

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**SAWYER COUNTY COURTHOUSE EMPLOYEES,  
LOCAL 1213, AFSCME, AFL-CIO**

and

**SAWYER COUNTY**

Case 159  
No. 67834  
MA-14034

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**Appearances:**

**Mr. James E. Mattson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the County.

**ARBITRATION AWARD**

Sawyer County Courthouse Employees, Local #1213, AFSCME, AFL-CIO (herein the Union) and Sawyer County (herein the County) are parties to a collective bargaining agreement dated May 15, 2007 and covering the period from January 1, 2007 to December 31, 2008. On March 7, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the County's refusal to pay mileage and travel time to Shirley Scharping-Anderson (herein the Grievant) for her travel to and from work. The parties jointly requested the undersigned to hear the dispute and a hearing was conducted on July 2, 2008. The proceedings were not transcribed. The parties filed initial briefs by August 13, 2008, and reply briefs by October 8, 2008, whereupon the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Did the Employer violate the terms of the parties' collective bargaining agreement and the long-standing past practice of paying mileage and driving

time from the employee's (Personal Care Worker) residence to work and back, when it denied the Grievant payment of her mileage and time spent driving from her residence to work and back to her residence?

And if so, the appropriate remedy is to make the Grievant whole for any lost wages and mileage payments the Grievant has lost and the County to pay the Grievant for mileage and driving time from her residence to work and back.

The County would frame the issues as follows:

Is the grievance timely?

If so, did the County violate the collective bargaining agreement when it paid the Grievant mileage and travel time in accordance with the County's policy rather than from her home?

If so, what is the appropriate remedy?

The Arbitrator characterizes the issues as follows:

Is the grievance timely?

If so, did the County violate the collective bargaining agreement or past practice when it did not pay the Grievant time and mileage between her home and her clients' homes?

If so, what is the appropriate remedy?

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE 5 – MANAGEMENT RIGHTS**

The County possesses the sole right to operate the County and all management rights repose in it, subject to the provisions of this contract and applicable laws. These rights include the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules;

...

C. To hire, promote, schedule and assign employees to positions within the County in accordance with the terms of this agreement;

D. To maintain the efficiency of County functions

. . .

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

. . .

The reasonableness of County action taken pursuant to this Article is subject to the grievance procedure.

#### **ARTICLE 6 – GRIEVANCE PROCEDURE**

A. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract or concerning any question regarding wages, hours and working conditions or other conditions of employment.

. . .

C. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

It is understood that the time limits set forth in this Article are substantive, and failure of the grievant to file and process the grievance within the time limits set forth in this Article shall be deemed a settlement and waiver of the grievance. In the event the Employer fails to respond to the grievance in a timely manner, the grievant may proceed to the next step of the procedure.

. . .

E. Steps in the Procedure:

Step 1: The grievant, or with a representative, shall orally explain his/her grievance to his/her immediate supervisor no later than seven (7) calendar days after he/she knew or should have known of the cause of such grievance. The work of the County shall not be interrupted by the processing of a grievance, except that if an

issue concerning employee safety is involved, the employee may submit his/her oral grievance and request that it be answered as soon as possible. The supervisor shall, within four (4) calendar days, orally answer the grievant, and the representative where applicable, of his/her decision.

## **ARTICLE 22 – MILEAGE**

Employees shall be paid mileage for traveling in the line of duty in the amount of forty-four cents (44¢) per mile effective with ratification of the 2007-2008 bargaining agreement, and forty-six cents (46¢) per mile effective January 1, 2008.

### **OTHER RELEVANT LANGUAGE**

#### **SAWYER COUNTY PERSONNEL-ADMINISTRATIVE POLICIES**

1. Mileage. Employees are reimbursed at the rate pursuant to current County policy (Appendix A). All travel, other than in the performance of the employee's regular day-to-day performance of duty, shall be approved in advance by the county Committee having jurisdiction over the employee's department operation.

Hayward is designated as the headquarters city for all county employees. Allowable mileage shall not exceed the lesser of two distances – headquarters to destination and return or home to destination and return, except whenever an employee is called out on emergency after regular working hours, mileage can be claimed from the employee's home and return.

When more than one employee is going to the same point, they are expected to travel in one car whenever possible. When a personal car is used, reimbursement will be over the shortest route. Only the driver is eligible for mileage reimbursement. No mileage will be paid if a county vehicle is used.

Home to office and return mileage is not reimbursable.

Any accidents involving the personal automobile being driven in the performance of official business on a reimbursable basis must be reported immediately by the employee filing an accident report with the owner's own insurance company and with the County Clerk's office.

### **STIPULATIONS**

At the hearing, the parties entered into the following stipulations of fact:

1. For Personal Care Workers (PCWs) who live in the County, their homes have been designated as their home base, and they are paid mileage and time from their homes.
2. Diana Warlin has a Hayward address, and the County did not learn of the fact that she resides outside of the County until after the filing of this grievance.
3. There has been no violation of Article 27 of the collective bargaining agreement.

### **BACKGROUND**

Sawyer County employs Personal Care Workers (PCWs), who operate within the County's Department of Health and Human Services. The PCWs are responsible for providing home care services to Sawyer County residents who are elderly or disabled and require assistance with personal hygiene, meals and housekeeping. The PCWs previously worked for private agencies, but in the 1990s were incorporated into the County HHS Department. The Personal Care program is discretionary and receives reimbursement from the State only for hours that are pre-authorized for providing services. In 2006, the program ran a deficit of \$163,142.55 and in 2007 it ran a deficit of \$177,636.86.

The County has adopted a personnel policy with respect to reimbursement of County employees for work-related travel. According to the policy, employees are reimbursed for work-related travel at the rate set forth in Article 22 of the contract, with the reimbursement being based on the distance between the employee's work headquarters and work-related destination, or the employee's home and work-related destination, whichever is shorter. For all employees the headquarters is deemed to be Hayward. Employees are not compensated for travel between their homes and the office in Hayward. A different policy has been applied to PCWs, however. When PCWs were privately contracted, the agencies that employed them considered their homes to be their "headquarters," so they were reimbursed for their travel to and from their homes and were also compensated for their travel time. PCWs live throughout the County and typically are assigned clients who live in proximity to their homes. This exception for PCWs is not referenced in the County Personnel and Administrative Policies.

Shirley Scharping-Anderson, the Grievant herein, was hired by the County as a PCW on April 17, 2006. She is not a resident of Sawyer County, but lives in the Town of Minong in Washburn County and has a 27 mile daily commute to and from the Sawyer County Courthouse, where the HHS Department has its office. At the time of her hire, the Grievant was given a copy of the County Personnel and Administrative Policies and was told that

Hayward was her headquarters and that she would be paid for her travel time and reimbursed for mileage between the Courthouse and the homes of her clients. She was also told that she would have a twelve month probationary period pursuant to the Union contract, and was provided a copy of the contract. Approximately seven to eight months later, the Grievant was at a PCW meeting and learned that other PCWs living throughout the County were being compensated for time and mileage traveling from home to their clients and back, which was often a substantial amount of their compensation. She did not grieve the issue at that time because she did not believe she had the right to grieve while on probation. She did not read the contract or consult the Union on this point. The Grievant's probation ended in April 2007.

In October 2007, the Grievant discussed her situation with some co-workers, who told her to bring the matter to the Union, which she did. The Union leadership told her she should be compensated for her time and mileage to and from her home, according to the practice that applied to the other PCWs. Subsequently, on November 8, 2007, Union Steward Louise Ladenthin filed grievances on Scharping-Anderson's behalf, seeking compensation for her time and mileage traveling between her home and the courthouse, retroactive to her date of hire. The grievances were denied both on substantive grounds and on the basis that they were untimely. The matter then proceeded to arbitration.

Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

## **POSITIONS OF THE PARTIES**

### **The Union**

#### ***Timeliness***

The Union asserts that the grievance was timely filed. Several months after being employed by the County, the Grievant discovered that, unlike her, every other Personal Care Worker in the County was being paid time and mileage to and from home each day as they traveled to their clients' residences. She attended a Union meeting in October 2007 and brought her concern to the Local. She had not previously been a member of a union and was unfamiliar with filing grievances and contract administration. As soon as it learned of the issue, the Local promptly filed grievances on her behalf, which were timely according to the timelines contained in the grievance procedure.

#### ***Merits***

The Union contends that the Grievant has been the subject of disparate treatment in that she alone among the PCWs was not paid time and mileage for travel between her home and work. The contract does not impose a residency requirement, nor does it in any way limit an employee's entitlement to time or mileage for travel. The County relies on County policy in support of its position, but there have never been discussions with the Union about payments to

non-County residents. Further, the County does pay her time and mileage for travel on weekends. Finally, the County never explained to the Grievant at the time of her hire, or afterward, that she was compensated differently than the other PCWs.

This disparate treatment has resulted in a major economic loss to the Grievant. PCWs are the lowest paid employees in the County. The refusal of the County to pay her for travel time has cost her \$7,401.42 and its failure to pay her mileage has cost her an additional \$10,924.20, with the loss increasing each day. This is a grossly unfair burden on an employee on the bottom of the pay scale. The Grievant does not travel significantly farther than some PCWs who live on the outskirts of the County, yet they are paid for time and mileage and she is not. The County contends that it would be an economic hardship on the County to compensate the Grievant for time and mileage. Nevertheless, economic hardship does not justify disparate treatment of an employee, or the imposition of an unreasonable work rule.

### **The County**

#### ***Timeliness***

The County asserts that the grievance is not timely and should be dismissed. It notes that the Grievant was hired on April 17, 2006 and was told at that time that her work headquarters would be in Hayward and that she would not receive time or mileage for her travel between work and home. She was also given a copy of the County Personnel-Administrative Procedures Manual and the Union contract. She was a member of the Union from the outset of her employment and had access to the grievance procedure from that point onward.

The grievance procedure requires that the Grievant explain the grievance to his/her immediate supervisor within seven days from the time he/she knew or should have known the cause of the grievance. It also makes clear that failure to meet the time limits of the grievance procedure constitutes a waiver of the grievance. There is substantial arbitral precedent to the effect that an arbitrator lacks jurisdiction over grievances that are not timely. It is also no defense that the Union acted promptly when it learned of the issue, because the Grievant's foreknowledge of the salient facts is imputed to the Union. The Grievant did not bring the facts of her situation to the Union until she had been working for eighteen months. Neither she nor the Union obtained a waiver of the timelines from the County. Thus the grievance was untimely filed and must be dismissed.

#### ***Merits***

The County asserts that the grievance must also fail on its merits. The contract does not specify whether or how time and mileage for travel are to be allocated, but the County Personnel and Administrative Policies are clear that Hayward is the headquarters for all County employees and mileage is calculated to and from that point. This policy has been in effect for at least sixteen years and has never been challenged by the Union. The County has

made an exception for Personal Care Workers, allowing them to treat their homes as their headquarters, but in most instances this results in less mileage than if they were headquartered in Hayward. The Grievant is not similarly situated to the other PCWs, because she lives outside Sawyer County and mileage traveled outside the County is not covered by the policy. Thus, in accordance with its management rights, the County determined to apply the same policy to the Grievant that applies to the Home Health Aides and pay mileage from and to Hayward. Article 22 refers to mileage in the line of duty, but mileage to and from work is not "in the line of duty." Further, the Grievant's hardship argument has little merit because employees choose where to live and she was aware of the fact that she would not be paid for travel from and to her home when she accepted the job. As a non-resident PCW, she seeks to have the practice applying to resident PCWs extended to her, but arbitral precedents do not support such a position. The grievance should be denied.

### **Union Reply**

#### ***Timeliness***

The Union reasserts that the grievances were timely. Once the Grievant became aware of the inequity in how she was paid mileage compared to the other PCWs she pursued filing grievances. She only learned of the discrepancy from conversations with co-workers several months after she began working for the County. Once she learned of this fact, she spoke to the Union in late October 2007 and the Union promptly began the grievance process. Prior to being approached by the Grievant, the Union had no notice of the problem.

#### ***Merits***

Clearly, the Grievant has been treated unfairly. The location of her residence is irrelevant. The contract does not specify how PCWs are to be compensated for travel time and mileage, but the practice is clear. All PCWs except the Grievant have been paid time and mileage for travel between their homes and the homes of their clients. The County attempts to compare the Grievant to Home Health Aides, but they are not members of the Courthouse bargaining unit and the Grievant's benefits should be commensurate with her co-workers. The County makes an issue of its financial difficulties, but this is not a justification for treating the Grievant differently and imposing the financial burden of the County on her.

### **County Reply**

#### ***Timeliness***

The County reiterates its position that the grievances were untimely. The Grievant knew the facts upon which the grievances were based at least ten months before the grievances were filed. When the Union learned of the facts is irrelevant. The Grievant's knowledge is imputed to the Union and her failure to follow-up for a period of months is fatal to the Union's case.



### *Merits*

If the Arbitrator finds this to be a “continuing grievance” and, therefore, timely going forward, the grievance still must fail. The only past practice in place is that of paying time and mileage to and from home to PCWs who are residents of Sawyer County. As a non-resident, the Grievant does not qualify and the County properly exercised its management rights to apply the same policy to the Grievant that applies to other County employees. A binding past practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period as an established practice of the parties. There are only two other non-resident PCWs who received time and mileage from their homes. In the case of one, the County was unaware that she was a non-resident. In the case of the other, the employee was temporary and was not covered by the collective bargaining agreement. These instances do not meet the criteria for a binding past practice. In the event the grievance is determined to have merit, however, the remedy should not be applied retroactively to the filing of the grievance, nor should it be applied to time and mileage incurred outside of Sawyer County.

## DISCUSSION

### *Timeliness*

The Grievant was hired by the County as a Personal Care Worker on April 17, 2006. She was placed on probation for twelve months. At the time of her hire, she was told that the courthouse in Hayward was her headquarters and that she would be paid time and mileage for travel between Hayward and the homes of her clients, but she would not be paid for time and mileage traveling between her home and Hayward, pursuant to the policy set forth in the County Personnel-Administrative Manual. She was not told, however, that the other Personnel Care Workers were subject to an exception to the County policy which treated their homes as their headquarters and paid them time and mileage for all travel between their homes and the homes of their clients. In approximately December 2006, the Grievant discovered that, unlike herself, the other PCWs were receiving time and mileage for travel to and from home, sometimes resulting in several hundred dollars per month in additional compensation. According to the Grievant, she did not believe she could contest the matter at that time because she was still on probation. Her probation was completed in April 2007. She claimed she did not contest the issue at that time because she had not been a member of a Union before and was unaware that the Union could help her. Ultimately, she brought the matter to the Union in late October 2007 and the Union shortly thereafter filed the grievances.

The County asserts that the grievances were untimely because the contract requires that they be filed within seven days from the time the Grievant learns the facts upon which the grievance is based. Grievances not filed within the contractual time limit are deemed waived. The Union takes the position that the grievances are timely because they were filed by the Union and were timely based on the time the Union became aware of the facts. The County argues that the Grievant’s knowledge must be imputed to the Union, making the date the Union learned the information irrelevant.

Here, the County's action of not paying the Grievant time and mileage between her home and Hayward was a daily occurrence, which commenced at the outset of her employment and continued thereafter. In circumstances where the action complained of is a recurring event, arbitrators have regarded such situations as being continuing violations, in which each successive event constitutes a new occurrence. The continuing violation doctrine exists to mitigate the harshness of the grievance procedure by allowing a grievant to file a grievance even if discovery of the violation occurs substantially after the first occurrence. The doctrine limits the remedy, however, to the date of the event for which the grievance was filed, rather than the first occurrence. The circumstances here qualify as such a continuous series of events, with each day that the Grievant was not paid for travel between home and Hayward being a separate occurrence. Nevertheless, that does not complete the analysis. The continuing violation doctrine does not give grievants discretion to file grievances whenever they choose. Rather, they are required to exercise due diligence in the assertion of their rights and to file their grievances in a timely fashion once the facts upon which the grievances are based become known. MONROE COUNTY, WERC Case 131, No. 54061, MA-9536 (Yaeger, 8/12/97); JUNEAU COUNTY, WERC Case 125, No. 56300, MA-10231 (Houlihan, 6/29/00); MANITOWOC SCHOOL DISTRICT, WERC Case 59, No. 62496, MA-12606 (Emery, 3/1/05).

Here, the Grievant was aware that she was not being provided the same time and mileage benefit at least as early as December 2006, approximately eleven months before the grievances were filed. She asserts that she believed that she could not file a grievance while she was on probation, but even were I to credit this excuse, her probation ended in April 2007, still nearly seven months before the grievances were filed. At some point she apparently spoke to Pete Sanders, the Director of the Health and Human Services Department, about the issue and he told her to take the matter to the Union, but still she did not do so. The Grievant claimed that she was unaware the Union was able to do anything for her until she went to a Union meeting in late October 2007 and spoke to Union Steward Louise Ladhenthin about the issue, but I find this excuse unconvincing and invalid. The testimony indicates she became a member of the Union at the time of her hire and was given a copy of the expired Union contract and County Personnel-Administrative Policies at that time. The grievance language in the contract did not change and she was able to read it, and ask questions about things she did not understand at any time. She also had access to the Union Stewards and other Union officers to discuss any issues regarding her wages, hours and conditions of employment. The record reveals that she knew enough about the contract to be aware that probationary status is in some instances linked to access to the grievance procedure, which indicates that at some time she read it and/or asked about its scope and application. Even if she didn't, however, her failure to do so was not the fault of the County. Even in circumstances where a violation is ongoing, a grievant has an obligation to take reasonable steps to pursue his or her rights once the facts supporting the violation become known. In my view, failing to come forward for seven months under these circumstances was an unreasonable delay. Furthermore, the Union is bound by the Grievant's knowledge, so the fact that she did not discuss the matter with the Union until shortly before the grievances were filed does not reset the timeline for filing the grievances. The contract clearly states that the Grievant had to bring the grievance forward within seven calendar days after she knew or should have known the cause of the grievance. She did not do

so and the grievances were untimely. As such, the Arbitrator does not have jurisdiction over the substantive issues of the grievances.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

**AWARD**

The grievances were not filed in accordance with the timelines set forth in the contractual grievance procedure and were untimely. The Arbitrator does not have jurisdiction over the grievances, therefore, and they are denied.

Dated at Fond du Lac, Wisconsin, this 14th day of January, 2009.

John R. Emery /s/

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John R. Emery, Arbitrator