been mutually understood by the parties through consistent past practice, to include the 30-minute tear-down time. Had the parties intended to limit PHN flex time to the advertised time of the clinics they could have easily stated this intention in the MOU. They chose not to do so. It is also significant that the County has benefited from this practice over the years. In addition, the above conclusion is not undermined by the County's refusal to adopt the QIT's recommendation to make the 30-minute tear-down time County policy. The QIT was clearly not involved in negotiations regarding the contents of the MOU.

The Union contended that because PHNs were allowed to flex their schedules under the express terms of the MOU either before or after they work the AHC, this demonstrates that the parties believed/intended that AHC's would have set ending times, known in advance. I disagree. The fact that the parties stated that flexing could be done before or after a clinic without more specific language thereon (especially in light of the parties' 30-minute tear-down past practice, found above) is insufficient to support the conclusion urged by the Union.

The Union has also argued that there was no *quid pro quo* for the nurses' relinquishing overtime pay forever in connection with AHC's. On this point, I note that the more favorable treatment of PHN requests for alternative schedules in the 1998-99 MOU as well as a $2.00/hour pay premium for AHC work that went beyond the PHNs' 4:30 p.m. normal quitting time and the County's agreement to allow the PHNs to flex before or after the clinics, demonstrates that a *quid pro quo* was offered and accepted in exchange for the County's gaining the ability to require PHNs to work AHC's without receiving overtime pay if they were given 30 days advance notice thereof.

In addition, the Union's argument regarding the Johnson memo is unpersuasive. In this regard, I note that this memo was not negotiated by the parties and that it issued prior to the occurrence of any MOU negotiations. Also, Johnson was never in charge of Scheduling MOU negotiations for the County and his statements in his memo appeared to merely be his thoughts on overtime and AHC's. Therefore, I do not believe the Johnson memo constitutes parole evidence relevant to the parties' intentions concerning the MOU.

This case is limited to three clinics, which occurred in 2001, where Carr and/or Sorenson worked between 15 and 30 minutes beyond the 30-minute tear-down time they had expected to work based upon past practice. No evidence was presented herein to show that the

County has intentionally or unintentionally allowed/planned AHC's to be held hours past the normal time that PHNs have come to expect AHC's would last (including the traditional tear-down time). Therefore, the decision herein is specifically limited to the facts before me. 9/

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***9/ The scheduling of open-ended clinics or the requirement that clinics continue hours after PHNs' normal 4:30 p.m. quitting time would raise other issues not before me. In addition, I note that Union Exhibit 9 is not sufficient to prove that the PHNs listed thereon received overtime pay for AHC work for having worked beyond the 30-minute tear-down time.***

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The County asserted that the flow charts provided to Union members (apparently approved by the County prior to their use) showed that the Union understood in 1998 that PHNs would not receive overtime/comp time for hours worked after their traditional 4:30 p.m. quitting time where they had received 30 days notice of their assignment. Although these flow charts were never formally agreed to by the Union, they do support the County's argument that the parties intended that overtime/comp time would not be available for AHC work under the conditions stated in paragraph 5 thereof.

Based on the above analysis, I issue the following

## AWARD

The Employer did not violate the 1999-2001 labor agreement when it denied overtime to Public Health Nurses who worked extra time because public health clinics (known as After Hours Clinics) unexpectedly ran beyond the advertised clinic schedules. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 23rd day of August, 2004.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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