

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

GRANT COUNTY PROFESSIONAL  
EMPLOYEES UNION, LOCAL 3377-A,  
WCCME, AFSCME, AFL-CIO

and

GRANT COUNTY

Case 51  
No. 51287  
MA-8561

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of Grant County Professional Employees Union, Local 3377-A, WCCME, AFSCME, AFL-CIO.

Mr. Jon E. Anderson, at hearing and on brief, and Peter L. Albrecht, on brief, Godfrey & Kahn, S.C., Attorneys at Law, 131 West Wilson Street, P.O. Box 1110, Madison, WI 53701-1110, appearing on behalf of Grant County.

ARBITRATION AWARD

Grant County Professional Employees Union, Local 3377-A, WCCME, AFSCME, AFL-CIO (Union), and Grant County (County) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (Commission) from its staff. On July 15, 1994, the Union filed a request with the Commission to initiate grievance arbitration in this matter. The County concurred in said request. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. Hearing was held on October 10, 1994, in Lancaster, Wisconsin, at which time both parties were afforded the opportunity to call witnesses, present other evidence and to make arguments as they wished. Said hearing was transcribed. The parties filed briefs and reply briefs, the last of which was received on February 20, 1995. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Kelly Bull (Grievant) was hired by the County on or about June 4, 1990, as the Hazardous Material Planner. Her job description included the following:

## HAZARDOUS MATERIALS PLANNER

### General Statement of Duties:

Under the general direction of the Local Emergency Planning Committee and the Emergency Government Director/Coordinator evaluates, plans and writes hazardous materials response plans. Conducts disaster exercises.

### Distinguishing Features of Class:

Must have knowledge of the principles, laws and practices applicable when developing hazardous materials response plans.

### Examples of Duties Performed (Illustrative Only)

Assist in the development and writing of off-site hazardous material response plans for county agencies, farmers and private industry.

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Must be on-call at all times.

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Other duties as assigned.

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The posting and the advertisement for the position did not mention on-call. This job description was reviewed on at least one occasion but this section was never modified.

At the time of her hire, the Grievant was an unrepresented employe of the County. She became represented by the Union pursuant to the agreement of the parties to accrete several previously unrepresented positions into the bargaining unit. The agreement was effective February 15, 1993.

Thereafter, the parties negotiated over the terms and conditions of employment for all positions in the unit, and specifically for the newly accreted employees. This resulted in an agreement in January 1994 that the terms of the 1993-94 collective bargaining agreement would apply retroactively to the newly accreted positions effective February 15, 1993.

Following final ratification of the agreement, the Grievant received back pay for wages and mileage sometime in February 1994. In a letter to her supervisor, Ruby Jahnke, (Supervisor), dated March 1, 1994, the Grievant requested back pay for her on-call duties.

When she got no response, she filed a grievance over the failure of the County to pay her for her on-call duties. The grievance was not resolved through the parties' grievance procedure and is properly before this arbitrator.

### PERTINENT CONTRACT LANGUAGE

#### ARTICLE 2 - MANAGEMENT RIGHTS

2.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote, demote, transfer or lay-off employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

2.02 The County's exercise of the foregoing functions shall be limited only by the express provisions of this contract, and the County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

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#### ARTICLE 11 - HOURS OF WORK

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11.08 On Call Beeper Duties: All unit employees assigned on call duties shall receive \$140 (effective January 1, 1994, \$150) per week in addition to their regular pay and shall be entitled to compensation pursuant to Section 11.06 for associated call-outs.

Employees assigned to on-call duties for less than one week shall be given a prorated portion. Example: an employee assigned on-call duties for one (1) day shall receive one-seventh (1/7) of the weekly payment. Section 11.07 shall not be applicable for associated call-outs. Additionally, full-time employees assigned such duties on a holiday shall earn eight (8) hours of compensatory time; part-time employees earn compensatory time on a pro-rated basis according to the percentage of full-time they regularly work.

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### SIDE LETTER AGREEMENTS

#### Duration and Applicability of Contract for Newly Accreted Employees.

The 1993-94 labor agreement shall not be considered applicable to the positions of Quality Control Technician, Hazardous Material Planner, Bookkeeper/Programmer (Controller/Programmer), Soil/Water Conservation Technician, Management Information Specialist, Fraud/Frost End Verification Investigator, and Child Support Investigator, which positions were accreted to the unit by agreement of the parties, until February 15, 1993.

#### ISSUE

The parties stipulated to framing the Issue as follows:

Did the County violate the terms of the applicable collective bargaining agreement when it refused to pay the Grievant "on-call" pay?

If so, what is the appropriate remedy?

The County also raised an issue regarding the timeliness of the filing of the Grievance.

#### POSITIONS OF THE PARTIES

##### Union

On brief, the Union argues that the evidence proves beyond reasonable doubt that the Grievant was hired with the understanding that she was to be on-call at all times, that this status

remained at least until some period after the grievance was filed, that it was the County which drafted the job description containing the phrase, that the County cannot claim that it did not know what it was stating when it made this requirement, particularly since the requirement remained in the job description as it was renewed year after year, that the fact that the Grievant was called out on few occasions is completely irrelevant, that the requirement for on-call compensation under the contract is not predicated on the employe actually receiving any calls, and that the contract was clearly violated.

The Union requests the arbitrator to uphold the grievance, to find that the County violated the collective bargaining agreement when it refused to make payments retroactive to February 15, 1993, for on-call duties of the Grievant, and to order the County to make the Grievant whole for losses incurred as a result of this contract violation.

On reply brief, the Union argues that the fact of the matter is that the Grievant was hired with the requirement that she be on-call at all times, that the contract is clear that the Grievant is entitled to compensation pursuant to Section 11.08 of the agreement, and that the County is simply trying to avoid living up to its contractual obligations.

#### County

On brief, the County argues that the "on-call" grievance is untimely and without merit and should be dismissed; that the Grievant's own delay in filing the instant grievance has frustrated the grievance procedure and she should not be allowed to benefit therefrom; that even if the grievance is timely filed, the Grievant was not "assigned" to be "on-call"; that to be eligible for "on-call" pay, the collective bargaining agreement requires that the employee be "assigned" to such duties; that in the instant case, the Grievant provided no evidence whatsoever that she was ever so assigned; and that, accordingly, the grievance should be denied.

On reply brief, the County argues that the Grievant is asking that she receive money for nothing, that during her entire period of employment with the County, the Grievant has never been called in during non-working hours by any representative of the County; that, further, the County has presented substantial, credible evidence that the Grievant never was assigned to on-call duties; and that, yet, the Grievant still insists that she should receive this additional compensation.

#### DISCUSSION

The County argues that the grievance is untimely filed, that the Grievant knew about the accretion into the bargaining unit in February 1993, that she waited until March 1994 to file a grievance, and that, at most, the County would be liable only from the date of the filing of the grievance until such time as the County told the Grievant she was no longer on-call.

The record is clear that the Grievant did not know until she received her back pay check

that the County would not pay her for being on-call. That occurred in late February 1994. She filed the grievance in early March 1994. The grievance is obviously timely and properly before this arbitrator in its entirety.

The Union bases its case on the fact that the job description in place at the time the Grievant was hired and which remained intact until the grievance was filed states, "Must be on-call at all times." To support its case, the Union asserts that the Grievant was told by the two officials hiring her that she would be on-call at all times. The Union would point to two instances when the Grievant was called out to bolster its case.

But in the first instance, she was only called so she would be appraised of a potentially hazardous situation; she was not called in to work. In the second instance, she was not called by the County but by the Platteville Police Department.

The Union argues that the fact that the Grievant was called out on few occasions is completely irrelevant. I disagree. The County argues that the Grievant had not been "assigned" on-call duties, and I believe the fact that the Grievant was never called out by a County official supports that argument.

In terms of what the Grievant was told when she was hired, the Supervisor denies that she told the Grievant that she would be on-call at all times. The other official present was not called to testify.

And while the job description states that the Grievant would be on call at all times, the Grievant has never received any other document stating that she was required to be on-call at all times. And except for the interview which took place in 1990, no other oral communication was made to the Grievant that she was expected to be on-call at all times. So while the job description may say one thing, this case hinges on the Grievant's actual duties; that is, was she assigned on call beeper duty?

The essential idea of having employees "on-call" is that "they are paid for the time during which they are. . .ready and able to work." **Roberts' Dictionary of Industrial Relations**, Third Edition (The Bureau of National Affairs, Inc., Washington, D.C., 1986). One way this is done is to assign employees to on-call and to require them to carry a beeper so that can be called when needed. That is not the situation here.

The Grievant testified that the County has never told her that she had to carry a beeper. The Grievant does carry one, but it is for her duties as an Emergency Medical Technician, not as a Hazardous Material Planner. The Grievant also testified that no one from the County has ever told her that she must remain at home or within the city or county limits or any other area limit and be ready and able to work.

Indeed, the Grievant is not required to carry a beeper or to stay at home or within the County or to always be ready and able to work for her position as Hazardous Material Planner.

Thus, I find that since at least February 1993, the Grievant has not been "assigned" to on-call beeper duty.

Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the Grievance is timely and properly before this arbitrator.
2. That the County did not violate the terms of the applicable collective bargaining agreement when it refused to pay the Grievant "on-call" pay.
3. That the Grievance is denied and dismissed.

Dated at Madison, Wisconsin this 8th day of June, 1995.

By James W. Engmann /s/  
James W. Engmann, Arbitrator