STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LINCOLN COUNTY (DEPARTMENT OF SOCIAL SERVICES and THE LABOR ASSOCIATION OF WISCONSIN, INC., FOR AND ON BEHALF OF ITS LOCAL NO. 601, THE LINCOLN COUNTY SOCIAL SERVICES WORKERS' ASSOCIATION	Case 88 No. 41499 INT/ARB - 5114 Decision No. 25977-A

APPEARANCES:

Dennis A. Pedersen, Representative, Labor Association of Wisconsin, Inc., on behalf of the Labor Association of Wisconsin, Inc.

Charles A. Rude, Personnel Coordinator, Lincoln County, on behalf of Lincoln County

On December 27, 1988, Labor Association of Wisconsin, Inc. (hereinafter "the Association") filed a stipulation with the Wisconsin Employment Relations Commission (WERC) alleging that an impasse existed between the Association and Lincoln County Social Services Department (hereinafter "the County") in their collective bargaining concerning a successor agreement to the parties collective bargaining agreement which expired on December 31, 1988 (hereinafter "the prior Agreement") and further requesting the WERC to initiate arbitration pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act (MERA).

On April 19, 1989, following investigation and report by a member of the WERC staff, the WERC found that an impasse existed within the meaning of Section 111.70(4)(cm)6 of MERA and ordered that arbitration be initiated. On May 9, 1989, after the parties notified the WERC that they had selected the undersigned, Richard B. Bilder of Madison, Wisconsin, the WERC appointed him to serve as arbitrator to resolve the impasse pursuant to Section 111.70(4)(cm)6 and 7 of the MERA. No citizen's petition pursuant to Section 111.70(4)(cm)6b was filed with the WERC.

On July 7, 1989, the undersigned met with the parties at the Social Services Department conference room at the Menard Center

in Merrill, Wisconsin to arbitrate the dispute. At the arbitration hearing, which was without transcript, the parties were given a full opportunity to present evidence and oral arguments. Post hearing briefs were submitted by both parties and were received by the Arbitrator on September 19, 1989.

This arbitration award is based upon a review of the evidence, exhibits and arguments, utilizing the statutory criteria set forth in Section 111.74(4)(cm)(7).

ISSUES

The parties are in agreement that the successor agreement should have a term of one year, commencing January 1, 1989 through December 31, 1989, and have reached agreement on almost all other matters. The only issue which has not been resolved voluntarily by the parties, and which has been placed before the Arbitrator, relates to Article X, Section A of the prior Agreement, which defines the regular schedules and working hours for bargaining unit employees, and, in particular, to language in the second paragraph of that Section providing what the parties refer to as "Flex-time."

Section A of Article X (HOURS AND OVERTIME) of the prior Agreement reads as follows:

> A. Hours
>
> The normal hours of work shall be 8:18 A.M. to 4:30 P.M. with a one (1) hour lunch break, Monday through Friday. The Association agrees that normal business shall continue throughout the entire work day and that to permit this, management may stagger lunch breaks. An employee and his supervisor, by mutual consent, may agree to different hours of work than those outlined above which would facilitate the delivery of service.
>
> Commencing January 1, 1988 and running for the term of this Agreement, employees will have an option to work from 8:00 A.M. to 4:30 P.M. with a one-half (1/2) hour unpaid lunch break. The employees will work Monday through Friday followed by a week of either Monday through Thursday or Tuesday through Friday as approved by the Director. The employer shall review the program from time to time and agrees to meet and confer with the Association if any problems develop, provided, however, the employer shall have the option of reverting back to the previous schedule with a thirty (30) day notice to the Association.

Neither party wishes to change the first paragraph of Section A of Article X; their differences relate only to the second paragraph.

The Association in its Final Offer proposes to retain the first two sentences of the second paragraph of Section A of Article X as it appears in the prior Agreement, but to delete the final sentence, to read:

> Employees will have an option to work from 8:00 a.m. to 4:30 p.m. with a one-half (1/2) hour unpaid lunch break. The employees will work Monday through Friday followed by a week of either Monday through Thursday or Tuesday through Friday as approved by the Director.

The County in its Final Offer proposes to retain the first two sentences of the second paragraph of Section A, as it appears in the prior Agreement above, but to revise the final sentence to read:

> The Director shall review the program from time to time, and if there are problems in administration or abuses of the program, he/she shall meet and confer with the Association. After this meeting, should the Director conclude that abuses or problems warrant cancelling the program, he/she shall so notify the Association and the Social Services Committee. Before his/her decision is implemented, the Association shall have the opportunity to discuss it with the Social Services Committee. If the Social Services Committee votes to sustain the Director's decision, the Association may appeal to the Legislative and Personnel Committee at that Committee's next regular meeting. The decision of the Legislative and Personnel Committee, however, shall be final.

HISTORY OF THE FLEX-TIME PROVISION

The bargaining unit comprises some 23 professional and nonprofessional non-supervisory social service employees, engaged primarily in various types of social work-related activities including income maintenance, child support and clerical work.

Up until 1986, the agreements between the parties included only a standard Monday through Friday working schedule. The concept of a flexible working schedule, or "Flex-time" as the parties came to call it, was first proposed by the Association during negotiations for a 1986 Agreement. The County was apparently reluctant to accept the proposal, due to its concern over the effect of a Flex-time schedule on staffing and other considerations. However, the parties agreed to incorporate a provision in the 1986 Agreement under which Flex-time would be tried out for a period of four months covering the April 1 through July 31, 1986 time period. Section A of Article X (Hours and Overtime) in the 1986 Agreement read:

A. **Hours:** The normal hours of work shall be 8:18 A.M. to 4:30 P.M. with a one (1) hour lunch break, Monday through Friday. The Association agrees that normal business shall continue throughout the entire work day and that to permit this, management may stagger lunch breaks. An employee and his supervisor, by mutual consent, may agree to different hours of work than those outlined above which would facilitate the delivery of service.

Commencing April 1st and running for a four (4) month consecutive period from 8:00 A.M. to 4:30 P.M. with a one-half (1/2) hour unpaid lunch break. The employees will work Monday through Friday followed by a week of either Monday through Thursday or Tuesday through Friday as approved by the Director. Prior to July 31, 1986, the employer representative and the employee representative will meet to determine if the work schedule shall continue through 1986. If the work cycle continues through December 31, 1986, it will be part of contract negotiations for a successor agreement.

This trial period was subsequently extended through October 3, 1986 by mutual agreement between the parties, and was then again extended to the end of the year 1986, with the proviso that Flex-time would be a subject of bargaining during the negotiations for a 1987 Agreement.

When negotiations began in late 1986 for a successor Agreement, the Association proposed to definitively establish the Flex-time schedule, eliminating the language relating to a trial period. However, due primarily to economic issues, the parties deadlocked in their negotiations and a petition was filed with the WERC. As a result of WERC mediation, a voluntary settlement was reached under which the County made some concessions on economic issues and the Union agreed to a provision under which the County retained the right either to continue or unilaterally to terminate Flex-time. The second paragraph of Article X, Section A in the 1987 Agreement read:

Commencing January 1, 1987 and running for the term of this Agreement, employees will have an option to work from 8:00 A.M. to 4:30 P.M. with a one-half (1/2) hour unpaid lunch break. The employees will work Monday through Friday followed by a week of either Monday through Thursday or Tuesday through Friday as approved by the Director. The employer shall review the program from time to time and agrees to meet and confer with the Association if any problems develop, provided, however, the employer shall have the option of reverting back to the previous schedule with thirty (30) days notice to the Association.

In negotiations for the 1988 Agreement, the Union again sought to definitively establish Flex-time by amending the second paragraph of Article X to remove the County's right unilaterally to terminate the Flex-time arrangement. But once again the parties reached a settlement in which, apparently in exchange for some concessions by the County on economic issues, the Association agreed to retain the language of the previous Agreement in this respect.

The Association once again raised the question of Flex-time in negotiations for a 1989 Agreement, seeking to put the Flex-time schedule on a permanent basis and to end the County's right unilaterally to terminate that schedule. It is upon this issue that the parties have reached impasse and placed this matter before the Arbitrator.

THE ASSOCIATION'S POSITION

The Association argues that the Arbitrator should accept its proposal to definitively establish or "lock-in" the Flex-time schedule, and to eliminate the County's right unilaterally to terminate it, because:

1. The current Flex-time schedule being worked by bargaining unit personnel has been continuously worked for approximately three years without any real problems. As a matter of fact, the Agency Director testified that it has "worked very well" and "been a good thing"; indeed it has worked so well that most of the supervisors work it also.

2. It is unfair to subject the Association's members to sustained uncertainty concerning the continuation of the Flex-time schedule under which they have now long operated. The interests and welfare of the public are best served by providing employees with stability regarding conditions of employment in such areas as scheduling. The possibility that the employer can unilaterally impose changes in existing schedules is counterproductive to the provision of a stable working environment and harmful to employee morale.

3. The employer has used, and continues to use, the threat of a unilateral change back to the schedule of more than three years ago as a "Sword of Damocles" in order to pressure the Association into voluntary settlement on other issues. Such a bargaining "lever" is counterproductive to a normal and desirable employer-employee collective bargaining relationship and, accordingly, needs correcting. The unrefuted testimony of Association officials is clear: the employer has used such a threat in the past on a number of occasions with the most recent such occasion being an attempt to intimidate and coerce the Association into abandoning

other issues or suffer the retaliatory consequences of a unilateral change in regular schedules. It is time the situation be changed. The best method for change is to implement the Association's final offer, which would not change the existing schedules, but rather would simply remove the unilateral right to make changes thereto. The net result will be that future changes, if any, to regular schedules will require collective bargaining rather than unilateral action. At this point in Wisconsin's collective bargaining history, such a change is the only reasonable alternative available.

4. Upon review of the comparables, comprising agreements both of other nearby counties and of other bargaining units in this County, it is clear that in none of them can the employer unilaterally change the employee's schedule at all. In all of these cases, changes can be accomplished only through the collective bargaining process. Reason dictates that the Association should not be subject to such unilateral changes either.

5. The Association's proposal for an appeal procedure regarding any unilateral termination of Flex-time by the Director does not provide adequate stability or assurance to employees since the appeal will be solely "in-house". With respect to the Association's proposal, on the other hand, if it somehow does not work out, it can always be changed through the regular bargaining process; indeed, there is already language in the first paragraph of Section A, Article X, which permits the parties to agree on another schedule.

THE COUNTY'S POSITION

The County argues that the Arbitrator should accept its proposal for retention of the language of the first two sentences of the second paragraph of Section A of Article X, but with revision and addition to the final sentence so as to provide for an internal appeal procedure regarding any cancellation of the Flex-time program, because:

1. The Association has at no time shown any compelling reason why the relevant present language of the Flex-time provision should be amended or removed. The Association, in its testimony presented at the arbitration hearing and in its exhibits, has made no contention, nor has it cited any instance, of threats or cancellation, or of abuse, of the Flex-time provision on the part of the County.

2. From a management perspective, in order to manage its workload, the County needs the right to determine whether Flex-time remains a viable option and if necessary to terminate it. One reason the County wishes

to retain this right to terminate Flex-time is to preclude any abuse of the Flex-time schedule. The Social Services Department, in order to provide the services to clientele that it is obligated to provide, must have a given number of social workers, income maintenance workers and clerical support workers each day of the Monday through Friday work week. Adoption of the Association's proposal would leave open the possibility that all represented employees might simultaneously decide to be off on a Friday or Monday, basically closing the Department. The County's recourse in this situation would be only disciplinary action, which is a long and arduous process. A second reason is that there is always the possibility of a change in the service delivery program which could require a full staff on the regular Monday through Friday work schedule. Most of the programs administered by the Social Services Department are programs funded by the State or Federal governments. These fund providers can require service providers, in this case the Social Services Department, to provide such services in a manner, and at times, which might not be compatible with a Flex-time schedule. In this event, without the language now in the second paragraph of Section A, Article X, the County could only attempt to bargain a different arrangement.

3. The Association's contention that the 1987 and 1988 Agreements continued Flex-time on a trial basis is incorrect. Only in the 1986 Agreement was the Flex-time issue treated on a trial basis. The 1987 and 1988 Agreements, with language jointly agreed upon by the parties, removed the reference to limited periods and any reference that Flex-time was something other than a regular part of the negotiated Agreement. Moreover, references by Association witnesses to County representatives saying during negotiations prior to those for the 1989 Agreement that certain wage adjustments would be granted only if the Flex-time cancellation provision remained in the Agreement were a normal part of the collective bargaining process.

4. While the Association submitted clauses from collective bargaining agreements in other counties and with other bargaining units in the County to buttress their contention that none of the other agreements have a provision allowing unilateral cancellation of a work schedule, none of the exhibits have a Flex-time provision either. It is only with respect to the provisions relating to Flex-time, unique to this Agreement, that the County has wished to retain, and has bargained in the past for, the right to cancel.

5. In negotiations for the 1989 Agreement, the County's initial position was that the language of the second paragraph of Section A, Article X should retain the same wording as it had in the 1987 and 1988 Agreements. However, in response to the Association's concerns that a subsequent Director of Social Services might arbitrarily cancel the Flex-time arrangement, the County has proposed, as reflected in its final offer, that any decision of the Director cancelling the Flex-time arrangement shall require 30 days notice, and that the Association can appeal the Director's decision first to the County Board's Social Service Committee and then to the County Board's Legislative and Personnel Committee. While this process could still result in the cancellation of Flex-time, it can no longer be a decision made by a single person.

DISCUSSION

The sole issue in dispute between the parties in collective bargaining negotiations for the 1989 Agreement between them is whether the Agreement should retain a provision, contained in the 1987 and 1988 Agreements, permitting the County unilaterally to terminate the bargaining unit's present Flex-time schedule upon notice. The County proposes to continue this provision, but with an additional internal appeal procedure to protect the Association against any arbitrary cancellation by a future Director. The Association wishes to eliminate this provision permitting unilateral cancellation by the County, so as to definitively establish or "lock-in" the Flex-time schedule as a contractual right of the bargaining unit members.

Each party has presented reasonable and sincere arguments for its proposal. The County points particularly to its need to have final control over the Department's schedule in order to prevent any abuse or provide for contingencies concerning the provision of services to the public. It believes that the Association has shown no reason or need to change the provision permitting its unilateral cancellation of the Flex-time arrangement. The Association points particularly to the desire of employees for security and certainty as to their working schedules. From the perception of the employees, the Flex-time schedule has now had a sufficient trial period and has proved its workability and worth.

Reference to the specific criteria listed in Wis. Stat. 111.70(7)(cm) are of only limited help in this instance. Thus, since there is no cost involved in the Flex-time arrangement or in either proposal, the statutory factors of financial ability of the County, overall compensation, and cost-of-living are not relevant. As regards external and internal comparables, the Union presented evidence regarding other agreements both in comparable surrounding counties and with other units in the County to support its position that, where specific work

schedules are established in agreements, employers do not usually have the right unilaterally to change them. However, the County argues that the agreements referred to by the Association do not contain the unique kind of Flex-time schedule here involved, and that these other agreements cannot therefore be regarded as comparable in this respect.

Consequently, the Arbitrator must in this case consider also the broader criteria reflected in Wis. Stat. 111.70(7)(cm)7(j), namely "such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment."

In the Arbitrator's opinion, there are several such broader considerations relevant to this matter.

First, absent some special reasons otherwise, employees are normally entitled to a reasonable measure of predictability and a certainty in their work schedules so that they can make their plans accordingly. The Flex-time arrangement is clearly considered important by the bargaining unit members. It is their perception that the County's right of unilateral termination denies them assurance that this schedule, under which they have now worked three years, will continue. As the Association points out, other agreements, both external and internal, reflect at least this principle that working schedules should be reasonably definite and not subject to unilateral cancellation by the employer. The Arbitrator believes that this consideration tends to support the Association's position.

Second, any understandings between the County and the bargaining unit members concerning a trial-period for Flex-time should be respected. The Arbitrator is persuaded by the Association's testimony that it understood, both in 1986 and since, that the Flex-time schedule was undergoing a trial period, and that, if it worked out, the County would definitively accept it. Consequently, it is understandable that, since Flex-time has now been in effect for some three years and has worked out well, the bargaining unit members feel that it is time the test ended and the County fulfill its part in what they view as an implicit bargain. The County argues, with considerable force, that this was not its understanding, at least as regards inclusion of the right to terminate in the 1987 and 1988 agreements, which they regard as simply a negotiated compromise. However, whatever may be the "truth" in this respect, a continued and understandable perception by the employees that they have been unfairly "strung along" cannot be in the interest of either the parties or the public. Again, in the Arbitrator's opinion, such considerations of employee reliance and morale tend to support the Association's position.

Third, the testimony and other evidence suggests that a definitive acceptance of the Flex-time schedule in the 1989 Agreement is unlikely to pose significant costs or risks for the County. The County concedes that the Flex-time schedule has worked for three years without abuse or any significant difficulties or problems. In his testimony, the Director said that Flex-time has "worked out quite well" and that it "has been a good thing for the staff, a positive thing for the Agency, and we want to see it work." The Director indicated that he had no plan to change or cancel the Flex-time schedule. Once again, in the Arbitrator's opinion, the long period in which Flex-time has worked successfully and to both parties advantage, lends support to the Association's position.

The Director explained that the County wanted to retain unilateral authority to cancel primarily as a sort of insurance or safety-net, in case there was abuse of Flex-time or unforeseen demands were put on the Department which required a different schedule. While these are appropriate and understandable management concerns, the evidence at the hearing suggest that they are quite speculative and contingent. In fact, the testimony indicated that the bargaining unit members have been highly responsible and cooperative in arranging their Flex-time schedules, and that they are sensitive and committed to the Department's important responsibilities. Moreover, Section A, Article X expressly provides that schedules may be changed by agreement of the parties. The Arbitrator believes that, in the event unforeseen circumstances arose, requiring some adjustment in order to meet the Department's responsibilities, the Association and bargaining unit members would continue to act responsibly and cooperatively so as to meet the Department's and public's needs. As the Association has itself pointed out, should this prove not the case and future problems develop, this experience would certainly be relevant in the negotiation of future agreements between the parties.

Thus, while there is much to be said for each party's position, the Association's arguments seem to the Arbitrator the more persuasive and the more likely, on balance, to meet the interests of the parties and the public, as reflected in the statute.

CONCLUSION

The Arbitrator concludes that, for the above reasons, the Association's proposal is the more reasonable.

AWARD

Based upon the statutory criteria contained in Section 111.70(4)(cm)7, the evidence and arguments of the parties, and for the reasons discussed above, the Arbitrator selects the final offer of the Association, and directs that it, along with all already agreed upon items, and those terms of the predecessor

Collective Bargaining Agreement which remain unchanged, be incorporated into the parties 1989 collective bargaining Agreement.

Richard B. Bilder

Madison, Wisconsin
October 23, 1989

Richard B. Bilder
Arbitrator