

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**KENOSHA COUNTY INSTITUTIONS EMPLOYEES,
LOCAL 1392, AFSCME, AFL-CIO**

and

KENOSHA COUNTY

Case 288
No. 69694
MA-14708

Appearances:

Mr. Nicholas E. Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, 8450 82nd Street #308, Pleasant Prairie, Wisconsin 53158, on behalf of the Union.

Attorney Lorette Mitchell, Assistant Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin 53140-3747, on behalf of the County.

ARBITRATION AWARD

For many years, the Kenosha County Institutions Employees, Local 1392 AFSCME, AFL-CIO (herein the Union) and Kenosha County (herein the County) have been parties to a collective bargaining relationship. At the time the circumstances giving rise to the grievance herein occurred, the parties were operating under an agreement covering the period from January 1, 2007 to December 31, 2009, which provided for binding arbitration of grievances arising thereunder. On March 17, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the Employer's discharge of Arleen Clark (herein the Grievant). The undersigned was selected to hear the dispute from a panel of WERC arbitrators and a hearing was conducted on June 15, 2010. The parties stipulated to bifurcation of the hearing and the initial phase addressed the County's procedural objections to arbitration of the grievance. The proceedings were not transcribed. The parties filed briefs on July 7, 2010 and on July 19, 2010 informed the arbitrator that they would not be filing reply briefs.

ISSUES

The parties did not stipulate to a statement of the issues.

The County would frame the issues in the initial phase, as follows:

- (1) Was Arleen Clark discharged from her position as a CNA with the Kenosha County Nursing Home, Brookside Care Center (BCC) within her probationary period?
- (2) Is the grievance barred due to timeliness?

The Union would frame the issues, as follows:

- (1) Was Ms. Clark a probationary employee under the Collective Bargaining Agreement at the time of her termination?
- (2) Was the grievance timely under the Collective Bargaining Agreement between the parties?

The Arbitrator adopts the issues as framed by the Union.

PERTINENT CONTRACT LANGUAGE

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

Step 1. Any employee who has a grievance shall first discuss it with his immediate supervisor with or without the presence of the steward at his option. If the grievance is not resolved between the employee with or without the steward and the immediate supervisor, the grievance shall be reduced to writing, in triplicate, on a form provided by the Union and the Union shall request a meeting with the department head within ten (10) working days after the supervisor's answer to the employee. If the grievance is resolved between the employee and the supervisor, the Union shall be notified of the settlement.

If the grievance is reduced to writing, a copy shall be furnished to the County's Director of Labor Relations and Personnel and to the Union's Council 40 representative.

Step 2. The hearing shall consist of a meeting with the administrator, the department head and the steward and aggrieved and/or other representatives of the Local. The department head shall give his answer in writing to the Union Representative who signed such grievance within four (4) working days of this meeting.

Step 3. In the event the grievance is not satisfactorily adjusted in Step 2, the Union may appeal the grievance to Step 3 by notifying within ten (10) working days of the completion of Step 2, the Administration Committee of the County Board in writing. This appeal shall state the name of the aggrieved, the date of the grievance, the subject and the relief requested. The Administration Committee shall give its disposition of the grievance to the Union in writing within fourteen (14) calendar days. If the Administration Committee fails to give its disposition of the grievance in writing to the Union within fourteen (14) calendar days after the date the parties have met to discuss the grievance, it shall be settled in favor of the grievant. The parties may mutually agree to extend the time limit at this step in accordance with Section 3.3.

Step 4. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within ten (10) working days following the receipt of the County's answer to Step 3 above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after the notice of appeal to arbitration, the Union or the employer may request two (2) panels of seven (7) arbitrators each from the WERC. The arbitrator shall be selected from the panel by each party alternately striking a name from the panel until only one (1) name remains, the party desiring arbitration striking the first name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

Section 3.2. Time Limits – Appeal and Settlement. The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step except Step 3, the County's representative fails to give his answer within the time limit therein set forth, the grievance is automatically appealed to the next step at the expiration of such time limit. Any grievance which is not appealed to the next step within the time limits provided herein shall be considered settled on the basis of the County's last answer.

Section 3.3. Extension of Time Limits. Additional days to settle or move a grievance may be extended by mutual agreement. No retroactive payments on grievances involving loss of pay shall be required of the County prior to ninety (90) calendar days before the date the grievance was first presented in writing.

Section 3.4. Time Limits for Filing Grievances. Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred.

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ARTICLE VI - SENIORITY

Section 6.1. Probationary Period. New full-time employees shall be on a probationary status for a period of ninety (90) calendar days. New part-time employees shall be on a probationary status for a period of sixty (60) scheduled days worked, or five (5) calendar months, whichever is earlier. During such probationary period, full-time employees shall not be entitled to any fringe benefits under this Agreement except for the appropriate wage rate to be paid for work actually performed. During this probationary period, neither the Union nor the employee shall have recourse to the grievance procedure in case of discharge. If still employed after such date, seniority shall date from the first day of hiring. Until a probationary employee has acquired seniority, he shall have no reemployment rights in case of layoff.

BACKGROUND

Arleen Clark, the Grievant herein, was hired by Kenosha County on February 26, 2008 as a part-time Certified Nursing Assistant at Brookside Care Center. During her employment she was assigned to the 3rd shift and normally worked from 11:00 p.m. to 7:00 a.m. Under the terms of the collective bargaining agreement, she was subject to a probationary period of the earlier of 60 scheduled days worked or 5 calendar months. On June 19, 2008, Clark entered into an agreement with the County and the Union to extend her probation "...an additional 30 working days from 6/20/08." At the end of her shift on August 20, 2008, Clark was called to a meeting with Brookside Interim Director Geraldine Kapplehoff, 3rd Shift Supervisor Karen Mader-Border and Union Vice President Kathy Million, wherein she was advised that she had not passed her probation and was being discharged. Clark protested and maintained that she had completed her probation, whereupon Million asked for a caucus. During the caucus, Clark showed her personal notes to Million to show she had passed probation. Million was unable to make a determination from Clark's notes, so asked for a copy of the master schedule from Kapplehoff, which was provided. Million went over the master schedule with Clark and Union Secretary Janis Buchholz and Million and Buchholz concluded that Clark had only worked 29 days from her extension and had not, therefore, passed probation.

Clark later met with Diane Yule, the Assistant Director of Personnel Services, to protest her termination. Yule spoke with Kapplehoff and was informed that Clark had not passed probation. Yule then examined the calendar and payroll information on her own and also came to the conclusion that Clark had not passed probation. She advised the Union of her findings. As a result of Clark's failure to pass probation, the Union did not immediately file a grievance regarding Clark's termination.

In January 2009, Clark filed a complaint against the County and the Union with the Equal Employment Opportunities Commission alleging that she was wrongfully terminated. At the end of January, Buchholz informed Union Representative Nick Kasmer of the complaint. Kasmer received a copy of the complaint in February 2009 and thereupon requested copies of the master calendar and payroll documents from the County, which were provided later during the month. After reviewing the calendar and payroll documents with Union officials, Kasmer determined that Clark had, in fact, completed her probation and the Union filed a grievance over her termination on March 11, 2009. The County denied the grievance and the matter proceeded to arbitration. The County raised procedural objections to arbitration based on Clark's failure to pass probation and the untimeliness of the grievance. The parties agreed to bifurcate the proceeding and the procedural objections were addressed in the first phase of the arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The County

The County asserts, in the first instance, that Clark had not passed her probation at the time she was terminated and was, therefore, not entitled to grieve her termination. After the termination, Clark met with Yule to protest her termination. Yule conducted an investigation and determined that Clark was terminated on the 30th day of her extension and, therefore, had not passed probation. This conclusion was confirmed by Payroll Specialist Denise Krahn, whose duties include tracking the workdays and hours of probationary employees and updating the County on their status. It has been held that an employee passes probation at the time he or she punches out at the end of the last day of the probation period. *Grievance Guide*, 5th Ed., p. 105. It is unknown whether Clark had punched out on August 20, but she had not left the worksite at the time she was called to the meeting with Kapplehoff. Inasmuch as Clark had not passed probation, therefore, the County was within its rights to terminate her for any reason not otherwise unlawful. *How Arbitration Works*, Elkouri and Elkouri, 6th Ed, p. 934.

Clark claims to have passed her probationary period, but was confused about her calculations as to when the extension began. Union witness Kathy Million also examined the calendar at the time of the termination and concluded that Clark had not passed probation. The Union did not change its position until after Clark filed her EEOC complaint, at which time it filed the grievance rather than discussing its findings with the County. Since Clark did not pass her probation, she did not have grievance rights under the contract and the grievance should be dismissed.

The County also asserts that the grievance was not timely. The contract specifies that grievances must be filed within 10 working days after the date of the event or occurrence that is the subject of the grievance or be barred. Clark was terminated on August 20, 2008. The grievance was filed on March 12, 2009, long after the 10 day deadline had passed. In the interim, memories have faded and it is difficult to reconstruct the events and circumstance surrounding the termination, making it difficult for the County to defend its action.

The contract language is clear and it is generally held that where the parties have agreed on a procedure regarding the filing of grievances and arbitrator will deny the grievance where the agreed procedure is not followed. The Union had notice of the termination and information regarding Clark's work dates. It reviewed the information and determined that Clark had not passed probation. The Union now asserts that it did not correctly calculate the dates until after Clark's EEOC complaint was filed, which is not good cause for missing the deadline. The Union appears to be making an argument based on a theory of "mistake," but the contract is clear. The grievance was not filed within 10 days of the occurrence and should, therefore, be barred.

The Union

The Union asserts that Clark had passed probation at the time she was discharged because she had worked at least 30 days since the extension of her probation. All the exhibits establish that Clark had worked for 30 days between June 20, 2008, the date of her extension, and August 20, 2008, the date of her termination. County Exhibit #1 shows the days Clark worked. The marked days between June 20 and August 20m equal 31 days. The County payroll records show 30 days worked. The master schedule (U. Ex. #1) shows 31 days worked.

The County may assert that June 20 and August 20 do not count as days worked. June 20 should count because the extension agreement states the extension id for "30 working days from June 20," thus including June 20 in the count. August 20 should count because the record shows that Clark was permitted to complete her shift on August 20 before she was terminated. The union notes the County's admirable motive in allowing her one extra day of pay, but this does not negate the fact that August 20 counts as a day worked for purposes of completing her probation. All the evidence supports the Union's position, therefore, that Clark had completed her probation at the time she was terminated.

The Union also asserts that the grievance was filed within 10 days of the date the Union knew Clark had completed probation and therefore the grievance was timely. It is generally held by arbitrators that where there is legitimate doubt as to whether a grievance is or is not timely, the benefit of the doubt should be resolved in favor of arbitrability. (citations omitted) Arbitrators have also generally held that the time for filing grievances begins when the Union knew or should have known that a grievance existed. (citations omitted)

The Contract requires that a grievance must be filed within 10 days of the event giving rise to the grievance. The Union determined that Clark had passed her probation in late February 2009. The grievance was filed on March 10, 2009 and referred to the County Personnel Department on March 11. The master schedule reveals that this time period would have been within 10 working days based on an examination of Clark's regular schedule, which usually called for her to work 2 or 3 days and then be off for 2 or 3 days. The contract specifies that the time period is based on 10 working days, which cannot mean 10 calendar days. It also should not mean Monday through Friday because Brookside is a 24/7 facility, which would mean a calendar day rule would apply.

The Union received the master schedule and payroll records in late February 2009 and then concluded that Clark had worked 30 days since her extension. Kathy Million and Janis Buchholz both testified that they reviewed the master schedule provided by the County on August 20 and agreed that Clark had only worked 29 days. They also reviewed the master schedule supplied in February 2009 and determined that she had worked 30 days, which suggests that the master schedule was altered after August 20. While the Union does not impute improper motive to the County in this regard, it does assert that the master schedule changed between August and February. The County may assert that Million and Buchholz were mistaken in their first review, but they are both long time employees and Union officials who are familiar with the workings of the master schedule. The probability, therefore, is that the schedule was incomplete in August and was completed at some later time and the Union was not informed of the change. Once the Union became aware of the change, it filed the grievance in a timely manner.

Under the circumstances, it was reasonable for the Union to file the grievance 7 months after the termination. The key time frame is not when Clark was terminated, but when the Union learned that she had passed probation. At the time of termination, the Union was assured by the County that Clark had not passed probation and a cursory examination of the schedule confirmed this. To not file a grievance at the time was, therefore, reasonable. The Union should be able to rely on the good faith assurances of the employer and act accordingly, rather than file a meritless grievance. Once a mistake is discovered, however, the Union should be able to file a grievance from the point at which the error was discovered. To hold otherwise would lead to many frivolous grievances and would sour union/management relations.

The Union does not dispute that the grievance was filed, in part, in response to Clark's filing of her EEOC complaint. But for that event, the Union would not have had occasion to review the County's records and determine that Clark had passed probation and would not have filed the grievance. Once the Union discovered that Clark had passed probation, it filed the grievance within 10 days.

The grievance should also be found to be timely on equitable principles. The doctrine of estoppel applies where one party, through promises or actions, induces another to act in response to their detriment. (citations omitted) The principle of "unclean hands" also prevents

a party with unclean hands from seeking relief in equity. In this case, if the filing of the grievance was not timely it was because the County's representations that Clark had not passed probation induced the Union to delay in filing a grievance. The Union relied on assurances from the Director of Nursing and the Assistant Personnel Director that Clark had not passed probation. The Union's reliance on the County's false representations estops the County from now claiming the grievance was untimely. The County's assurances also mean that it does not have clean hands because it cannot be allowed to make false assurances and then claim the Union was untimely because it relied on those assurances. On equitable principles, therefore the grievance should be found to be timely.

DISCUSSION

In this case, the County raises two separate procedural objections to the arbitrability of this grievance. In the first instance, it maintains that the Grievant, Arleen Clark, was still a probationary employee at the time of her termination. As such, it is asserted that under the contract she is not entitled to grieve her discharge. Additionally, the County maintains that the grievance was untimely according to the requirements of the grievance procedure. Under either, or both, of these premises, the County asserts that the grievance should be dismissed. I will address the issues in the sequence in which they were presented by the parties

Probationary status

Clark was hired as a part-time employee on February 26, 2008. She was terminated at the end of her shift on August 20, 2008. Under Article VI, Section 6.1 of the contract, she was subject to a probationary period of either 60 scheduled days worked, or 5 calendar months, whichever is earlier. Thus, initially her probationary period would have been scheduled to end no later than July 26, 2008. The County attendance log reveals, in fact, that Clark completed her 60 working days on June 28th, and would ordinarily have completed her probation on that day. On June 19, 2008, however, Clark entered into an agreement with the County and the Union to extend her probation for a period of 30 working days "from 6/20/08." According to the testimony of Assistant Personnel Director Diane Yule, an employee on the 3rd, or C, shift clocks in at 11:00 p.m. and clocks out at 7:00 a.m. on the following morning and the employee is then recorded as having worked on the day corresponding to the majority of the shift. Thus, a 3rd shift employee coming to work at 11:00 on June 19 would be recorded as having worked June 20th, rather than the 19th. According to the County's attendance log, subsequent to the signing of the agreement on June 19th, Clark clocked in and worked on June 20, 23, 26, 28, 29, 30, July 4, 5, 7, 8, 10, 12, 13, 14, 17, 18, 21, 23, 26, 27, 30, 31, August 4, 5, 7, 9, 10, 14, 15, 19 and 20 – a total of 31 days. This is also consistent with the master calendar for the C shift at Brookside Care Center, where Clark worked. Ordinarily, this would mean that she had completed her probation at the time she was discharged. The County asserts, however, that the first day of the extension, June 20, and the last day, August 20, should not be counted, meaning she would have only worked 29 days after the extension and had not completed her probation at the time of her discharge.

The County asserts that June 20 should not count because the extension agreement was not signed until that day, despite the fact that it was dated June 19th, thus Clark had already worked the 20th when the agreement was signed. The County also notes that the agreement states that the extension is 30 working days “from 6/20/08,” which it asserts means that the extension did not include June 20th. The County asserts further that, although Clark had completed her shift on August 20th before she was terminated, she was still on the worksite and it is unknown whether she had actually clocked out. Citing authorities to the effect that the employee completes probation once he or she has clocked out on the last day, the County asserts that the uncertainty here should be balanced in the County’s favor.

The testimony regarding when the agreement was signed is ambiguous. Clark initially stated it was signed on June 19th, but then stated she was unsure of the date and that it might have been signed on June 20th. Diane Yule stated that the document was signed on the 20th, but was not present at the event and did not sign the document herself. Her evidence was based on a conversation she had with Brookside Interim Director Geraldine Kapplehoff, who did not testify, and thus was hearsay. The document itself was dated June 19th. In my view, the key is the date on the document itself. This indicates that, whatever the actual date of signing, the County intended it to take effect on June 20, which would have been Clark’s first work day after the agreement was intended to have been made. To me, it would have been unlikely and illogical for the County to have dated the document June 19th, had Clark work the 20th, and then have made the agreement effective thereafter. In this context, therefore, the phrase “from 6/20/08” suggests that the 20th was to have been included in the extension period.

I am also of the view that August 20th should be included in the extension period. The record is clear that Clark clocked in at 11:00 p.m. on August 19th and worked her entire shift. At the end of her shift she was summoned to Kapplehoff’s office, whereupon she was informed of her termination. There is no evidence in this record of whether Clark clocked out before her meeting with Kapplehoff. The County, presumably, maintains time cards indicating when employees clock in and clock out, but these were not offered into evidence, leaving the fact of the matter in dispute. What is not in dispute, however, is that Clark had completed her work on August 20th at the time she was summoned to Kapplehoff’s office. To allow the determination of whether she had completed the work day to hinge on whether she had first stopped to clock out would unreasonably elevate form over substance. She had completed her shift at the time she met with Kapplehoff and she should be given credit for that day. The County maintains that Clark was allowed to complete her shift in order to provide her with one more day of pay, which was a noble motive, but it does not change the fact that the 20th then counts as a day worked for purposes of Clark’s probation period. I find, therefore, that Clark had worked 31 days between the effective date of her extension and her termination and had completed her probation.

Timeliness

The issue of timeliness revolves around a determination of the appropriate date for calculating the commencement of the time period within which the grievance needed to be filed in order to comply with the contract. Clark was terminated on August 20, 2008. The grievance was filed on March 11, 2009. Article III, Section 3.4 of the contract states: "Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred." Further, Section 3.3 states: "Additional days to settle or move a grievance may be extended by mutual agreement. There was no agreement here to extend the timelines. The County asserts that under the contract language, in order to be timely the grievance needed to be filed within 10 working days of Clark's termination on August 20. The Union counters by arguing that the appropriate date for commencing the time for filing the grievance was when it discovered that Clark had completed her probation, which was in late February 2009.

I note at the outset that where the parties have agreed to specific language regarding the time for filing and processing grievances arbitrators will usually enforce it according to its terms. Absent mitigating circumstances, therefore, if a grievance is not filed within the time specified by the contract, it will ordinarily be dismissed. Dismissal of a grievance, however, is a harsh result because it prevents the grievant from having her grievance considered on the merits, and this is especially so where the grievance arises out of a discharge from employment. Therefore, where there is doubt as to whether the grievance was timely, arbitrators will typically resolve any such doubt in favor of arbitrability. The first questions, then, are 1) what was the event or occurrence that triggered the time for filing the grievance and 2) whether the Union filed the grievance within 10 working days of that event. Assuming that the answers reveal that the grievance was not timely, however, a subsidiary question is whether there are mitigating circumstances justifying the delay.

Usually grievance provisions are couched in terms of actual or constructive notice. Thus, the time for filing the grievance is tolled at the point which the employee or Union knew or should have known of the circumstances giving rise to the grievance. Here, however, the triggering event is the event, itself, irrespective of knowledge or notice. The County asserts that the triggering event was Clark's termination. The Union asserts that it was the discovery that she had passed her probation.

Ordinarily, the County's position would have merit. Clark was terminated on August 20, 2008 and her grievance challenges the merits of the termination. The triggering event, therefore, would reasonably be the termination and the grievance would have needed to have been filed within 10 working days thereafter. The matter is complicated, however, by the dispute over Clark's probationary status. At the time of termination, the County asserted that Clark had not passed probation and did not have grievance rights and it provided documentary evidence to the Union supporting its position. Upon review of the documents, the Union officers advising Clark agreed with the County's position and did not file a grievance. Months

later, after Clark filed her EEOC complaint, the Union requested and received additional documents from the County leading it to the conclusion that Clark had, in fact, passed probation. The Union asserts that after the termination the master calendar was amended, which accounts for the fact that different conclusions were reached in August and February. The County, which maintains the master calendar, did not offer evidence as to whether it may have been changed after August 20, leaving the matter in doubt.

Two potential scenarios suggest themselves as most likely to have been what occurred. One is that Union Officers Kathy Million and Janis Buchholz were mistaken in their interpretation of the master calendar on August 20. The other is that the calendar was updated at some time after August 20 and that the update added work days to Clark's schedule. If there was a mistake by Million and Buchholz in their original assessment, such mistake would be fatal to the Union's position because negligence in determining Clark's employment status would not justify an extension of the time period for filing the grievance. If the documents were altered, however, and Million and Buchholz reasonably relied on the original incomplete calendar, such alteration would mitigate the delay. The record does not provide clear direction either way. In their testimony, however, both Million and Buchholz were adamant that they counted the calendar days several times on August 20 and could not come up with more than 29 days worked. Both also were involved in the review of the documents received in February and were equally adamant that the second review established that Clark had worked at least 30 days. Million further testified that the master schedule provided by the County in February 2009 was different and had additional notations than the one she reviewed in August 2008. Kapplehoff, who was the management representative who gave the calendar to Million and Buchholz on August 20 and asserted that it established that Clark did not complete her probation, did not testify. It is not possible on this record to explain why the review in August and the review in February resulted in different conclusions. What can be stated, however, is that if the Union was convinced in August that Clark had not completed probation, it was reasonable for the Union to not grieve the discharge at that time. Indeed, under the contract the Union only obtained the ability to grieve the discharge once Clark had passed probation. Since the evidence does not give clear direction as to the explanation of the discrepancy, I conclude that the ambiguity should be resolved in favor of arbitrability, inasmuch as to do otherwise would deprive the Grievant of the opportunity to have her grievance determined on the merits. I find therefore, that the proper "event" for commencing the grievance time lines was the Union's discovery in late February 2009 that Clark had passed probation and was entitled to grieve her discharge.

The record reveals that the Union received notice of Clark's EEOC complaint in late January 2009 and received a copy of the complaint itself in February. At that time, Union Representative Nick Kasmer requested copies of the County's master schedule and payroll records, which were provided in late February. At that time, Kasmer and the Union officers reviewed the records, concluded that Clark had passed her probation and filed the grievance on March 11. I agree with the Union's proposition that, inasmuch as Brookside is a 24/7 facility, the terms "work days" and "calendar days" as used in the grievance provision must have a different meaning or else there would be no point to using different terms. I find, therefore,

that the term “work days” must refer to the work days of grievant. Since Clark was terminated on August 20, she did not work after that point. I find, therefore, that for purposes of her discharge grievance the 10 work day time period may be determined based on her average work schedule over time. The record reveals that Clark worked 87 days over a 26 week span, averaging approximately 3-1/3 days worked per week. This leaves approximately a 3 week window within which the Union would have needed to file the grievance after it discovered she had passed probation. Counting back from March 11, this would have started the time for filing on February 18, 2009. The record does not give an exact date as to when the Union received the payroll and calendar documents beyond “late February.” It is reasonable to conclude, therefore, and the County does not contest, that the documents were received after February 18. I find, therefore, that the grievance was filed within the 10 work day window and was timely.

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

AWARD

1) Arleen Clark was not a probationary employee under the Collective Bargaining Agreement at the time of her termination.

(2) The grievance was timely under the Collective Bargaining Agreement between the parties.

The grievance is arbitrable and may be scheduled for a hearing on the merits.

Dated at Fond du Lac, Wisconsin, this 12th day of August, 2010.

John R. Emery /s/

John R. Emery, Arbitrator