

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**PIERCE COUNTY HUMAN SERVICES EMPLOYEES, LOCAL #556,  
AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**COUNTY OF PIERCE**

Case 141  
No. 67191  
MA-13795

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**Appearances:**

**Steve Hartmann**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for Pierce County Human Services Employees, Local #556, American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Mindy K. Dale**, Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the County of Pierce, which is referred to below as the County or as the Employer.

**ARBITRATION AWARD**

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Judi Brunner and Jennifer Kruse. Evidentiary hearing, which was not transcribed, was held in Ellsworth, Wisconsin on November 29, 2007 (References to dates are to 2007, unless otherwise noted). The parties filed briefs and reply briefs by March 12, 2008.

**ISSUES**

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

Did the County violate the collective bargaining agreement (Art. 6 Sec. 6.03) and/or past practice when it failed to pay time and one-half to the Grievants for hours worked on 3/7/07 in excess of 40 hours?

If so, what is the remedy?

The County states the issue thus:

Did the County violate the collective bargaining agreement by not paying overtime to the grievants when they did not work over 40 hours in a workweek?

If so, what is the appropriate remedy?

I adopt the Union's view as that appropriate to the record.

### **RELEVANT CONTRACT PROVISIONS**

#### **PREAMBLE**

. . .

Both parties to this Agreement will cooperate so that there will be a harmonious relationship. Every other negotiation session shall be conducted during normal work hours and paid by the County as if the employee was attending to normal duties. The alternative negotiation sessions shall be held outside the normal work day with no pay from the County. The employee shall work his/her normal work day on those days of the alternative bargaining sessions. No overtime payments will be paid on negotiation days except for time spent performing normal duties.

Mediation and arbitration sessions shall be scheduled by mutual agreement. If such sessions are scheduled during the normal work day, they will be considered business of the County and attendees will be excused from normal duties without loss of regular wages. No overtime will be paid on negotiation days except for time spent performing normal duties.

Mediation and arbitration sessions shall be scheduled by mutual agreement. If such sessions are scheduled during the normal work day, they will be considered business of the County and attendees will be excused from normal duties without loss of regular wages. No overtime will be paid for time attending mediation/arbitration sessions.

Grievance processing will be considered business of the County and shall be conducted during normal hours with no loss of regular wages for participating employees. . . .

...

## **ARTICLE 6 - HOURS OF WORK**

Section 6.01. The normal work week for County employees shall be thirty-five (35) hours. The County may establish classifications as workweeks of forty (40) hours. . . .

Section 6.02. For classifications not established at forty (40) hours per week, hours worked between thirty-five (35) and forty (40) per week shall, at the option of the employee, be paid at the straight time rate or be taken as compensatory time off. . . .

Section 6.03. The employee shall be paid time and one-half their regular rate of pay when working over forty (40) hours per week.

Section 6.04. Employees will not be on call-out status. Employees in positions that are not classified as 40-hour per week who are called out during other than working hours shall receive pay at the straight time rate for hours between thirty-five (35) and forty (40) hours per week, and pay at time and one-half for hours worked in excess of forty (40) hours per week. . . .

Section 6.06. For the duration of this contract, Adjusted Work Schedule option is available on a voluntary basis. See Appendix B. . . .

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## **ARTICLE 9 – GRIEVANCE PROCEDURE AND ARBITRATION**

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Section 9.09. Decision of Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement. . . .

...

## **ARTICLE 12 – HOLIDAYS**

Section 12.01. Employees shall be paid at the regular straight time rate when not working on the following holidays . . . providing the employee shall have worked his/her last scheduled work day prior to and his/her first scheduled work day following the said holiday, unless excused. For the purpose of this section, time off for sick leave or vacation shall be considered as time worked.

...

### ARTICLE 13 - SICK LEAVE

Section 13.01. . . . Employees shall be paid while on such sick leave at the rate of actual hours taken as sick leave and at the regular rate of pay. . . .

### APPENDIX B SIDE LETTER OF AGREEMENT *Alternate Work Scheduling*

The parties . . . agree to the following side letter as a pilot program for the duration of the 2005-2007 collective bargaining agreement. . . .

The parties have recognized and discussed numerous issues pertaining to alternative scheduling including, but not limited to:

1. Recognizing that in order for this program to be successful, it must be a voluntary program. . . .

#### **Alternative Schedules:**

1. ***Flexible Work Schedule:*** The employee's normal workday may be "flexed" within the confines of a 7 or 8-hour workday. The employee may start earlier, work later, and/or reduce lunch hours to a minimum of 1/2 hour per day.
2. ***Compressed Workweek:*** While the employee's workweek remains at 35 or 40 hours per week, the number of hours per day or days per week may vary.
  - a. ***Overtime:*** Employees on the compressed workweek schedule shall receive overtime compensation only for those hours worked in excess of 40 hours in a workweek. For 35-hour employees, hours over 35 are compensated at straight time. . . .

#### **Miscellaneous:**

1. ***Grievance:*** Neither the decision to grant or deny a request for alternative work schedule, nor the application of this policy, shall be subject to the grievance process. . . .

### ALTERNATIVE SCHEDULING FAQ's

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**Q. What happens if I take a compressed workweek and call in sick?**

- A. When employees working a compressed workweek are absent an entire day they have one of the following options: 1) take appropriate leave to cover the number of hours they were scheduled to work on that day, or 2) with permission of the supervisor, make-up the time within the workweek. For example, if an employee requests sick leave on a regularly scheduled nine (9) hour workday the employee will either be required to use nine (9) hours of sick time, or adjust their hours accordingly, (without creating overtime).

...

**BACKGROUND**

The grievance form, dated March 8, alleges the following as the relevant circumstances:

Employee denied overtime pay when it had been pre-approved. Employee took vacation time during the same week and was therefore told to adjust off vacation time. Employees have been paid overtime and vacation time in the same week for many years under different supervisors.

The Grievants work in the Human Services Department. Brunner is an Economic Support Specialist and Kruse is a Child Support Specialist. Ronda Brown-Anderson is their immediate supervisor. Brunner submitted an overtime request for the week of February 26 through March 2, and claimed eight hours of sick leave for February 27 and 28, as well as three and one-fourth hours of vacation for March 1. Kruse made an overtime request in the same week, and also claimed vacation during that week. Brown-Anderson issued each an e-mail dated March 7 denying the overtime request. The e-mails state,

The union contract, article 6, section 6.03, states “the employee shall be paid time and one-half their regular rate of pay when working over forty (40) hours per week.” Therefore, you would not claim vacation and OT all in the pay period, but rather request no OT and less vacation time used. Please adjust the “Request For Time Off” forms accordingly, and resubmit them to me.

Kruse received a similar e-mail dated March 14, denying her claim for two and one-half hours of overtime for the following week, in which she also claimed vacation time.

The parties entered the following stipulation at hearing:

In lieu of the Union’s proposed exhibits, Pierce County will stipulate that prior to this grievance, Supervisors in the Economic Support area and the Child

Support area consistently approved overtime based upon hours paid over 40 in a work week, rather than hours worked over 40 in a work week.

It is undisputed that the bulk of overtime approved in the Human Services Department occurs in the Economic Support and Child Support Units, which are located in a separate building from other Human Services Department Units. The balance of the background is best set forth as an overview of witness testimony.

### **Reginald Bicha**

Bicha, now the Administrator of Children and Family Services for the State of Wisconsin, served the County for roughly five and one-half years as its Director of Human Services. While a County employee, he was the ultimate authority regarding the approval of overtime, but would rely on input from his unit directors. His direct oversight of overtime was in the monitoring of overtime totals and its budgetary impact. Employee turnover was an ongoing problem in the Economic Support Unit and on occasion he would have to approve a Unit Director's advance approval of a set amount of overtime in a week. He was familiar with the labor agreements covering Human Services Department employees and did not think that overtime was paid unless an employee had spent forty hours in work status prior to claiming overtime for hours worked beyond that. Employees on flex time adjusted their work weeks to avoid overtime.

Brown-Anderson approached him to confer regarding Brunner's request for overtime in a week in which Brunner had taken vacation. Brown-Anderson wanted Brunner to adjust her hours rather than claim overtime. After consulting with other departmental supervisors, Bicha agreed. He could not recall specific overtime requests preceding Brown-Anderson's inquiry, but assumed that any denials were consistent. When asked of prior supervisory approvals of overtime for weeks in which an employee had claimed paid leave, he noted, "it is possible they misunderstood the contract."

### **Dawn Churchill**

Churchill has worked for the County for over seventeen years, and currently works in the Administrative Support Unit. She has been a Union officer for roughly one-half of her tenure. She is not aware of any employee who was paid overtime in a manner inconsistent with the parties' stipulation. While serving as a Union officer, she did not receive any grievances regarding overtime payment. She spoke with employees within the Administrative Support Unit and none reported any payment of overtime inconsistent with the parties' stipulation. The bulk of overtime occurs in the Economic and Child Support Units.

### **Joyce Keenlyne**

Keenlyne has been a County employee for over seventeen years, and served as a Union officer for five. She is not aware of any employee who was paid overtime in a manner

inconsistent with the parties' stipulation. She received no complaints and no grievances regarding overtime payment while a Union officer. The bulk of units in the Human Services Department do not generate overtime. She did not discuss County calculation of overtime with employees outside of the Child and Economic Support Units.

### **Jennifer Kruse**

Kruse has worked for the County for more than twenty years, and currently works as a Child Support Specialist. She has been paid overtime consistent with the parties' stipulation, and was never denied overtime based on the criteria applied by Brown-Anderson on March 7. While she has worked in units other than Child Support, the units have little, if any, overtime.

### **Curt Kephart**

Kephart has served as the County's Administrative Coordinator since August 1, 2005. County labor agreements need to be consistent regarding overtime and should be consistent with Fair Labor Standards Act (FLSA) criteria. He believed that County labor agreements were internally consistent in requiring forty hours of time worked prior to County payment of overtime premium. In the event of conflict between contract and FLSA, the contract governs.

### **Ronda Brown-Anderson**

Brown-Anderson has worked as a Supervisor in the Economic and Child Support Units since January 11. Prior to the March 7, she had approved overtime requests for weeks in which an employee had used paid time off to fill out a forty hour schedule. Those approvals were "inadvertent." She had used the hours' tracking system of her predecessor, which relied on separate forms for paid time off and overtime requests. Submission of these separate forms could be separated by days, or weeks in cases seeking paid time off in advance. As a result, she could not reliably track the totals for a given work week, and was not aware that employees requested overtime for weeks in which they had claimed paid time off. Since March 7, she has implemented a tracking system which totals all hourly pay records on a single sheet. The County still has trouble tracking hours under Flex time schedules, since adjustments in hours can come in after-the-fact.

### **Donna Robole**

Robole has served the County as Business Operations Manager for the Human Services Department since 1991, and has worked for the County since 1985. The County's payroll system is based on separate forms for time off requests and for extra hours' requests. Each supervisor has a system to track these requests and to approve time off and additional hours. Many Human Services Department employees work Flex schedules. The County payroll system assembles and processes pay records on a monthly basis rather than on a weekly basis. On two occasions, while working as a Supervisor, she approved overtime for hours worked in excess of forty in a week in which the employee had taken comp time. She did so without

realizing the contractual significance of the approval. Supervisory requests of employees to adjust schedules to avoid overtime or to work off paid time off hours are typically done verbally. Robole was aware of no units other than Economic and Child Support in which an employee could claim overtime for a week in which they used paid time off. Robole investigated the grievance, and found that Brunner and Kruse had, in the past, been pre-approved for overtime. She was unaware of this prior to her investigation. She was aware of no overtime denial inconsistent with the parties' stipulation prior to the March incidents that prompted the grievance.

### **Jill Kvigne**

Kvigne has served as a Supervisor in the Human Services Department for a little over two and one-half years. She supervises three unit positions as well as professional positions included in another bargaining unit. Kvigne seldom has to approve overtime, but has not authorized overtime for employees who use paid leave to fill out a forty hour schedule. She is not aware of any instance in which an employee has refused to adjust their schedule to avoid overtime payment.

### **Kathy Hass**

Hass is the Manager of the County's Office on Aging. She has worked for the County in that capacity for more than thirty-one years. Her unit uses no overtime, but she understands the labor agreement to require that the normal forty hour schedule be filled with working hours prior to County payment of overtime for hours worked beyond forty. She assisted Robole in filling the Director vacancy created when Bicha left. To her knowledge, during that period no Human Services Department Supervisor approved overtime for an employee who used paid time off during a week in which they claimed overtime.

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

## **THE PARTIES' POSITIONS**

### **The Union's Brief**

The language at issue "is clear and unambiguous and to the extent it is not, the 20+ year practice between the parties is interpretive of the language." A detailed review of the language makes this evident. Article 6 must be read as a whole, with Section 6.03 being the provision specifically covering the grievance. Section 6.01 establishes a "normal work week" which necessarily must include "all hours performing work on behalf of the employer" as well as any paid leave. Paid leave must be taken within the confines of the normal work week, and thus "all compensable time is included in the 40 hours of the workweek." Section 6.02 specifically addresses "hours worked" between thirty-five and forty hours for employee classifications not established at forty hours. The specific reference to "hours worked" is significant and necessary since there is no entitlement to pay other than for hours worked.

Section 6.04 is similarly constructed to Section 6.02, and demands overtime pay “for hours worked” in excess of forty per week. Section 6.03 similarly provides overtime pay for “working over” forty hours per week. The “composition of the forty hours is not addressed.”

Thus, Section 6.01 sets a forty hour base period, which can include hours worked as well as hours in paid time off. Nothing in Article 6 addresses the composition of the forty hours, and, therefore, the “County is asking the Arbitrator to change the language of the agreement by adding the word ‘worked’ after all references to 40 hours.”

In fact, virtually all overtime “has occurred in the Child Support and Economic Support areas.” The evidence establishes that “for at least 20 years these departments had paid time and one-half for all hours worked over 40 compensable hours in a week.” Supervisory testimony to the contrary rests either on witnesses who were not personally familiar with the practice or stated the practice rested on “error”. Presumably the “error” rests on the recent supervisory discovery of the contract. That discovery likely rests on having “been instructed as to the ‘correct’ answer.”

In sum, Article 6 clearly supports the grievance whether viewed on its language alone or on its language as clarified by consistent past practice. It follows that the grievance should be sustained and the “grievants and any others who have since been violatively denied time and one-half” should be made “whole for all losses.”

### **The County’s Brief**

The County argues that the “contract language is clear and unambiguous.” The use of “working” in Section 6.03 establishes this point. “Working” must be read to establish a threshold of forty working hours that is the necessary condition to overtime payment for working hours in excess of that threshold. Arbitral precedent is consistent in requiring the enforcement of clear and unambiguous contract language without recourse to interpretive aids outside the four corners of the labor agreement.

It is significant that Section 6.03 “is consistent with the Fair Labor Standards Act” as well as with other agreement provisions, including: the Preamble; Article 6; Appendix B, Side Letter, Compressed Workweek; and Section 13.01. Published guidelines on the implementation of the compressed workweek make it possible for employees to work additional hours to avoid sick leave account debits, but require them to do so “without creating overtime.” Beyond this, Section 12.01 expressly permits “sick leave and vacation” to be considered “time worked”, but “for the purpose of this section” only. The absence of such language with regard to Section 6.03 is telling. These provisions, read together, establish that “the words ‘hours worked’ are fundamentally clear and unambiguous.”

The grievance seeks a benefit that must be won at the table before it can be enforced in arbitration. Section 9.09 precludes arbitral modification of contract terms. The clear language of Article 6 must be enforced as written or else the arbitrator acts beyond the scope of authority granted in Article 9.

Even if the grievance posed a reason to consider evidence of past practice, “the grievance must be denied.” The evidence restricts the asserted practice “to one supervisor in one building” and “there is no evidence of a mutual agreement to include vacation time in the calculation of overtime.” The County Human Services Department operates out of two buildings, and the Child Support and Economic Support Units work in one of them. That supervisors in that building evolved their own way of handling overtime cannot be held against the County or even against the Human Services Department. Brown-Anderson and Bicha both testified that prior practices had no bearing on the labor agreement. The evidence implies that laxity of administration rather than mutual agreement produced the asserted “practice.” Hass’ and Robole’s testimony confirms this. Testimony from supervisors outside of the Child and Economic Support Units further underscores this.

The evidence falls short of establishing the agreement that makes past practice binding. At most, the evidence “can establish a practice attributable to supervisors in one out of four units of the Human Services Department who engaged in an overtime approval process that was not known to or endorsed by the Administration.” Close examination of the evidence in light of arbitral precedent confirms this. The language of the labor agreement unambiguously undercuts the asserted practice. The evidence cannot be considered unequivocal since only one of four units of the Human Services Department recognized it. The practice cannot be considered clearly enunciated and acted upon because County tracking of the asserted benefit was so deficient that the current supervisor “found it necessary to implement a new hours tracking system.” Nor can the asserted practice be considered an agreed upon means of handling overtime, since it was not Department-wide and was not supported by County administration. At most, the grievance points to errors in the “occasional inclusion of vacation and sick leave in overtime calculations.” Past decisions by this arbitrator involving the County establish that practices which run contrary to clear language may be terminated, and “what is good for the goose is good for the gander.”

Regarding this conflict between contract language and practice, the evidence establishes no binding past practice. Thus, the “grievance must be denied.”

### **The Union’s Reply Brief**

The County mistakenly construes “hours worked in excess of forty hours per week” as “hours worked in excess of forty hours worked per week.” Nothing in Section 6.01 limits the normal forty hour week to “hours worked”. Rather, paid time off can and must be used to fill out a normal forty hour week. It is, then, the County and not the Union that seeks arbitral modification of the labor agreement.

Neither the Preamble nor Section 12.01 bears on the grievance. Each is unique and each addresses how the forty hour threshold to overtime is met. The Alternative Scheduling provisions do not change the overtime language. Rather they clarify that “if your alternative schedule is a workday in excess of 8 hours an employee cannot charge for overtime until the hours worked are outside the normal alternative schedule hours.” The FLSA has no bearing

on a contractual issue. The County's view of Article 9 is appropriate, but mistakes that the County rather than the Union seeks arbitral modification of the labor agreement.

County attempts to unravel the past practice are unconvincing. Virtually all overtime originates in the Child and Economic Support Units. Little, if any, of the supervisory testimony on the issue was derived from direct experience. What direct experience was involved is wished away as a "mistake" by the County. The County's attempt to discredit a Union Steward's testimony ignores that it reflects the only testimony from a witness with contract enforcement experience. Nor will the evidence support that the practice is traceable to a single supervisor. The assertion that the County's record keeping is suspect is as amenable to the view that the County wishes to destroy a known practice as it is with the assertion that it wishes to conform its records to its labor agreement. Nothing in arbitral precedent, including the decisions involving this arbitrator, has any bearing on the fact that over twenty years of consistent practice with the Child and Economic Support Units clarifies the language the County claims as unambiguous. The County's attempt to assert the Sergeant Schultz defense, "I know nothing," must be rejected. The grievance must be sustained with an appropriate make whole ordered.

### **The County's Reply Brief**

To interpret Section 6.03 as the Union wishes demands that "working" be interpreted to include vacation time, but "there exists no language in the agreement that time 'working' includes vacation time." The Union's view in fact undercuts the normal meaning of "working." The Union's view misinterprets agreement provisions providing paid time off, including Section 17.04, Section 19.01 and Section 13.01. Each of these provisions offers compensation at regular rates, but none establish paid leave as "working" time. The evidence affords not "one case . . . to illuminate or substantiate its interpretation that hours worked includes vacation time."

Nor will evidence of past practice fill this void. At best, the evidence shows one supervisor "developed a system and perpetuated a system." The arrival of a new supervisor brought the "system" to an end. The older system was not unequivocal. If it had been, the new supervisor would not have had to bring it to her supervisor's attention, and the system would have been department-wide. Arbitral precedent highlights that the Union's arguments are flawed by the absence of contractual support for them and by the absence of evidence of mutual agreement underlying the past conduct.

A review of the record demands that the "clear and unambiguous language of the agreement be honored and that the grievance be denied.

### **DISCUSSION**

The parties' statements of the issue precisely pose the interpretive dispute. The County's presumes that the Grievants "did not work over 40 hours" in the disputed pay period.

This view is defensible, but begs the interpretive issue, which is whether the “when working over forty (40) hours per week” reference of Section 6.03 is a specific reference to hours beyond forty or a general reference to total weekly hours worked. More specifically, the dispute is whether time spent in paid time off status to fill out a forty hour workweek can be counted to meet the forty hour threshold that prefaces the overtime entitlement of Section 6.03. Unlike the County’s, the Union’s statement can incorporate each party’s position.

The County’s statement accurately highlights that the fundamental issue is whether or not the language of Section 6.03 clearly and unambiguously dictates the conclusion that “when working over forty (40) hours” can refer only to total hours in a week. The parties’ statements of the issue resolve this, since each states a plausible reading of the same language. That Section 6.03 permits two plausible interpretations establishes that it is ambiguous. The parties’ stipulation refers to twenty years of consistent interpretation by County supervisors in the Economic and Child Support Units which reads the “when working over forty (40) hours” reference consistent with the Union’s view. Without regard to the grievance’s merit, this underscores that the Union’s view is plausible. County use of other agreement provisions underscores that the disputed reference is ambiguous. That Section 6.03 uses the “working over” reference while Section 6.04 uses the “hours worked in excess of” reference to create the same overtime premium manifests that the language of Article 6 poses an interpretive issue that strays beyond a single section.

The conclusion that the language of Section 6.03 is ambiguous makes the Union’s reading of Section 6.03 more persuasive than the County’s regarding the Grievants’ circumstances. Bargaining history and past practice are, in my view, the most persuasive guides to the resolution of contractual ambiguity because each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. However, this conclusion prefaces rather than resolves the interpretive difficulty.

The difficulty is that the language at issue affects not just the Grievants, but the entire Human Services Department. The proven practice does not, however, reliably stretch beyond the Economic and Child Support Units. Certain witness testimony indicates that the practice may extend beyond these units, but there is little detail to that testimony. Even if the consistency of supervisory testimony is traceable in part to the County’s current position on the grievance, the fact remains that the testimony is consistent. There is no dispute that supervisors generally seek to avoid overtime and no dispute that employees and supervisors across units often agree to adjust schedules to avoid overtime or to minimize the usage of paid time off. At a minimum, this undercuts the asserted uniformity of the practice as it extends beyond the Economic and Child Support Units. Significantly, the uniformity of the practice falls short of establishing the knowledge of County managers above the immediate supervisors in the Economic and Child Support Units. That other units generate less overtime than the Economic and Child Support Units falls short of rebutting the testimony of County witnesses that other units have applied the same language differently over a considerable period of time. Thus, the evidence poses issues on the scope of the proven practice and thus on its use as a guide to the interpretation of Section 6.03.

The parties' use of other guides highlights the interpretive difficulty. The Union persuasively notes that the definition of a "normal work week" in Section 6.01 presumes that the use of paid time off must fall in a "work" week, thus highlighting that pay and work status for a given hour are not mutually exclusive. Similarly, Sections 6.02, 6.03 and 6.04 are each consistent with a view that reference to the overtime premium specifically links the premium to "hours worked in excess of forty" or hours "working over forty", thus precluding paying an overtime premium on an hour in paid time off status. Contrary to the County's view, these references do not necessarily apply to any hour other than an hour above forty. However, the Preamble supports the County's reading of Section 6.03 over the Union's. That the Preamble defines negotiating during regular hours as the equivalent of "normal duties" supports the County's view that it is the performance of normal duties rather than paid time off which fills out the forty hour threshold to the overtime premium. That Section 12.01 includes "time off for sick leave or vacation . . . as time worked" for "the purpose of this section" affords greater support for the County's reading of Section 6.03 than for the Union's, since it implies that the use of "sick leave or vacation" is otherwise not to be considered as "time worked." Section 13.01 can support either party's view. Similarly, Appendix B will support either party's view. The "Miscellaneous" section of Appendix B seems to preclude its application as an interpretive guide. On balance, these interpretive guides mirror the evidence of past practice by underscoring that Section 6.03 can be read or implemented consistent with either party's view.

As the parties note, this is the third time I have addressed a grievance in this County involving the application of past practice: see COUNTY OF PIERCE, MA-6649, No. 4348 (2/27) and COUNTY OF PIERCE, MA-8316, No. 4938 (11/94). As noted below, the prior grievances are not directly applicable here. However, their treatment of the binding force of past practice is applicable, and the following citation from one of the awards highlights the principles governing this grievance:

To address the binding force of a practice, it is first necessary to isolate the purpose for which the practice is asserted. The major purposes of evidence of past practice have been summarized thus:

- (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement. MA-8316 AT 10, citing Elkouri & Elkouri, *How Arbitration Works*, Fourth Edition (BNA, 1985) at 437.

This passage is covered in the Fifth Edition at 630. This grievance questions whether the practice falls within (1) or (2).

In my view, the proven practice cannot be considered to indicate a binding interpretation of Section 6.03 because the evidence establishes that the Human Services Department has applied that provision differently in the Economic and Child Support Units than in the balance of the Human Services Department. The evidence of practice establishes that the language is amenable to two plausible interpretations and that the Department has implemented each. It is, then, an improper stretch of the evidence under Section 9.09 to resolve the ambiguity on a department-wide basis through recourse to the evidence of past practice. The governing language applies to all units, but the practice varies between them. At most, the evidence establishes that the County permitted supervisors in the Economic and Child Support Units to respond to caseload needs through pre-approval or after-the-fact approval of overtime to address case load issues by permitting the use of paid time off to fill out the forty hour threshold to overtime.

Against this background, it is consistent with the record to view the proven practice as a benefit covering matters not included in the written contract. Section 6.03 clearly addresses the issue of overtime payment as a general matter, but does not establish how to treat the use of paid time off in filling out the forty hour threshold to the overtime premium, or treat the amount of discretion available to individual supervisors to pre-approve overtime in response to caseload issues. The silence of Section 6.03 on this point permitted two contrary views of overtime approval to exist within the same department. Against this background, Brown-Anderson's denial of the requested overtime constitutes County action to terminate a practice applied to employees in the Economic and Child Support Units.

I cited, in MA-8316 (at 11), an article by Richard Mitthenthal, ("Past Practice and the Administration of Collective Bargaining Agreements", from *Arbitration and Public Policy* (BNA, 1961), which underlies the text cited above from Elkouri & Elkouri, and which speaks persuasively on the termination of past practices. He noted in that article, at 56, the following:

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement.

This persuasively addresses the interpretive issue. Because Brown-Anderson did not act on a clean slate, her denial of the overtime requests is a violation of Section 6.03, and more specifically of the benefit established by her predecessors over a long period of time to allow paid time off to count toward the forty hour threshold that is the condition for overtime payment. However reasonable her denial may be as a matter of the interpretation of Section 6.03 cannot obscure that it overturned a long established pattern of overtime approval within the Economic and Child Support Units. While Section 6.03 is broad enough to permit her view of the section, the consistent past practice to the contrary stands through the life of the agreement. That the same section permitted two divergent, but reasonable, views of its terms to be implemented within the Human Services Department must be reconciled through bargaining rather than through grievance arbitration. Section 6.03 does not distinguish

between units, but neither party has successfully bargained a unit-wide resolution of its ambiguity and the department has implemented two contradictory interpretations. Until the ambiguity is resolved in bargaining it cannot be enforced in arbitration on a unit-wide basis. This arbitration establishes that the practice is not amenable to unilateral termination during the term of the labor agreement.

The parties did not discuss the issue of remedy. It is not evident how many hours are at issue regarding the Grievants or whether this Award impacts other incidents. Against this background, the Award stated below states a general make-whole remedy and a retention of jurisdiction in the event the general make whole cannot be applied without dispute.

### AWARD

The County did violate the collective bargaining agreement (Art. 6 Sec. 6.03) and/or past practice when it failed to pay time and one-half to the Grievants for hours worked on 3/7/07 in excess of 40 hours. The specific violation is the County's unilateral termination of a past practice in the Economic and Child Support Units during the term of the collective bargaining agreement. The practice does not extend beyond those units and thus does not establish a unit-wide practice determining the ambiguity posed by the language of Section 6.03.

As the remedy appropriate to the County's improper, unilateral termination of a past practice, the County shall make the Grievants whole for the difference between the wages and benefits they earned for the pay period(s) in dispute and the wages and benefits they would have earned but for the County's improper, unilateral termination of a past practice allowing paid time off to be counted as part of the forty hour threshold to the provision of overtime premium under Section 6.03 in the Economic and Child Support Units of the County's Human Services Department. I will retain jurisdiction for a period not less than forty-five days from the date of this Award to address any remedial disputes.

Dated at Madison, Wisconsin, this 7th day of May, 2008.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

RBM/gjc  
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