

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
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 WISCONSIN PROFESSIONAL POLICE : Case 34
 ASSOCIATION/LAW ENFORCEMENT EMPLOYEE : No. 46944
 RELATIONS DIVISION and its affiliated : MA-7109
 KEWAUNEE COUNTY PROFESSIONAL :
 POLICE ASSOCIATION :
 :
 and :
 :
 KEWAUNEE COUNTY :
 :

Appearances:

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, by Edward F. VanderBloomen, Jr., Business Agent, 4617 Bellevue Place, Two Rivers, Wisconsin 54241, appearing on behalf of the Association.
Ms. Elma E. Anderson, Kewaunee County Corporation Counsel, 613 Dodge Street, Kewaunee, Wisconsin 54216, appearing on behalf of the County.

ARBITRATION AWARD

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division and its affiliated Kewaunee County Professional Police Association, and Kewaunee County, hereafter the Employer or County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the County, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On February 19, 1992, the Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on April 22, 1992, in Kewaunee, Wisconsin. The hearing was not transcribed and, following the receipt of posthearing argument, the record was closed on May 4, 1992.

ISSUE:

The parties were unable to stipulate to a statement of the issue.

The Employer proposes the following statement of the issue:

Does Article 3, Section K, of the collective bargaining agreement control the Employer selection of employe to be called in to provide extra help when no employe is absent from regularly scheduled work?

Did the Employer violate the contract by using a permanent part-time employe to provide extra help on November 21, 1991?

The Association frames the issue as follows:

Did the Employer violate the Agreement when it authorized a permanent part-time Radio Operator/Jailer (Mark Jandrin) to work four (4) hours of overtime on November 21, 1991?

If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issue:

Did the Employer violate the Agreement when it authorized a permanent part-time Radio Operator/Jailer, Mark Jandrin, to work four hours on November 21, 1991?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 3: HOURS OF WORK

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C. Shift Schedule

Shift schedule shall be as follows:

RADIO OPERATORS-JAILERS

7:00 a.m. - 3:00 p.m.
10:00 a.m. - 6:00 p.m.
3:00 p.m. - 11:00 p.m.
7:00 p.m. - 3:00 a.m.
11:00 p.m. - 7:00 a.m.

TRAFFIC OFFICERS, ETC,

8:00 a.m. - 4:00 p.m.
10:00 a.m. - 6:00 p.m.
4:00 p.m. - 12:00 midnight
7:00 p.m. - 3:00 a.m.
12:00 midnight - 8:00 a.m.

. . .

K. Shift Selection

All shifts and slots shall be open for bidding among full-time employees in December of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority.

When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined under the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time. No employee shall be forced to move out of his or her current slot or shift.

Regularly occurring or scheduled open shifts shall be filled by permanent part-time employees. So far as practical, the permanent part-time employees shall be scheduled so as to distribute the work equally among them. Regularly occurring or scheduled open shifts shall include open shifts resulting from the ninth slot in the rotation in the radio operator/jailor classification and from any anticipated absences known to the County at the time the monthly work schedule is prepared. All other open shifts, resulting from sick leave, emergency leave, or funeral leave, or similar conditions, shall be considered unscheduled.

When the department head has notice, at least 24 hours in advance of an unscheduled open shift, all full-time employees scheduled to work on that calendar day in that classification, shall be given the opportunity to move into that open shift according to seniority. When there is less than 24 hours advance notice, or when all full-time employees scheduled to work on that calendar day in that classification have refused the shift, full time employees, in that classification, who are on scheduled days off, will then be offered the chance to fill the open shift. Then, full time employees in any other classification shall be offered the work. Thereafter, the shift will be offered to regular part-time personnel. Under this section, an offer of work shall require only a single telephone contact at the employee's residence. An employee who cannot be contacted personally in this manner shall be deemed to have rejected the offer.

ARTICLE 16: GRIEVANCE PROCEDURE AND ARBITRATION

It is hereby agreed that the Association shall be permitted to form a three (3) man grievance committee whose purpose shall be to meet with the Department Head at least once each month during working hours upon dates to be mutually agreed upon between the Department Head and this committee for discussing any problem affecting normal working conditions in the operation of the Sheriff and Traffic Department and for the presentation of pending grievances.

Any grievance concerning an alleged violation of the terms of this contract shall be raised within twenty (20) days of its occurrence or of its becoming

known to the aggrieved employee or shall be considered waived. Such grievances shall be handled in the following manner:

Step One: By the Department Head and a three (3) member grievance committee with the employee present. If the grievance is denied by the Department Head, that fact shall be stated in writing with a copy going to the aggrieved employee, the Association Representative, and the Head of the County Personnel Committee no later than 10 days from the date on which the meeting took place. An adjustment of the grievance agreed to between the Department Head, the Grievant and the Grievance Committee shall be reduced to writing if deemed appropriate, by all parties, however, it shall not be required. If the Department Head takes action appropriate to adjust the grievance as agreed during the meeting, no right to appeal to the next step of the grievance procedure shall accrue.

Step Two: If the grievance is not settled in the above manner, the grievance shall be reduced to writing and signed by the aggrieved employee and/or Association and copies sent to the Department Head and the Chairman of the Personnel Committee of the County Board of Supervisors no later than five (5) days from the date on which the written denial is received. Within thirty (30) days of the date of receipt of the written grievance the Department Head and the Chairman of the Personnel Committee shall schedule a joint meeting of Department Head, aggrieved employee, the Association grievance committee, and the Personnel Committee of the County Board of Supervisors, to attempt to adjust the grievance. A denial of the grievance shall be reduced to writing with a copy delivered to the aggrieved employee and the Head of the Association's Grievance Committee no later than ten (10) days after the date on which the meeting is conducted. If during the course of the meeting, it is agreed that the employer shall take certain action to adjust the grievance, such agreement shall be reduced to writing if agreed to by all parties, but a written agreement shall not be required, and the taking of the agreed action shall constitute a full settlement of the grievance and no right to appeal to the Step 3 procedure shall accrue.

Step Three: Any and all grievances which can not be adjusted between the parties as outlined above may be submitted to an arbitrator. The sole arbitrator shall be appointed by the Wisconsin Employment Relations Commission upon request by either or both of the parties. The decision of the arbitrator shall be final and binding on both parties to this agreement and shall be handed down in writing.

The arbitrator shall have no power to add to or subtract from or modify any terms of the contract or any supplementary agreements made thereto, or establish or change any wage.

* * *

BACKGROUND

When the Department posted the work schedule for November, 1991, Thomas Flaherty, a full-time employe, was scheduled to work as Radio Operator on the 7:00 a.m. to 3:00 p.m. shift of November 21, 1991. Approximately two days before November 21, 1991, Mark Jandrin, a regular part-time employe, was asked to work on November 21, 1991. 1/ On November 21, 1991, Jandrin worked as Radio Operator from 8:00 a.m. to 12:00 p.m. to provide Flaherty time to perform one of his other duties, i.e., meeting with the TIME auditor. Jandrin was paid four hours of straight time for his work on November 21, 1991.

On December 19, 1991, the Association filed a grievance alleging that the Employer had violated Article 3, Section K, when it offered the four hours to Mark Jandrin and did not offer the work as overtime to full-time personnel. The grievance was denied at all steps of the grievance procedure and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Association

Article 3, Hours of Work, clearly identifies when the Employer can utilize permanent part-time personnel and when it cannot. These rights were further clarified in the grievance settlement of August 5, 1991. The Employer, motivated by a desire to avoid overtime costs, has chosen to utilize the permanent part-time employes for filling "unscheduled open shifts" in violation of the parties' agreements. The full-time employes' desire to work any "unscheduled open shifts" is consistent with the terms of the parties' collective bargaining agreement.

The Employer did not claim, and the record does not establish, that an emergency situation existed. Rather, the record demonstrates that the Employer had more than ample notice of the audit on November 21, 1991. The Employer was able to offer the disputed work to regular full-time employes as required by the collective bargaining agreement and the prior settlement agreement.

In June of 1991, Evan Hansen sought and received nine hours of overtime when the Sheriff recognized that he had made an error in calling in a part-time employe. The fact that Chief Deputy LaCrosse may not agree with the Sheriff's position on when part-time employes may be called in to fill "unscheduled open shifts" places Association members in a precarious position.

Contrary to the position of the Employer, the Memorandum of Settlement is entitled to be given effect as an agreement between the parties. The Association's position is supported by the testimony of Chief Deputy LaCrosse who, when speaking of the Memorandum of Settlement, acknowledged that "Any schedule changes" with respect to "unscheduled open shifts" means any changes to the schedule.

The grievance should be sustained. In remedy of the contract violation, the Association requests that the Employer be directed to cease and desist from utilizing part-time personnel to fill "unscheduled open shifts". The Association further asks that the Employer be directed to provide full-time employes with makeup overtime for all situations in which it has improperly used part-time personnel.

1/ At the time of hearing, Jandrin was a full-time employe.

Employer

Contrary to the argument of the Association, Article 3, Section K, does not apply to the situation presented by the facts of this grievance. The clear and unambiguous language of the agreement, as well as the bargaining history of the parties, demonstrates that the procedures of this section apply only to circumstances where there is an absence from the shift. Officer Flaherty worked his assigned shift on November 21st, as did every other officer scheduled to work in the jail/dispatch center on November 21, 1991. Officer Mark Jandrin did not fill an open shift, or vacancy. Rather, Jandrin met the need for extra help due to increased work.

The proposition that any work, or every opportunity for work, must go to full-time personnel in preference to part-time personnel, was specifically rejected and removed from the Association's proposal during bargaining. Even if the language of the agreement were in some way ambiguous, the intent of the parties can clearly be seen from the changes between the original proposal and the final, ratified agreement.

In the grievance giving rise to the Memorandum of Settlement, two officers who had been scheduled to work were given holiday leave after the monthly work schedule was prepared. This created two unscheduled open shifts. The holiday leave was "a similar condition," which like sick leave, emergency leave or funeral leave, resulted in an officer being absent from his normal or scheduled work day. This being so, the provisions of Article 3, Section K, governing the filling of unscheduled open shifts should have been, but were not, followed. The facts are different from the present case and, thus, the Memorandum of Settlement does not establish a controlling precedent.

The Memorandum speaks to "schedule changes." Construing the Memorandum within the factual context of the grievance, it is clear that the parties intended to deal with the situation in which an officer who was scheduled to work, requests and receives a day of leave after the monthly schedule is prepared. This produces a "schedule change." Neither the language of the Memorandum, nor the factual context that generated the Memorandum, suggests that the parties intended to fundamentally change the collective bargaining agreement. Indeed, to accept the Association's position would be to provide the Association with a benefit which they sought, but could not obtain, in contract negotiation.

The June, 1991 matter involving Officer Hansen is not controlling. One informal dispute resolution cannot establish a binding past practice. Especially where, as here, the alleged practice is contrary to the clear and unambiguous language of the agreement and to the bargaining history of the parties to the agreement.

Neither the settlement of the grievance, nor the language of the Memorandum of Settlement, supports the conclusion that the parties' fundamentally modified Article 3, Section K. Moreover, the absence of any formal ratification procedure for the Memorandum precludes a finding that it involved any fundamental alteration to the language of the formally ratified agreement. There has been no violation of the collective bargaining agreement and the grievance must be denied.

DISCUSSION

The Association, contrary to the Employer, argues that the Employer violated the parties' collective bargaining agreement when the Employer did not offer the work performed by Jandrin on November 21, 1991 to full-time employees on an overtime basis. Specifically, the Association argues that the Employer has violated Article 3, Section K, of the Agreement and the Memorandum of Settlement.

Article 3, Section K, is entitled Shift Selection and, as reflected in its title, sets forth a procedure for filling shifts, as well as slots. 2/ Paragraph One of Section K states that "All shifts and slots shall be open for bidding among full-time employees in December of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority."

Given the fact that bidding for shifts is done on an annual basis, it is reasonable to conclude that the "shifts" which are the subject of Article 3, Section K, are shifts which can be predetermined one year in advance. It follows, therefore, that the shifts which are the subject of Article 3, Section K, are the shifts contained in the Department's regular work schedule.

Article 3, Section C, Shift Schedule, provides that shift schedules shall be as follows:

RADIO OPERATORS-JAILERS

7:00 a.m. - 3:00 p.m.
10:00 a.m. - 6:00 p.m.
3:00 p.m. - 11:00 p.m.
7:00 p.m. - 3:00 a.m.
11:00 p.m. - 7:00 a.m.

TRAFFIC OFFICERS, ETC,

8:00 a.m. - 4:00 p.m.
10:00 a.m. - 6:00 p.m.
4:00 p.m. - 12:00 midnight
7:00 p.m. - 3:00 a.m.
12:00 midnight - 8:00 a.m.

Paragraph Three of Section K provides the Employer with the express right to use permanent part-time employees to fill "regularly occurring or scheduled open shifts". Paragraph Three further provides that "Regularly occurring or scheduled open shifts" shall include open shifts resulting from "the ninth slot in the rotation in the radio operator/jailor classification" and "from any anticipated absences known to the County at the time the monthly work schedule is prepared".

When the Employer posted the work schedule for the month of November, 1991, the Employer was not aware that it needed additional coverage on November 21, 1991. Thus, the work performed by Jandrin on November 21, 1991 did not involve an open shift "from any anticipated absences known to the County at the time the monthly work schedule is prepared". Nor did it involve the ninth slot in the rotation in the Radio Operator/Jailer classification. The undersigned turns to the issue of whether there is any other basis to conclude that Jandrin worked a "regularly occurring or scheduled open shift".

Construing Paragraph One and Paragraph Three of Section K as a whole, the undersigned is persuaded that a "scheduled open shift" is a shift which appears on the monthly work schedule, but which is not filled by the normal assignment of full-time employees. The hours worked by Jandrin on November 21, 1991 are not part of the monthly work schedule and, in fact, did not appear on the November, 1991 work schedule. As the Employer argues, all of the shifts which comprised the regular work schedule for November 21, 1991 had been assigned pursuant to Article 3, Section K, and had been worked by the employee assigned to the shift. The undersigned is satisfied that the hours worked by Jandrin on November 21, 1991 did not constitute a "scheduled open shift" within the

2/ Neither party argues that the instant dispute involves the filling of a slot.

meaning of Article 3, Section K.

The Employer had less than two weeks notice of the need to provide extra-coverage on November 21, 1991. While it is evident that Flaherty's meeting with the TIME auditor was a part of Flaherty's normal work duties, it is not evident that such meetings were "regularly occurring".

In summary, Paragraph Three of Section K provides the Employer with the right to assign "regularly occurring or scheduled open shifts" to part-time employees. For the reasons discussed above, the undersigned does not consider the work in dispute to involve "regularly occurring or scheduled open shifts" within the meaning of Paragraph Three.

The last sentence of Paragraph Three provides that "All other open shifts, resulting from sick leave, emergency leave, or funeral leave, or similar conditions, shall be considered unscheduled." Given the examples of "sick leave, emergency leave, or funeral leave", it follows that "similar conditions" are those in which the shift is open because an employee is absent from work.

The procedure for filling an "unscheduled open shift" is set forth in Paragraph Four of Article 3, Section K. 3/ Given the last sentence of Paragraph Three, the undersigned is persuaded that "unscheduled" modifies the word "open", rather than the word "shift". That is, it is not the shift which is unscheduled, but rather, it is the opening which is unscheduled. The undersigned is satisfied that an "unscheduled open shift" is a shift which is contained in the Department's work schedule and which becomes open after the posting of the work schedule because the employee assigned to the shift is absent from work.

As the Employer argues, all of the employees who were scheduled to work on November 21, 1991 did in fact work on November 21, 1991. Jandrin did not work a scheduled shift which became open after the posting of the work schedule because the employee assigned to the shift was absent from work. Accordingly, Jandrin did not work an "unscheduled open shift" within the meaning of Article 3, Section K.

Article 3, Section K, was negotiated during the most recent contract negotiations. The evidence of negotiation history does not demonstrate that the parties intended Article 3, Section K, to be given any construction other than that which is reflected in the plain language of the Article. Giving effect to the plain language of Article 3, the undersigned has concluded that Jandrin's work on November 21, 1991 is neither a "regularly occurring or scheduled open shift" or "an unscheduled open shift". It follows, therefore, that Paragraph Three of Article 3, Section K, does not provide the Employer with the express right to assign the disputed work to part-time employees and Paragraph Four does not express a limitation upon the right of the Employer to assign the disputed work to part-time employees.

3/ Paragraph Four of Article 3, Section K, provides, *inter alia*, that, when the Department Head has at least 24 hours advance notice of an unscheduled open shift, then full-time employees scheduled to work on that calendar day in that classification are to be given the first opportunity to work the "unscheduled open shift". If such full-time employees refuse the shift, or there is less than 24 hours advance notice, then the shift is required to be offered in descending order to (1) full-time employees in the classification who are on scheduled days off (2) full-time employees in other classifications and (3) regular part-time personnel.

In June of 1991, the Employer called in Jandrin, who was then a part-time employe, to perform undercover work. Thereafter, Evan Hansen, a full-time employe, advised the Sheriff and Chief Deputy LaCrosse that he had been available to work overtime on that day and would not file a grievance if the Employer would agree to pay him nine hours of overtime. According to Hansen, whose testimony on this point was not rebutted, the Sheriff decided that he had erred in not calling in Hansen. Thereafter, the Sheriff authorized the payment of nine hours of overtime to Hansen.

Hansen did not file a grievance in June, 1991, and the meeting between Hansen, the Sheriff and LaCrosse did not conform to the requirements of the parties' contractual grievance procedure, which provides, inter alia, that the Association's grievance committee shall be present at each step of the grievance procedure. The Association does not argue, and the record does not demonstrate, that the Association's grievance committee was a party to the disposition of the Hansen matter. The undersigned is satisfied that the disposition of the Hansen matter was not a settlement of a grievance and is not entitled to be given effect as a grievance settlement.

While the evidence of the Hansen matter of June, 1991 may support the conclusion that the Sheriff intended to offer future undercover assignments to full-time employes, the present case does not involve undercover work. Given the lack of identity of issue, as well as the lack of evidence that the Association was a party to the disposition of the Hansen matter, the undersigned agrees with the Employer's argument that the Sheriff's disposition of the Hansen matter does not constitute a binding past practice, nor is it otherwise a controlling precedent. The undersigned turns to the issue of whether the Memorandum of Settlement obligated the Employer to offer the disputed work to full-time employes.

In June of 1991, after the parties had executed the relevant collective bargaining agreement, the Employer posted a monthly schedule which indicated that, on June 22, 1991, Deputy Louis Richard was to work the 3 - 11 shift and that, on June 20, 1991, Deputy Evan Hansen was to work the 3 - 11 shift. After the posting of the June, 1991 schedule, Richard received approval to take a holiday on June 22 and Hansen received approval to take a holiday on June 20. On June 14, 1991, the Association filed Grievance No. 91-143 alleging that the Employer violated Article 3, Section K, and any other applicable Articles and Sections of the Agreement, when the Employer assigned a temporary part-time employe to fill in for Deputy Louis Richard and a regular part-time employe to fill in for Deputy Evan Hansen.

Grievance No. 91-143 was settled by the parties at a Step Two Grievance meeting held on August 5, 1991. County Corporation Counsel Elma Anderson drafted a Memorandum of Settlement which was signed by representatives of the Association and the Employer. This Memorandum of Settlement contained the following:

A Step Two Grievance meeting was held on Monday August 5, 1991, to attempt to resolve the above numbered grievance. Present for the County were: Sheriff Cole Kuehl, Chief Deputy Dale LaCrosse, County Board Chair Harold Reckelberg, Supervisors Gary Thayse, George Kruse, Milton Rodrain, and Robert Entringer, and Corporation Counsel Elma E. Anderson. Present for the Association were President Chris Gulbrand, Thomas Vaness, and Edward VanderBloomen, Business Agent, WPPA/LEER.

After discussion, it was agreed that the County had violated the terms of the contract in connection with filling the two unscheduled open shifts on June 20 and 22, 1991.

It was further agreed that, in the future, the County will post a tentative monthly schedule approximately two weeks before the beginning of the month. A final monthly schedule will be posted on the last day of the preceding month. Any schedule changes

made prior to the posting of the final schedule will be regarded as "regularly occurring or scheduled open shifts", and maybe (sic) filled by permanent part-time employees. Any schedule changes made after the posting of the final schedule will be regarded as "unscheduled open shifts" and shall be filled by full time employees, in that classification, who are on scheduled days off,... Then, full time employees in any other classification shall be offered the work. Thereafter, the shift will be offered to regular part-time personnel.

The issue of the use of temporary part-time personnel remains unresolved.

Based upon this, the Association agrees that no further action with respect to Grievance 91-143 will be taken.

Step Two of Article 16, Grievance Procedure and Arbitration, provides the Employer's Step Two representatives with the right to adjust grievances. There is no contractual requirement that such adjustments be formally ratified by the Employer's Board of Supervisors.

The Employer does not argue, and the record does not demonstrate, that the Step Two meeting involving Grievance No. 91-143 did not conform to the requirements of Article 16. The Memorandum of Settlement, which was signed by Step Two representatives of the Employer and the Association, is entitled to be given effect as a grievance settlement.

The Memorandum of Settlement contains an acknowledgment that the Employer had violated the collective bargaining agreement. However, as the Employer argues, the factual situation giving rise to Grievance No. 91-143 can be distinguished from that giving rise to the instant grievance. Specifically, Grievance No. 91-143, unlike the instant grievance, involved a situation in which work became available because the employe who was scheduled to work was absent from work. Given the difference in the underlying factual circumstances, the Employer's admission that it violated the contract in connection with filling the two unscheduled open shifts on June 20 and 22, 1991, cannot be reasonably construed to be an admission that the Employer violated the contract in the present case.

The Memorandum of Settlement, however, contains more than an admission of contract violation. Paragraph Three of the Memorandum of Settlement also sets forth a procedure to be followed in the future. The Association, contrary to the Employer, maintains that Paragraph Three of the Memorandum of Settlement requires the Employer to offer the disputed work to full-time employes. Specifically, the Association argues that Jandrin's work on November 21, 1991 involved a "schedule change made after the posting of the final schedule" and, as such, must be filled as an "unscheduled open shift".

The first and second sentences of Paragraph Three of the Memorandum of Settlement provide for the posting of a tentative monthly schedule and a final monthly schedule. It follows, therefore, that the term "schedule changes", as that term is used in Paragraph Three of the Memorandum of Settlement, means changes in the posted monthly schedule.

As discussed above, the work performed by Jandrin on November 21, 1991 was not work which was posted on the monthly work schedule. If one were to view the Memorandum of Settlement in isolation, one could reasonably conclude that the work performed by Jandrin on November 21, 1991 involved a "schedule change". The Memorandum of Settlement, however, does not stand in isolation. Rather, it is given context by the circumstances which gave rise to the Memorandum of Settlement, as well as by the provisions of the parties' collective bargaining agreement.

The grievance which gave rise to the Memorandum of Settlement involved shifts which became available because of the absence of the employe who was scheduled to work the shift. It is not evident that the parties had any

discussions concerning work which did not involve scheduled shifts. 4/ Construing Paragraph Three of the Memorandum of Settlement within the context of the dispute which gave rise to the Memorandum, leads to the conclusion that the "schedule changes" addressed by the Memorandum of Settlement are changes involving scheduled shifts.

As stated above, Grievance No. 91-143, which gave rise to the Memorandum of Settlement, expressly references Article 3, Section K, of the parties' collective bargaining agreement. While the Memorandum of Settlement does not expressly reference Article 3, Section K, it does reference language contained in Article 3, Section K. Accordingly, the undersigned is satisfied that the Memorandum of Settlement was intended by the parties to clarify the provisions of Article 3, Section K, of the parties' collective bargaining agreement.

As discussed above, the provisions of Article 3, Section K, provide a procedure for filling scheduled shifts, but are silent on the assignment of the work which is in dispute, i.e., that which does not involve a scheduled shift. As the Employer argues, to accept the Association's construction of the Memorandum of Settlement would not clarify Article 3, Section K, but rather, would provide the Association with a right which is not contemplated by the language of Article 3, Section K.

4/ Chris Gulbrand and Harold Reckelberg were present at the Step Two grievance meeting of August 5, 1991 and each signed the Memorandum of Settlement. Neither Gulbrand, nor Reckelberg, related any discussions which occurred between the parties at the time that they reached agreement on the terms of the Memorandum of Settlement.

As the Association argues, the Memorandum of Settlement was drafted by a County representative. Under generally accepted rules of contract construction, ambiguous provisions of a settlement agreement may be construed against the party which drafted the agreement. It is generally recognized, however, that this rule is a rule of last resort, to be used when there is no other persuasive evidence of the parties' intent. 5/ In the present case, the undersigned is satisfied that there is persuasive evidence that the parties' intended the term "any schedule changes" to mean changes involving scheduled shifts.

The undersigned is satisfied that the work performed by Jandrin on November 21, 1991 did not involve "any schedule change" within the meaning of Paragraph Three of the Memorandum of Settlement. Neither the language of the Memorandum of Settlement, nor that of Article 3, Section K, of the collective bargaining agreement requires the Employer to assign the work performed by Jandrin on November 21, 1991 as an "unscheduled open shift".

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the Agreement when it authorized a permanent pa
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 30th day of July, 1992.

By _____
Coleen A. Burns, Arbitrator

5/ Elkouri and Elkouri, How Arbitration Works, 4th Ed. (BNA, 1985),
sh p. 362-363.
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