BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY

and

MARATHON COUNTY OFFICE AND TECHNICAL EMPLOYEES UNION, LOCAL 2492-E, AFSCME, AFL-CIO

Case 315
No. 64644
MA-12962

(Adult Day Care Givers Work Hours Grievance)

Appearances:

Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appeared on behalf of Local 2492-E.

Dean R. Dietrich, Attorney at Law, Ruder Ware, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appeared on behalf of Marathon County.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement (the agreement or contract, herein) which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed on behalf of certain adult day care givers, who are referred to below as the Grievants. The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on August 4, 2005 at the Marathon County Building in Wausau, Wisconsin. No transcript was prepared. Briefing was completed on October 31, 2005. Joint Exhibit 10-B (it became apparent that the original Joint Exhibit 10 did not include all pages of the exhibit) was received into the record on November 1, 2005 and the record was closed.

ISSUE

The parties did not stipulate to the issue. At the hearing the Union stated the issue as:

> Did the employer violate the collective bargaining agreement when it reduced the hours of the grievants on or about February 4, 2005?
>
> If so, what is the remedy?

The County, in its initial brief, stated the issue as:

> Did the Employer violate the "Layoff Provisions" contained in Article 6(B) of the Contract when it reduced the hours of the employees on February 4, 2005?
>
> If so, what is the appropriate remedy?

The Arbitrator selects the Union's statement of the issue. The selection of the issue is addressed in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

Article 1 – Recognition

The County hereby recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time nonprofessional employees in the employ of Marathon County pursuant to the Wisconsin Employment Relations Commission Decision No. 20999, Case LXXXIII, No. 31833, ME-2242 for the purpose of conferences on wages, hours and conditions of employment. Employees expressly excluded from representation includes all confidential, supervisory and managerial employees, elected officials and all other represented employees of Marathon County.

Article 2 – Management Rights

The County possesses the sole right to operate the departments of the County and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:

A. To direct all operation of the respective departments;
B. To establish reasonable work rules;
C. To hire, promote, transfer, assign and retain employees;
D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
E. To relieve employees from their job duties because of lack of work or for legitimate reasons;
F. To maintain efficiency of department operations entrusted to it;
G. To take whatever action is necessary to comply with State and Federal laws;

H. To introduce new or improved methods or facilities;

I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

J. To change existing methods or facilities;

K. To determine the methods, means and personnel by which operations are to be conducted;

L. To take whatever action is necessary to carry out the functions of the departments in situations of emergency;

M. To utilize temporary or seasonal employees when deemed necessary provided such employees shall not be utilized for the purposes of eliminating existing full-time and part-time positions;

N. To contract out for goods and services so long as no employees in the department in which the subcontracting occurs are laid off or released by such action.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

Article 3 – Grievance Procedure

A. Definition of Procedure: A grievance shall be defined as a dispute over interpretation and application of the provisions of this collective bargaining agreement between the County and the Union. Grievances shall be handled and settled in accordance with the following procedure:

Step 1: An employee covered by this Agreement who has a grievance is urged to discuss that grievance with the immediate supervisor as soon as the employee is aware of the grievance. In the event of a grievance the employee shall continue to perform the assigned task and grieve the complaint later. Within ten (10) working days after the employee knows or should have known of the event giving rise to the grievance, the employee shall set forth the grievance in writing, dated, and signed.

The Grievance shall be submitted to the immediate supervisor if it concerns a matter over which the immediate supervisor has authority. All other grievances shall proceed directly to Step 2.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, and relief sought, the date the incident or violation took place, the specific section of the agreement alleged to have been violated, if any, and the signature of the grievant and the date.

The immediate supervisor shall investigate the grievance and discuss the matter with the employee and the Union, and provide a written answer to the grievance within ten (10) working days after receipt of the written grievance.

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B.5. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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Article 5 – Hours of Work and Overtime

A. Normal Hours of Work:

1. Normal Hours: Subject to the special provisions listed below, the normal hours of work for employees covered by the Agreement shall be from 8:00 a.m. to 5:00 p.m., Monday through Friday, and 8:00 a.m. to 4:30 p.m. Monday through Friday, from Memorial Day to Labor Day.

   All employees covered by this provision (except as provided below) shall be granted a one (1) hour lunch period without pay.

2. Treatment of Hours of All Employees:

   a. Rest breaks: All employees covered by the Agreement shall be allowed two (2) fifteen (15) minute breaks with pay in each complete work day.

   b. The employee and immediate supervisor/Department Head, by mutual agreement, may establish different hours of work than those outlined above which would facilitate the delivery of services.

3. Special Provisions for Listed Departments/Positions:
The following provisions on hours of work shall apply for the listed departments and positions:

. . .

e. Aging & Disability Resource Center Department: The normal hours of work for Site Managers and Van/Bus Drivers shall be between 7:30 a.m. and 5:00 p.m., with the employees receiving a one half (1/2) hour unpaid lunch period, and with the exact starting time to be determined by the Department Head. Van/Bus Drivers shall have their normal hours of work reduced by one-half (1/2) hour (or prorated portion thereof) during the period from Memorial Day to Labor Day.

. . .

g. Sheriff's Department:

1) The normal work schedule for Public Safety Telecommunicators shall comprise a cycle of four (4) consecutive days of work with two (2) consecutive days off. The normal work day for employees hired or transferring into a Public Safety Telecommunicator position after 3/1/95 shall consist of eight (8) hours and ten (10) minutes. Employees hired or transferring into a Public Safety Telecommunicator position before 3/1/95 shall continue to work a (sic) eight hour and twenty (20) minute work day.

2) The normal work schedule for corrections Officers shall comprise a cycle of four (4) consecutive days of work with two consecutive days off. The normal work day shall consist of eight (8) hours and ten (10) minutes.

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h. Employment and Training: The normal hours of work shall be from 8:00 A. M. – 9:00 A. M. to 5:00 P. M. – 6:00 P. M. with the exact starting time to be determined by the Department Head with at least a week advance notice of a change in the employee's required work hours. Employees shall receive a one hour unpaid lunch. The normal hours of work shall be reduced by one-half (1/2) hour during the period from Memorial Day to Labor Day.

The normal hours shall be forty (40) hours per week for full-time employees except during the Memorial Day to Labor Day period when the normal hours shall be 37 ½ hours per week with no reduction in pay. (Employees who have an approved flex schedule can deviate their work hours from the normal hours of work)

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Article 6 – Seniority

A. Probationary Period: New employees hired at Pay Level 11 and above in Appendix A shall serve a one (1) year probationary period. New employees hired at Pay Level 10 and below n Appendix A shall service a six (6) month probationary period. Employees discharged before the end of the probationary period shall have no right of appeal through the grievance and arbitration procedure in Article 3. If still employed after the completion of their probationary period, their seniority shall date from the most recent date of hiring. Part-time employees shall receive seniority credits based on their hours worked.

B. Layoff: In the event it becomes necessary to reduce the number of employees in a department, temporary and seasonal employees in that department shall be the first to be laid off before the employee in the classification in the department whose position is being eliminated. The employee whose position is being eliminated shall, if necessary, be allowed to replace an employee with less seniority in the same or a lower pay range provided the employee (whose position is eliminated) is qualified to perform the work of the position selected. The employee replaced under this provision shall be allowed to exercise similar rights under this provision. Employees laid off in a reduction in force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be more than two (2) years. When vacancies occur in any department while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed in those jobs, provided they are qualified to perform the available work.

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Article 28 – Part-time Employees

Regular part-time employees are defined as employees who are regularly scheduled to a lesser number of hours than a full-time employee as provided for in work schedule of Article 5. Part-time employees shall receive the following prorated fringe benefits on the basis of their regularly scheduled hours per year: sick leave, holidays, health insurance, dental insurance, funeral leave, personal days, vacation and perfect attendance leave. Part-time employees will be required to make a prorated contribution to the health and dental insurance programs if they opt for coverage.

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Article 31 – Entire Memorandum of Agreement

This Agreement constitutes the Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment supplemental thereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any items covered by the terms of this Agreement and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity is set forth in this Agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

BACKGROUND AND FACTS

The County operates an aging and disability resource center (ADRC) where adult day services (ADS) are provided to: older persons experiencing a decrease in physical, mental and social functioning; socially isolated persons who would benefit from stimulation of being with others; older persons who need some help with the activities of daily living, and; persons needing a safe, supervised environment during the day. The ADS program provides a variety of health, social and support services in a supervised setting on weekdays, 7:30 a.m. to 5:00 p.m. Participants can attend either full or half days. Four hours or less is considered a half day for participants. Besides enhancing program participants' independence in the activities of daily living, the program also provides respite for family care givers. State and Federal regulations and standards apply to the ADRC and ADS. The ADRC has its own governing Board.

Prior to entry into the program participants are assessed to determine which of three levels of care and assistance they require. Staffing standards for levels one and two require a one staff to eight participant ratio; level three requires a one staff to four participant ratio. Four County employees currently serve as the program care givers and are used to staff at these ratios. Their scheduled starting and ending times have varied from each other in consideration of staffing ratio needs. There is also a director of the ADRC, a social worker, and drivers. The printed work schedules indicate there are also casuals and Sr. Aides involved with the ADRC.

In 2004 the ADRC experienced a decrease in funding due to a number of participants going from full days to half days, a number of cancellations, and other things, so that expenses began to exceed revenues. The Board considered different ways to address this situation during 2004 and the early part of 2005. Among the actions taken by the Board were to institute a half day cancellation fee for Community Options participants who cancelled their scheduled programming with less than 24 hours notice, instituting a pre-paid package schedule for private pay participants, and an across the board fee increase. Marketing efforts were maintained. To bring expenses in line with revenues the Board consolidated some managerial or supervisory positions. The Board also felt that the ADRC was staffed in excess of the required ratios for certain parts of the day. In June of 2004 there was an adjustment in staff hours whereby an employee care giver took a voluntary layoff and another employee care giver took a voluntary reduction in hours. Revenues were still not meeting expenses and the County Board made a one time revenue adjustment to the program by adding $25,000.00 to the budget. This was designed to maintain the program through the end of 2004 with the ADRC to become financially stable after that without financing through the County tax levy.

To further address the budget issue the ADRC Board then considered either reducing the number of days it would provide ADS or whether to further reduce staffing hours for certain days and times that the staffing still exceeded the minimum regulatory staffing ratios. It decided to reduce and reschedule the hours of the four employees who served as the program care givers, effective February 14, 2005. This allowed the ADRC to keep most of their participants and keep the ADRC open during its normal hours of operation at the minimum required staffing ratios. The ADRC did reduce the number of Friday participants to be able to staff the remaining participants with two employee care givers on Fridays. The total reduction was 25.5 hours per week and was not done by mutual agreement.

The reduction in hours was accomplished by reducing: one 40 hour per week employee to 36 hours; one 40 hour per week employee to 35 hours; one 32 hour per week employee to 25 hours, and; one 20 hour per week employee to 10.5 hours. Forty (40) hours per week is considered a full time equivalent (FTE). This reduction in hours reduced the FTE rate for the four affected employees and that reduced their benefit rates accordingly. Their incomes were reduced due to fewer hours. The Board did not eliminate the position whose hours were reduced to 10.5 and spread these hours over the other three positions because to do so would leave the ADRC under the minimum required staffing ratios for Tuesdays, Wednesdays and

Thursdays. That in turn would require the County to not serve a certain number of participants on those days. This in turn would cause a greater loss in revenue. The ADRC Board anticipates that if more participants are enrolled in the future there will be more staff hours required and those hours would be assigned to the four current staff members.

None of the Grievants herein have worked from 8:00 a.m. to 5:00 p.m. Monday through Friday, nor have they worked from 7:20 a.m. to 5:00 p.m. on any day of the week, based on the record.

The County manages employment levels using Full Time Equivalencies (FTEs) and as of December 31, 2004 had 595.04 organized FTEs among various bargaining units and 130.02 non-organized FTEs, along with 43 elected positions.

In the official grievance form the statement of the grievance reads in pertinent part:

> List applicable violation: Article 6 #B Layoff Section; Defacto reduction of employees.
>
> Adjustment required: No reduction in work hours; Make whole for all losses.

The grievance was signed by a Union officer "for ADS employees". The grievance was denied by the County in the letters referenced as Joint Exhibits 5 and 7. The County's March 11, 2005 grievance denial stated in pertinent part:

> The layoff provisions of the labor agreement are clear and unambiguous as it pertains to bumping procedures. It clearly states that a position must be eliminated for that to occur. A reduction in hours is not an elimination of a position.

This arbitration followed. Other matters are set forth in the Discussion section below.

POSTIONS OF THE PARTIES

The Union

The Union's position is summarized as follows. A reasonable interpretation of the contractual hours and layoff language leads to a conclusion that the collective bargaining agreement has been violated. Reducing the workforce for economic reasons is not uncommon.

But, by using full time equivalencies in filling positions and then cutting hours, the reduction in hours without reducing the number of individuals amounts to a smoke screen. This was not done consistent with considerations of contractually mandated seniority. A workforce reduction cannot be legitimately accomplished by a unilateral across the board cut in work hours and benefits. This violates Article 5 and Article 6 of the contract. A basic forty-hour work week for ARDC employees is outlined in Article 5.A.2.e. and in February 2005 there was no mutual agreement to reduce the number of work hours. To allow for unilateral reduction in hours would result in no need for the "mutual agreement" provision of Article 5. The Grievants accepted positions with the expectation of a certain income stream and level of benefits. Specifically defined hours of work and layoff procedures are bedrock job security features and recognize that employees and their families have personal budgets. Marathon County is a relatively wealthy county and can withstand the financial pressure of temporarily reduced ARDC income. The County should have either implemented the Article 6 layoff provisions, or somehow found the resources to fund the program.

An adverse ruling in this dispute would result in harsh, absurd and nonsensical results. Reducing hours rather than employees ignores the seniority/layoff provisions of Article 6.A and the mandated work hours defined in Article 5 which are unalterable without mutual consent. This bargaining unit contains Corrections Officers whose hours are listed in Article 5. If the jail population declined and the County had limited resources it could, in its view, cut the number of all full time Officers in half. Such an approach would allow the employer to evade the provisions of Articles 5 and 6, impacting all the departments and its 200 plus employees, and give the County the right to wide ranging work hour reductions of employee groups to as low as a single hour per week. Benefit pro-rations would make family supporting jobs a cruel joke. This is essentially the position of the employer and this could lead to harsh, absurd and nonsensical results. Where another interpretation would lead to just and reasonable results the more rational and levelheaded approach should be applied. Arbitrators reject extreme positions such as the County's. Arbitrators interpret contracts to avoid harsh results not called for by the contract.

A reading of the contract as a whole supports the position advanced by the Union. Labor agreements should be interpreted as a whole in the context of the intent and spirit of the contract. Interpretations of more than one clause give effect to each other. No provisions should be rendered meaningless and interpretations are to give effect to all provisions. The County's interpretation argues that both Articles 5 and 6 are meaningless whether viewed together or apart. Why have seniority based layoff/bumping procedure and simply cut hours across the board, or have stipulated hours with mutually agreed to alterations with unilateral cuts or alterations by the employer? This extreme approach flies in the face of clearly expressed language, spirit and integrity of the agreement.

The past practice of the parties supports the position advanced by the Union. This maneuver has never been attempted before because the Employer knows, the Union believes, it would be inappropriate. The County is engaging in collective bargaining through the grievance mechanism. The ability to reduce contractual hours should be relegated to the bargaining table.

Relevant case law favors the position advanced by the Union. Some arbitrators believe each case must turn on its own facts. Arbitrators applying contract language similar to that here in similar fact situations have held that layoff provisions were to be applied.

The County

The County's position is summarized as follows. The arbitral authority shows that the County didn't violate the terms of the contract by reducing the work hours of adult day care employees. It is well recognized that management retains the right to determine employee work hours, work schedules and the number of hours to be worked by employees unless the employer had specifically bargained that right away. These principles apply here. The relevant contract provisions demonstrate that the County has the authority to reduce the work hours of the Adult Day Care employees, it had not bargained this authority away, and no contract provision limits its authority in this regard.

The management rights clause and other provisions of the contract vest the County with the contractual right to determine employee work hours. Reading the contract provisions as a whole the County is vested with the right to reduce work hours and no provisions within the contract specifically limit that right. Article 2 vests the County with rights to: direct all operations of the respective departments; take whatever actions is necessary to comply with State and Federal laws; manage and direct the working force, to make assignment of jobs, determine the size and composition of the work force, determine the work to be performed by employees; and, determine the competence and qualifications of employees. The County has the right to reduce the work hours and has not bargained that right away. Article 2 gives the County the right to determine the size and composition of the work force and the work to be performed. The County determined it required four staff to maintain the Adult Day Services program and comply with state regulations. The County took action to maintain the number of clients it could support to maintain efficiency of the operations. The terms of the layoff provisions in Article 6.B do not apply. There is a layoff procedure in the contract but, the contract does not obligate the County to lay off an employee instead of reducing hours. Absent such a provision the County maintains the contractual right to adjust work hours to provide adequate staffing levels in accordance with regulatory standards. The County's rights are restricted only by express terms of the contract and no provisions, including Article 6.B, limit the County's authority to reduce employee work hours. Giving effect to Article 31 requires a finding that the County did not violate the contract.

A layoff is not a reduction in hours and therefore the County did not violate the terms of the contract. The procedure the County must follow in the event it becomes necessary to reduce the number of employees in a department is in Article 6.B. The number of employees was not reduced, therefore Article 6.B does not apply. A reduction in hours is not a layoff. Layoff is not defined in the contract. As commonly understood a layoff does not include a reduction in hours. Layoff entails an indefinite or temporary severance or separation from employment and if the employee still has a job no layoff has occurred. A number of arbitral decisions accept this. The Union's contentions to the contrary lack contractual basis. Nothing in the language of the agreement, the bargaining history, or the past practices of the parties suggests there was a mutual understanding or intent to prevent the reasonable reduction of hours in favor of layoff by seniority. The employer's actions were based on legitimate business reasons and not motivated by anti-union animus or serve to undermine the union's status as bargaining agent.

The County has legitimate reasons for reducing the hours of the Union employees. They were not arbitrary, capricious or discriminatory. They addressed a reduction in revenue. Reducing hours rather than a layoff resulted in continued service to the clients. The County has adjusted work hours in the past. The County's interpretation of the contract allows it to meet client needs with flexibility of regulated staffing levels, fluctuating enrollment and scarce revenues. Money is a finite resource. Cutting the number of employees from four to three would result in reducing the number of clients served and jeopardize the goal of the ADS program, which is to serve the needs of clients, not employees. Nothing in the contract requires the County to cut client services in order to preserve the number of hours an employee must work. The Union's interpretation of the layoff provision would lead to absurd and detrimental results.

Union Reply

The Union (having previously seen the County Reply) contends that the County stated the issue in its brief to reference Article 6.B, while the Union referred to the collective bargaining agreement as a whole. The Union contends Article 5 is a related portion of the collective bargaining agreement and including arguments identifying a violation of that portion should not be procedurally barred from consideration by the Arbitrator. The County is correct that there are no Site Managers at ADRC. However, Article 5 applies to employees and specific hours are listed for each department. The Union believes these hours should apply to Adult Care Workers who are not listed as Site Managers.

County Reply

The County contends that the Union's argument with respect to the layoff provision is unpersuasive. The Union argues the term layoff in Article 6 should include reduction in hours. Arbitrators focus on contract language first. Article 6 is not ambiguous. The Union focuses on impact. The Union's arguments on resources contradict the management rights clause.

The County also contends that the Union is barred from pursuing any action based on Article 5 of the contract as the Union failed to follow the grievance procedure and provide timely notice of its claim to the County. The grievance alleged a violation of Article 6, but the Union's brief argues a violation of Article 5. At no time has the County had notice of this claim, and objects to this argument as untimely and procedurally defective. The grievance procedure must be followed to move any and all claims to arbitration. The Union advanced no statement of issue in its brief. Therefore, the County's statement of the issue should be adopted. Arbitrators have found claims procedurally deficient where the party failed to follow the grievance procedure. The County had no notice of this claim. The Union's arguments with respect to Article 5 of the contract must be dismissed as being procedurally deficient. The Union failed to give any notice of its claim that Article 5 had been violated. The Union failed to follow step 1 of the grievance procedure, which requires a written grievance and the specific section of the agreement alleged to be violated. The Union failed to provide any written grievance that states Article 5 was violated. Arbitral history supports the County. The Union fails to offer any plausible excuse for failure to give actual notice. The Union offers no evidence prior to September 23, 2005 that indicates Article 5 was violated. The Union offered no evidence that Article 5 was ever discussed. The presentation of a broad issue by the Union does not alter the fact that the Union failed to follow step 1 of the grievance procedure. The Union was either hiding the ball or has recognized the weakness of its argument with respect to Article 6.B.

Regardless of the procedural matter, the County must prevail on the merits. The contract does not grant ADC workers a set number of hours. The contract defines the timeframe in which hours may be scheduled. The contract defines normal hours of work. No consent is needed to adjust the number of hours an employee is scheduled. The Grievants are not Site Managers or Van/Bus Drivers, so Article 5.A.3.e. does not apply. Comparative provisions in the contract show the parties did not agree to guarantee ADC workers a set number of hours per week, where some other departments did. Express mention of one thing implies the exclusion of others. And, the Union's case citations are not analogous to this matter.

DISCUSSION

Against the backdrop of framing the issue, the County contends that the Union's arguments concerning Article 5 of the agreement cannot be considered. As set out above, the Union's statement of the issue has been adopted. That is the statement which is most appropriate to the record. Article 3 of the agreement contains the grievance and arbitration provisions. The article provides, among other things, that a grievance contain the specific section of the agreement alleged to have been violated, if any. The County contends in its reply brief that the Union is barred from pursuing any action based on Article 5 (Hours of Work and Overtime) of the agreement as the Union failed to follow the grievance procedure and provide

timely notice of its claim to the County. However, agreements are to be read as a whole, even when focusing on the area where the alleged breach occurred. The County's letter of February 22, 2005 denying the grievance (Jt. Exhibit 5) references staff hours, and the County's letter of March 11, 2005 denying the grievance (Jt. Exhibit 7) states, among other things, that "[a] reduction in hours is not an elimination of a position." Even though the written grievance did not specifically refer to Article 5, the County was on notice of the nature of the grievance so as to be able to meaningfully prepare and respond to it in both the grievance process and in arbitration. See, CITY OF HARTFORD, MA-12736 (EMERY, 10/05). At its core the instant case concerns a reduction in work hours and how, if at all, the layoff provisions are implicated. The nexus between the hours of operation provisions in the agreement, the layoff provisions in the agreement, the grievance that was filed (Jt. Exhibits 2, 3, and 4), the County's denials and the evidence presented by the parties at the hearing support the Union's statement of the issue.

On the merits of this grievance, the Union's central argument is that the agreement requires the County to lay off an employee, thus providing bumping rights under Article 6, rather than merely unilaterally reducing hours, which is a violation of Article 5. As stated in the written grievance, the Union maintains this is a "defacto reduction of employees". The County's central argument is that the management rights clause allows it to determine the hours and schedules of the employees and that is not limited by Article 5, nor is a reduction of hours a layoff so as to trigger the provisions of Article 6. To decide the issue it must be determined whether the County can unilaterally reduce the hours of the ADC employees and whether the layoff provisions must be followed.[1]

Article 2 – Management Rights is drafted broadly in favor of the employer. All management rights repose in it, although they must be exercised consistently with the other provisions of the contract. Many of those rights are, without limitation, enumerated. They include the right: to relieve employees from their job duties because of lack of work or for legitimate reasons; to maintain efficiency of department operations entrusted to it; to take whatever action is necessary to comply with State and Federal Law; to manage and direct the working force; to make assignments of jobs; to determine the size and composition of the work force; to determine the work to be performed by employees; and, to determine the competence and qualifications of employees. These provisions, especially that reserving to the County the right to determine the size and composition of the work force, indicate that the County has retained the right to schedule the hours of work, albeit within the limitations of the agreement. Management generally retains those rights which are not bargained away or limited by the collective bargaining agreement. MID-STATE TECHNICAL COLLEGE, MA-10383 (JONES, 9/99). Most arbitrators have recognized that, except as restricted by the agreement, the right to

[1] All references to Article 5-Hours of Work and Overtime herein reference those hours other than from Memorial Day to Labor Day. Context may require a refiguring of exact hours at issue herein for any particular time of the year, but the exact number of hours is not dispositive of the result of this award.

agreement, the right to schedule work remains in management. *Elkouri & Elkouri,* How Arbitration Works (6th Edition, 2003) p.722. See also, *St. Antoine,* The Common Law of the Workplace (BNA, 1998) pp. 267-269. That is the case here. In the agreement between these parties there are specific places where the actual scheduling of work hours is set out. Those are found in Article 5 A.3.g.1, and 2, where the phrase "normal work schedule" is used for certain Sheriff's Department employees. A specific shift of eight (8) hours and ten (10) minutes is also provided in those subsections. The word "schedule" is not used in Article 5.A.1 and 2, or in Article 5.A.3.e, in describing hours of work. Thus, the County has restricted its right to schedule only in certain parts of the agreement as applied to certain departments or functions in those departments. The County has not relinquished the right to schedule in the ADRC.

Similarly, Article 5.A.3.h. sets out normal hours of work but then goes on to specify a 40 hour week for full time Employment and Training employees. However, neither Article 5.A.1 and 2, nor Article 5.A.3.e., contains a forty hour reference or any other number of hours. The County has bound itself to a certain number of hours for Employment and Training employees by inclusion of that provision. The County has not bound itself to any certain number of hours for the employees in the ADRC by including a specific number of hours in Article 5.A.3.e. The County has not restricted its right to schedule the number of hours of work in the ADRC and, thus, retains the right to schedule there.

It is true that Article 5.A.1. specifies that normal hours of work shall be from 8:00 a.m. to 5:00 p.m., Monday through Friday, and 8:00 a.m. to 4:30 p.m., Monday through Friday, from Memorial Day to Labor Day. However, the use of terms such as normal, regular, standard, etc., in describing hours of work has almost universally been held not to guarantee the hours set forth in the described week. *See,* JACKSON COUNTY, MA-12338 (HOULIHAN, 3/05). When such modifiers to the hours of work are used there is no guarantee that the work week will be as described. This is particularly true here, where the agreement does specify, or guarantee, a certain number of hours per week in Employment and Training and in the Sheriff's Department by specifically providing for those hours. Use of the phrase "normal" in describing work hours retains meaning in describing the time parameters within which work activity will be scheduled, and affording employees an expectation of a work schedule from which non-working lives can be organized. *See,* AMERICAN NATIONAL RED CROSS, BLOOD SERVICES, BADGER REGION, A-5120, (MCLAUGHLIN, 5/94). The reference in Article 5.A.2.b. to 'mutual agreement' refers to establishing different hours of work than those outlined above which would facilitate the delivery of services. The phrase "mutual agreement" applies to hours of work as set out above, i.e., the Normal Hours of Work. Those normal hours of work are the parameters within which the work schedule is established and within which scheduled hours are set. They reflect a day shift, as opposed to a night shift or swing shift. The record is not clear how the 7:00 a.m. and 7:30 a.m. staring times for some ADRC employees (Jt. Exhibits 11, 12, 13) were developed other than being posted into or hired into. In any event, the mutual agreement language modifies the normal hours of work, which is not the same as the number of scheduled hours.

For the ADRC the normal hours of work set out in Article 5.A.3.e are between 7:30 a.m. and 5:00 p.m. for Site Managers and Van/Bus Drivers. Both Parties in their briefs acknowledge that the Grievants are not Site Managers, nor are they Bus/Van Drivers, so those stated hours do not control the issues here. And, it is clear that, even after reducing the ½ hour unpaid lunch period, the remaining hours under Article 5.A.3.e would total nine (9) hours per day. No one has argued that a work hours schedule providing for 9 hours per day should apply. There is no evidence that prior to the reduction in hours any of the Grievants worked from the starting times to the ending times which are set out in Article 5.A.1 or Article 5.A.3.e. However, the operational hours of the ADRC have consistently started at 7:00 a.m. as seen in the actual work schedules of the Grievants (Jt. Exhibits 11, 12, 13). The specific clause for the ADRC under Article 5.A.3.e does not provide a basis for setting the Grievants' scheduled hours at 40 per week, 20 hours per week, or any other number.

Neither Article 5.A.1 nor Article 5.A.3.e. guarantees a 40 hour work schedule or a 20 hour work schedule.

The agreement here recognizes in several places that there are part-time employees as well as full-time employees and that begins with the recognition clause. The County's management right to determine the size and composition of the work force is contained in the management rights clause. The County has used FTEs to staff the work force at the size and composition it determines. There is no limitation in the agreement which requires the County to use only full-time positions in filling positions. If the normal hours of work as set out in Article 5.1 required an 8:00 a.m. to 5 p.m. work day Mondays through Fridays then there could be no part-time employees. This would render many portions of the agreement meaningless. The normal work times in Article 5 cannot be read to require all employees work those hours unless there is a mutual agreement otherwise. There is no contractual provision which requires the County to use only full-time employees or full-time FTEs in the ADRC. Similarly, there is no requirement that the County use only half-time equivalents or any fraction thereof in the ADRC.

The Union's argument and concern about the County reducing all hours of all employees, even to the extreme of an hour a week, is both qualitatively and quantitatively different than the situation here. That would be a violation of the principle expressed in the management rights clause as to the required reasonableness of the exercise of management rights in the agreement. The scenarios the Union expresses are not the case here. Those scenarios would have their own facts, contract language, and possible past practices which may combine to yield a different result. But here, the County has two compelling and legitimate reasons for partially relieving the Grievants from their duties through the reduction in hours. Those reasons are the decrease in client use and resultant economic constraints on the self sufficiency of the ADRC programs to pay for itself, and the State regulations on staffing levels. These are not arbitrary, capricious or unreasonable staffing decisions made by the County in its attempt to keep the program operational.

Having determined that the County did not violate the agreement as to hours of work, there is still the matter of whether the County's reduction of hours is a layoff and subject to the provisions of Article 6. The Union argues that the reduction in hours is a de facto reduction of employees. By following the layoff provisions to accomplish the reduction in hours the Union points out that the incumbent in the position eliminated would then be able to exercise seniority rights and bump a different employee in order to maintain hours of work. Yet, intuitively, if the County has the right to reduce hours it would follow that the County need not use the layoff provisions to accomplish the same net reduction in hours. That is also the result reached by interpreting the agreement provisions.

Generally, arbitrators do not view a reduction of hours as triggering or requiring the use of layoff provisions in a labor agreement. *See,* RICHLAND COUNTY, MA-2254 (MCGILLIGAN, 2/04); ATHENS SCHOOL DISTRICT, MA-12056 (EMERY, 10/03); MID-STATE TECHNICAL COLLEGE, MA-10383 (JONES, 9/99). As in the agreement language in Article 6 here, layoff provisions usually contemplate a separation, suspension or break from employment before its provisions apply. A reduction of hours is not a separation from employment. It is not an elimination of a position. There are occasional contract language driven exceptions to this, such as SUPERIOR MEMORIAL HOSPITAL, A-5165 (SHAW, 9/94). In that case, the arbitrator did interpret layoff to include reduction in hours, even though the contract did not so specifically provide. The determination was based on contract language requiring layoff of part-time employees before full-time employees. Theoretically, if layoff did not include reductions in hours, a full-time employee could be reduced to part-time and then be completely laid off before less senior employees without reference to the seniority protections in the layoff clause. Here, the specific language in the contract in this case must be looked at. Article 6 speaks in terms of "reduce the number of employees"; "be laid off"; "whose position is being eliminated"; "[e]mployees laid off in a reduction in force"; "the time of the layoff". Here, the Grievants all remained employed and the number of employees has remained the same. No one was laid off. The Article does not require part time employees to be laid off before other employees as was the case in SUPERIOR MEMORIAL HOSPITAL, SUPRA. It does require that temporary and seasonal employees in that department shall be the first to be laid off. But there is no reference to part-time employees and the Grievants are not temporary or seasonal employees. The layoff language provides the County with the right to reduce the number of employees in a department. There is no definition of layoff besides the phraseology used throughout Article 6. There is no reference to "reduction in hours" or reduced work load. The County has not violated Article 6 because it does not apply to this reduction in hours.

It is true that the County probably could have made its reduction in hours in such a fashion so as to first totally eliminate the previous 20 hour per week position. But that would not have met the minimum staffing requirements needed to keep the level of services that were retained. Reading the layoff language, the management rights language, and the hours of work language together and giving meaning to each clause, the County was not obligated to lay off any Grievant and has the ability to reduce the hours of the Grievants for the legitimate reasons noted above.

The Union argues that employees took these positions expecting a certain level of work and income, and to unilaterally reduce the hours is harsh, absurd and nonsensical. The Union further contends that the County is relatively wealthy and can afford to maintain the previous number of hours. If this agreement were susceptible to two equally compelling conclusions, then the one which would avoid an otherwise harsh result would be preferable. However, the agreement here does not present that choice. It simply does not guarantee these particular employees with any set number of hours or require use of the layoff provisions. The reduction of hours was within the framework of the agreement and for legitimate reasons. The County's relative wealth, and presumably its taxing ability, is not a precept upon which to base a contract interpretation. That is a policy decision that an arbitrator cannot make or add to the contract language.

The Union argues that past practice of the parties supports the Union position in that the County has never attempted this before, inferring that the County knew it would be inappropriate. The Union distinguishes, correctly, that a single incident where hours were reduced in another bargaining unit was the substance of a negotiated higher wage rate upon their incorporation into the Courthouse unit. This single incident was not involved in this bargaining unit and its particular agreement language. It does not establish a practice. And, the prior non-exercise of a management right, or any right by either party, does not preclude the exercise of that right. The absence of an occurrence does not establish a practice. Therefore, past practice is not available to either party to further its position.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

Marathon County did not violate Article 5 or Article 6 of the Collective Bargaining Agreement when it reduced the number of hours of the ADRC employees in February, 2005. The grievance is dismissed.

Dated at Madison, Wisconsin, this 30th day of November, 2005.

Paul Gordon /s/
Paul Gordon, Arbitrator

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