

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ST. CROIX COUNTY (HEALTH CARE CENTER)

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 128
No. 50817
MA-8394

Appearances:

Weld, Riley, Prenn and Ricci, S.C., by Ms. Victoria Seltun, 715 S. Barstow Street, P.O. Box 1030, Eau Claire, WI 54601, and
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Eau Claire, WI 54601.

ARBITRATION AWARD

St. Croix County (Health Care Center), hereinafter referred to as the County, and Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Mr. Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the deduction of sick leave from an employee's sick leave account. Hearing on the matter was held in Hudson, Wisconsin on September 8, 1994 and January 10, 1995. Post hearing arguments and reply briefs were received by the arbitrator by June 5, 1995. Full consideration has been given to the evidence, arguments, and testimony presented in rendering this award.

ISSUE:

At the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

"Did the County violate the collective bargaining agreement when it failed to review and determine the average hours of work of employees and failed to prorate employees fringe benefits and seniority based upon certain disputed employees average actual hours worked?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

III. RELEVANT CONTRACT PROVISIONS

...

Article 1 - Recognition

Section 1.02 Benefit Clarification. As noted in Section 1.01, bargaining unit membership is available to regular full-time and regular part-time employees without restrictions as to number of hours worked. However, for the purpose of awarding benefits, it should be noted that employees must be working a minimum of twenty (20) hours per week, on average, to qualify for benefits including, but not limited to: PTO, holidays, health insurance, and bereavement leave. [Emphasis Added].

...

Article 2 - Management Rights

Section 2.01 The County possesses the sole right to operate County government and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

...

- c. To hire, promote, transfer, schedule and assign employees in positions with the County.

...

Article 3 - Grievance Procedure

Section 3.04 Arbitration Decision. The Arbitrator shall issue a decision which shall be final and binding upon the Parties. The Arbitrator shall not have the authority to change or modify the terms of the collective bargaining agreement. [Emphasis Added].

...

Article 6 - Hours of Work

Section 6.01 Standard Time. Regular full-time employees are scheduled to work an average of between thirty-five (35) and forty (40) hours per week. Regular part-time employees are scheduled to work an average of between twenty (20) and thirty-four and nine-tenths (34.9) hours per week. [Emphasis Added].

...

Section 6.03 Part-time Benefits. In calculating the benefits for regular part-time employees, each employee is assigned a percentage of time that reflects the usual average number of hours worked per week. For example, an employee assigned to work an average of 20 hours per week would be a 50% employee. An employee assigned to work an average of 30 hours per week would be a 75% employee. All percentages are based upon a 40 hour per week standard. [Emphasis Added].

For health insurance benefits for part-time employees, see Article 14, Health Insurance, Section 14.03. Part-time Employee Coverage. For holiday benefits for part-time employees, see Article 12, Holidays, Section 12.03 Determining Part-time Allocation. [Emphasis Added].

The percentage assigned to each part-time employee changes if the average number of hours worked increase or decrease. The employee, the Department Head, or designee may request percentage changes by formally requesting the Personnel Department to do so. The Personnel Department shall advise the employee, the Department Head, and the payroll center of any change in percentage assignment. [Emphasis Added].

...

Article 7 - Seniority

...

Section 7.02 Part-Time Employment Credit. Employees who work less than twenty (20) hours per week do not accrue seniority.

Part-time employees who work an average of twenty (20) or more hours per week shall accrue seniority since the last date of hire.

...

Article 12 - Holidays

...

Section 12.03 Determining Part-time Allocation. To be eligible for holiday time, an employee must be working an average of twenty (20) or more hours per week. For the calculation of holiday time (pay), a part-time employee is assigned a percentage of time that reflects the usual "average number of hours worked per week". For example, an employee assigned to work an average of twenty (20) hours per week would be a 50% employee. An employee assigned to work an average of thirty (30) hours per week would be a 75% employee. All percentages are based upon a forty (40) hour per week standard. For calculation of holiday time, the employee receives the percentage of time that s/he is usually scheduled to work per week, (i.e. 50% of eight [8] hours or 75% of eight [8] hours). [Emphasis Added].

...

Article 14 - Health Insurance

Section 14.01 Terms of Coverage. A group health insurance program shall be available to employees. To be eligible for the health insurance coverage, the employee

must be working an average of twenty (20) or more hours per week in a regular position. Employees shall determine the kind of coverage they desire: family or single. The insurance premiums are based upon a composite rate. [Emphasis Added].

Section 14.02 Contribution Rates. For full-time employees, working an average of thirty-five (35) or more hours per week, effective January 1, 1993, the Employer will pay either 90% or up to \$566.50 per month, whichever is greater, toward the applicable premium. In the event an employee elects, in lieu of the standard plan, to be included in the HMO-Triple Gold program or an 80-20 Co-Pay Plan that may be offered by the County, effective January 1, 1993, the Employer will pay 90% or up to \$566.50 per month, whichever is greater, toward the applicable premium. At the termination of the contract, the cost of any health insurance increases will be equally split between the parties until a successor agreement is reached. A successor agreement may include terms to provide for retroactive payment of insurance contributions. The County may, at its option, decide not to withhold payment for the premiums. No employee shall make any claims against the County for additional compensation in lieu of his/her cost of coverage because s/he does not qualify for the family plan.

Section 14.03 Part-time Employee Coverage. Regular part-time employees working an average of twenty (20) to thirty-four and nine-tenths (34.9) hours per week are eligible for the County group health insurance policies. If the employee's last date of hire is prior to January 1, 1987, s/he receives health insurance at the same contribution rate as the full-time employees. If the employee's date of hire is January 1, 1987 or thereafter, the employee is responsible for paying a percentage of the premium cost each month and the Employer is responsible for paying a percentage of the premium cost each month based upon the following percentage formula. [Emphasis Added].

For the calculation of health insurance premiums, the part-time employee pays a percentage of premium based upon the average number of hours (or percentage) that an

employee is scheduled to work each week. For example, an employee assigned to work an average of twenty (20) hours per week would pay 50% of the health insurance premium and the Employer would pay 50% of the health insurance premium. An employee assigned to work an average of thirty (30) hours per week would pay 25% of the health insurance premium and the Employer would pay 75% of the health insurance premium. [Emphasis Added].

Newly-hired part-time employees who are filling a slot scheduled to work an average of twenty (20) or more hours per week shall be eligible for health insurance. In order to maintain eligibility for health insurance, the employee must work a minimum of 1,040 hours annually. An employee who has worked a minimum of 1,040 hours from September 1 through August 31 will be permitted to retain his/her insurance for the following year (September through August). An insured part-time employee who fails to work a minimum of 1,040 hours from September 1 through August 31 will lose his/her eligibility for health insurance until such time as s/he is in a position that is scheduled for an average of twenty (20) or more hours per week. [Emphasis Added].

...

BACKGROUND:

The County and the Union have been parties to a series of collective bargaining agreements. Commencing with the 1994-1996 collective bargaining agreement the parties adopted a Master contract which governs employees of the County's Health Care Center, Human Services, Highway and Courthouse. On January 29, 1994 the Union filed a grievance alleging part-time employees were not receiving benefits they were eligible to receive. The grievance cited the following provisions of the collective bargaining agreement were being violated by the County's actions: Article 6, Section 6.03; Article 1, Section 1.02; Article 6 Section 6.01; Article 7, Section 7.02; Article 12, Section 12.03, Article 13, Section 13.04; and Article 14, Sections 14.02 and 14.03. On March 4, 1994 Personnel Director Debra Kathan sent the following reply to the Union:

March 4, 1994

To: Sally Sanchez, Union President

From: Debra Kathan, Personnel Director

Re: Health Center Grievance 1,94/D/01

Grievance 1,94/D/01 requests that all part-time employees receive benefits. The County denies this request and therefore the grievance, effective this date.

Please note that the Master Contract makes twelve or more references to benefits for part-time employees, and clearly distinguishes the category of "20 or more hours worked per week" as the cut-off point for the awarding of pro-rated benefits.

This same benefit level, i.e., 20 hours, was determined through extensive negotiations with the County and all four AFSCME bargaining units as we progressed on language for the Master Contract. The understanding reached across the table, and defined in the contract is quite clear. Employees must be at the 20-hour threshold to receive benefits.

Clearly, the 20-hour average for hours worked per week reflects the number of hours assigned to each position. Hours that an employee works that are in addition to his/her assigned number of hours per week do not count toward the 20-hour average. Picking up additional hours through an on-call system or the filling of a vacant shift do not constitute regular, guaranteed hours and therefore are not calculated into the assigned hours each week.

As I indicated to you earlier this week, I have requested that the Nursing Home Administrator and Director of Nursing evaluate other work schedules which would have the effect of lessening part-time assignments that are under the 20 hour per week threshold and increasing work hours to those employees in part-time status at or above 50% assignments. I am awaiting their evaluation of scheduling options. It is not the county's intention to deprive employees of fringe benefits, however, we will not extend benefits to employees who have work assignments less than 20 hours per

week. Grievance denied.

On August 30, 1994 the Union submitted the following request to Kathan requesting that the percentage assignments of 18 individual employees identified be formally changed to the hours actually worked by each employee:

TO: Deb Kathan
FROM: Sally Sanchez
Local 2721 Union President

DATE: August 30, 1994

I have received the hours worked from 01/01/94 to 06/30/94 of the employees listed below. I have found that the hours worked do not reflect the percentage that they now hold. Therefore, on behalf of the union, I am requesting that the percentage be changed to the hours actually worked by each of these employees (and any others involved) according to Article 6, Section 6.03 of the contract.

In doing so, I would also request that benefits be awarded to them because of the actual hours that they have been working according to Article 1, Section 1.02 of the contract; to include PTO, holidays, health insurance, bereavement leave and seniority from 01/01/94.

Employee

-	40	Adeline Christopherson		55-
			56%	
-	50	Kay Lewis		92-
			93%	
-	79	Theresa Zimmerman		96%
-	20	Mary Radtke		52%
-	88	Deanna Person	100%	
-	93	Wanda Olson		100%
-	80	Joette Davis		85-
			86%	
-	50	Melinda Fagnan		53%
-	50	Noreen Briese	97%	
-	20	Ann Ames		87%
-	20	Sue Bouthilet		50-
			60%	

-	64/75	Denise Albrecht		75%
-	75	Josie Winberg		78-79%
-	78	Tammy Stuart		100%
-	20	Sonja Ramirez	49.59 -	63%
-	20	Treston Lindberg		90%
-	50	Tom McNamara		59-
			60%	
-	50	David Cook		81%

At the commencement of the arbitration hearing on September 28, 1994 the arbitrator asked for each individual employe to submit a request to Director Kathan and requested the County to prepare a chart of the actual hours worked for each of these employes. Of the original eighteen (18) employes identified by the Union fourteen (14) submitted request and two (2) additional employes submitted request, Kathy Bengston - twenty percent (20%) assignment and Cathy Peterson - eighty-eight percent (88%) assignment. Three (3) employes, Olson, Stuart, and Person have become full-time employes. Four (4) employes are assigned to a fifty percent (50%) or less assignment, Ames, Radtke, Christopherson and Bouthilet. The following, Joint Exhibit 5, is the actual hours worked for each employe, excluding the three (3) employes currently assigned to full-time:

Denise Albrecht		01-15-94	56
75% (60 Hours)		01-29-94	56
Date of Hire	07-13-93	02-12-94	62.25
		02-26-94	55.25
		03-12-94	62
		03-26-94	75
		04-09-94	66
64% (51.2 Hours)		04-23-94	60
		05-07-94	60.25
		05-21-94	52
		06-04-94	51
		06-18-94	46
		07-02-94	52
		07-16-94	51
		07-30-94	48
		08-13-94	48
		08-27-94	46
		09-10-94	53.5
		09-24-94	53.25
		10-08-94	46
Ann Ames		01-15-94	72
20% (16 Hours)		01-29-94	72
Date of Hire	09-17-89	02-12-94	64
		02-26-94	64

		03-12-94	68.75
		03-26-94	77
		04-09-94	65
		04-23-94	77
		05-07-94	72
		05-21-94	72
		06-04-94	64
		06-18-94	70.5
		07-02-94	72
		07-16-94	61.25
		07-30-94	39
		08-13-94	87
		08-27-94	40
		09-10-94	72
		09-24-94	80.5
		10-08-94	80
Susan Bonthilet		03-26-94	41
20% (16 Hours)		04-09-94	79.75
Date of Hire	03-21-94	04-23-94	65.75
		05-07-94	56
		05-21-94	40
		06-04-94	31.75
		06-18-94	48.5
		07-02-94	47.5
		07-16-94	64
		07-30-94	59.75
		08-13-94	56.25
		08-27-94	49
		09-10-94	48.5
		09-24-94	40.25
		10-08-94	48.5
Noreen Briese		01-15-94	68
50% (40 Hours)		01-29-94	71
Date of Hire	05-25-88	02-12-94	80
		02-26-94	58
		03-12-94	80
		03-26-94	78
		04-09-94	80
		04-23-94	80
		05-07-94	80

		05-21-94	47
		06-04-94	50
		06-18-94	74
		07-02-94	70
		07-16-94	78
		07-30-94	72
		08-13-94	80
		08-27-94	66.5
		09-10-94	68
		09-24-94	71.75
		10-08-94	62
Adeline Christopherson		01-15-94	40
40% (32 Hours)		01-29-94	32
Date of Hire	10-17-88	02-12-94	24
		02-26-94	64
		03-12-94	48
		03-26-94	56
		04-09-94	48
		04-23-94	40
		05-07-94	32
		05-21-94	56
		06-04-94	40
		06-18-94	32
		07-02-94	24
		07-16-94	32
		07-30-94	32
		08-13-94	65
		08-27-94	40
		09-10-94	72
		09-24-94	none
		10-08-94	40
David Cook		03-26-94	32
50% (40 Hours)		04-09-94	68.75
Date of Hire	03-21-94	04-23-94	65.75
		05-07-94	64.75
		05-21-94	56
78% (62.4 Hours)		06-04-94	80
		06-18-94	72.5
		07-02-94	80
		07-16-94	64
		07-30-94	69.75
		08-13-94	72

		08-27-94	64
		09-10-94	64
		09-24-94	73
		10-08-94	71.5
Joette Davis		01-15-94	72
100% (80 Hours)		01-29-94	72
Date of Hire	08-16-91	02-12-94	75.5
		02-26-94	71.75
		03-12-94	53
		03-26-94	14
		04-09-94	40
		04-23-94	80
80% (64 Hours)		05-07-94	65.75
		05-21-94	73.5
		06-04-94	79
		06-18-94	80
		07-02-94	64
		07-16-94	79.5
		07-30-94	80
		08-13-94	70
		08-27-94	64
		09-10-94	80
		09-24-94	55.75
		10-08-94	65.25
Melinda Fagnan		01-15-94	40
50% (40 Hours)		01-29-94	32
Date of Hire	03-10-93	02-12-94	43.75
		02-26-94	48
		03-12-94	40
		03-26-94	41.5
		04-09-94	44
		04-23-94	33
		05-07-94	40.5
		05-21-94	48
		06-04-94	52
		06-18-94	46
		07-02-94	51.25
		07-16-94	57
		07-30-94	43.25
		08-13-94	41
		08-27-94	48.5
		09-10-94	44

		09-24-94	48.25
		10-08-94	45.75
Kay Lewis		01-15-94	24
20% (16 Hours)		01-29-94	57.25
Date of Hire	06-08-93	02-12-94	64
		02-26-94	65.5
50% (40 Hours)	02-27-94	03-12-94	66
		03-26-94	77
		04-09-94	73.75
		04-23-94	66.5
		05-07-94	67.25
		05-21-94	64
		06-04-94	72
		06-18-94	71.75
		07-02-94	48
		07-16-94	65
		07-30-94	69.25
		08-13-94	56.5
		08-27-94	57.5
		09-10-94	65.5
		09-24-94	64.5
		10-08-94	56.5
Treston Lindberg		05-21-94	
20% (16 Hours)	05-16-94	06-04-94	80
50% (40 Hours)	05-30-94	06-18-94	64
Date of Hire	05-16-94	07-02-94	65.25
		07-16-94	80
		07-30-94	67.75
		08-13-94	64
		08-27-94	63.75
		09-10-94	70.25
		09-24-94	73
		10-08-94	63.25
Tom McNamara		03-26-94	40
50% (40 Hours)		04-09-94	44
Date of Hire	03-21-94	04-23-94	73
		05-07-94	40
		05-21-94	40
		06-04-94	48
		06-18-94	40
		07-02-94	54
		07-16-94	52

		07-30-94	43
		08-13-94	53.5
		08-27-94	40
		09-10-94	43.75
		09-24-94	40.5
		10-08-94	39.75
Mary Radtke		01-15-94	38.75
20% (16 Hours)		01-29-94	24
Date of Hire	10-16-89	02-12-94	27.75
		02-26-94	37.5
		03-12-94	51.25
		03-26-94	53.75
		04-09-94	51
		04-23-94	52.5
		05-07-94	58
		05-21-94	48.25
		06-04-94	17.5
		06-18-94	16.5
		07-02-94	21.5
		07-16-94	24
		07-30-94	27.25
		08-13-94	24.25
		08-27-94	27.75
		09-10-94	41
		09-24-94	16
		10-08-94	16.5
Sonja Ramirez		01-15-94	16
20% (16 Hours)		01-29-94	16
Date of Hire	07-28-93	02-12-94	20
		02-26-94	52
		03-12-94	37.75
		03-26-94	48.75
		04-09-94	25
		04-23-94	52
		05-07-94	42.5
		05-21-94	38.5
		06-04-94	87.5
		06-18-94	79.5
		07-02-94	77.5
		07-16-94	24
		07-30-94	24
		08-13-94	8
		08-27-94	59.25

		09-10-94	74
		09-24-94	57
		10-08-94	63
Josie Winberg		05-07-94	60.5
75% (60 Hours)		05-21-94	60.5
Date of Hire	04-25-94	06-04-94	66.75
		06-18-94	64
		07-02-94	52.25
		07-16-94	73.5
		07-30-94	65
		08-13-94	72
		08-27-94	54.25
		09-10-94	60
		09-24-94	60
		10-08-94	55
Theresa Zimmerman		01-15-94	80
79% (63.2 Hours)		01-29-94	78
Date of Hire	04-20-84	02-12-94	77.25
		02-26-94	80
		03-12-94	73.25
		03-26-94	80
		04-09-94	80
		04-23-94	78.75
		05-07-94	64
		05-21-94	70.25
		06-04-94	48
		06-18-94	62.75
		07-02-94	76
		07-16-94	72.5
		07-30-94	64
		08-13-94	64
		08-27-94	55.75
		09-10-94	70.3
		09-24-94	72.75
		10-08-94	70.25

UNION'S POSITION:

The Union contends the parties' collective bargaining agreement consists of a master agreement section which contains language governing all employees and all bargaining units as well as individual appendices for each of the four (4) bargaining units wherein issues and language unique to the individual bargaining unit are located. The Union asserts that one of the main accomplishments during the negotiations which culminated into the current collective bargaining

agreement was the creation of the master agreement. The Union argues that under Article 6, Section 6.03, paragraph 3, an employe's percentage changes if an employe's average number of hours worked rises or falls. The Union also argues that County Personnel Director Debra Kathan testified that the master contract language applies to all employes in all four (4) bargaining units, that Kathan agree with the Union's interpretation of this provision of the agreement, and that Kathan acknowledged this interpretation would apply to employes in the Social Services bargaining unit. The Union contends that Kathan's testimony that the language does not apply to Health Care Center employes is without merit.

The Union points out that Article 6, Section 6.03, was developed at the very end of bargaining by then Union Representative Guido Cecchini and Health Care Center Union President Sally Sanchez. The Union points out that Kathan acknowledged in her testimony that Cecchini approached her about this matter, that Cecchini informed her the language was to resolve a problem with part-time employes in the Social Services bargaining unit, and that she agreed on behalf of the County to put the language into the collective bargaining agreement. However, the Union argues Kathan's testimony that she believed the language would only apply to Social Services is not credible as she acknowledged on cross examination that most of the part-time employes in Social Services are not in the bargaining unit.

The Union further contends that the County has acknowledged the language of the master agreement applies to all employes and that the County does not assert the Union's interpretation Article 6, Section 6.03 is inaccurate. The Union also argues the language speaks for itself and that there is no alternative way of viewing it. The Union further asserts that under Article 3, Section 3.04, the Arbitrator must enforce the language as it is written and understood and that it must be enforced uniformly across bargaining units.

The Union argues that a remedy should go back to January 1, 1994. The Union asserts the Union filed the instant grievance as soon as it was aware that part-time employes were not being adjusted to reflect their hours worked. The Union also contends that the filing of the grievance on January 27, 1994 is an indication that it was not confused by the meaning of Article 6, Section 6.03.

In its reply brief the Union asserts the following five points. One, that the County assertion that Sections 6.03, 12.03 and 14.03 support the proposition that "an employe is assigned a percentage of time that reflects the usual, average number of hours worked per week" is indeed what the County does. However, this does not conflict with the Union's position that the percentage can be adjusted under Article 6, Section 6.03, paragraph 3. The Union argues that once the percentage is adjusted the contract is in harmony. Two, the County assertion that because there is no mandatory overtime additional hours worked should not be included in determining the employe's time worked has no basis in the collective bargaining agreement. The Union points out Article 6, Section 6.03, contains no exceptions to hours worked. Three, the collective bargaining agreement has a specific method of adjustment for hours worked in the

addition to the percentage. Four, posting rights do not alter the interpretation of Article 6, Section 6.03, paragraph 3. The Union stresses the instant matter is not just a Health Care Center issue but a county wide issue. Lastly, six, the term "designee" is not limited to use by the County. The Union argues the County would probably favor a system were part-time employees would have to individually assert their rights. However, the Union stresses it has the mandate to enforce the collective bargaining agreement and the Union's role as designee is no less important than the County's.

COUNTY'S POSITION:

The County contends that when Section 6.03, paragraph 3, is interpreted in relation to the collective bargaining agreement as a whole an employee's percentage employment does not change merely by picking up additional discretionary hours. The County argues that inclusion of discretionary hours which would allow an employee to move to fifty percent (50%) or more and eligible for County provided benefits was never the intent of the parties at the bargaining table and the collective bargaining agreement, read as a whole, supports this position. The County points out that there are twelve (12) or more references to the benefit eligibility of part-time employees. In particular, the County points to Article 14 and argues that in order to be eligible for health insurance coverage an employee must be working an average of twenty (20) or more hours per week in a regular position. Further, part-time employees health insurance premiums are based upon the average number of hours (or percentage) that an employee is scheduled to work each week. The County points out that in order to maintain eligibility for health insurance an employee must work a minimum of one thousand and forty (1040) hours annually. If the employee fails to do so they lose their eligibility until such time that they are in a position that is scheduled for an average of twenty (20) or more hours per week.

The County contends that a reading of these provisions demonstrate clearly that benefits must be provided to those employees who are hired and scheduled to work twenty (20) or more hours per week. The County argues the references "scheduled," "assigned a percentage of time," "usual average number of hours per week" and especially "in a regular position" favors the County argument that when an individual is hired by the Health Care Center they are hired to fill a specific assignment. The County asserts that when an employee is hired for a specific assignment they are scheduled for that assignment by the Director of Nursing on a weekly basis.

The County acknowledges there are instances when Health Care Center employees can pick up additional hours on a voluntary basis. However, the County argues the additional hours are discretionary and the employee does have the right to say "yes" or "no" to the additional hours. The County argues the increase in discretionary hours does not change the percentage assignment, an eighty percent (80%) position remains an eighty percent (80%) position. The County further argues that this position is supported by the phrase "assigned a percentage of time that reflects the usual, average number of hours worked per week" which can reasonably be interpreted to mean that while a schedule may change because of voluntarily assumed hours, an employee is assigned

hours on the schedule based upon the percentage of time they were hired to work per week.

In support of its position, the County points to Buffalo County Hospital, 93 LA 1247 (Goodman, 1989). Therein the arbitrator concluded that when an employe worked voluntary additional hours the employe was working non-regularly scheduled hours. The County contends therein as in the instant matter holiday pay and health insurance is based upon the number of hours an employe is scheduled to work.

The County also asserts that to allow an employe to change their percentage assignment would render meaningless the posting provisions of the collective bargaining agreement. The County argues the employes could have posted to a higher percentage position and that posting is the traditional way employes have changed their assignments. The County contends issues of seniority, promotion and posting would be adversely affected by automatic changes in percentage assignments. In support of this position the County points to Safeway Store, 92 LA 1285 (Thornell, 1989) wherein the arbitrator concluded that advancement from part-time to full-time was not automatic, based solely on the hours worked.

The County also argues that bargaining history supports its position that employes do not automatically move into and out of benefit positions by voluntarily increasing their hours worked per week. The County points to Kathan's testimony and asserts that a threshold was established for benefit and seniority that a person be assigned a regular position, and if scheduled twenty (20) or more hours per week, or assigned a fifty percent (50%) position (the Health Care Center going by percentages while all other County employes being by hours) they are eligible for the benefit package. Further, that Kathan testified that the third paragraph was geared to Human Services employes, that the percentage assigned changes if hours of work increases, that there was little discussion over the interpretation of the language, and that if you worked more than your percentage you were entitled to benefits.

The County also contends "designee" refers to the ability of a Department Head such as the Director of Nursing to assign a designee. The County asserts this is generally the immediate supervisor of each work unit.

The County concludes that the Union suggestion that percentage assignments change simply by picking up additional hours and requesting a change is inconsistent with other contractual provisions and reality. The County points out it has expressly reserved the right to schedule and assign employes and changes are not automatic. Further, management can accept or reject the request because it has the unilateral right to determine percentage appointments because of posting, budgets, seniority and, most importantly, the fact there is no guarantee that extra hours will be available once the percentage has been increased. The County also contends keeping track of people moving into and out of benefit positions would be a booking nightmare and would have a significant financial impact on the Health Care Center.

In its reply brief the County contends that contrary to the Union's arguments, there is a dispute as to the meaning of Article 6, Section 6.03, paragraph three (3). The County asserts there is no automatic movement in an employee's percentage assignment. The County argues that while a schedule may change, based on voluntary hours, an employee's percentage assignment does not change. The County stresses that benefits are based upon the hours scheduled in accordance with the percentage of the position and not on the basis of additional non-regularly scheduled hours. The County asserts the automatic change sought by the Union would render meaningless the posting provisions of the collective bargaining.

The County also asserts the Union mischaracterizes the testimony of Kathan. The County points out Kathan testified the Union was considering the accretion of several part-time employees in the Human Services unit. Kathan believed Section 6.03 language would allow these employees the ability to request to have a formal change in their hours. The County contends such a formal request is available to the Health Care Center employees.

The County also argues that should the Union prevail the remedy should go back to the date of the individual request, August 30, 1994, as it was not until that date that the County was made aware of any situation where an employee was in a fifty percent (50%) position and not receiving benefits.

DISCUSSION:

The parties collective bargaining agreement clearly makes a distinction between hours "worked" or "working" by an employee and the hours an employee is "scheduled" to work. As the County has pointed out, Article 2, Section 20.1, paragraph c., gives it the right to schedule and assign employees. However, benefit calculation under Article 6, Section 6.03, states the assigned percentage of an employee is to reflect the usual average hours "worked" per week. The Arbitrator has emphasized the term "worked" for two reasons. First, both parties acknowledged that this portion of the provision was reached after much discussion between the parties. Second, the term is in the past tense and thus means the actual time spent at labor for the County. The Arbitrator finds, for benefit calculation, that benefits are to be based upon actual hours worked, not the hours scheduled.

Paragraph 3 of Article 6, Section 6.03, allows for the employee or the County to request a review to see if the average of hours worked has increased or decreased. While the parties have disputed the intent of this language the Arbitrator finds it clear and unambiguous. When a request is made to the County's Personnel Department the County is to review the work hours of the employee in question to determine whether they have increased or decreased. Once the Personnel Department has determined whether the hours worked have decreased or increased, the employee, Department Head and payroll center are to be advised of any change in percentage assignment. Thereafter, it would follow, the employees benefits would be based upon the usual average number of hours worked each week. There is no exclusion of this mechanism for employees who were not

receiving prorated benefits prior to the review. Thus an employe who is hired at a percentage below what is necessary to receive benefits below fifty percent (50%), the employe may ask to have their actual hours worked reviewed to determine whether they are eligible for benefits under Article 6, Section 6.03.

The Arbitrator finds that Buffalo County Hospital, 93 LA 1247 (Goodman, 1989), cited by the County is not on point. Therein the parties collective bargaining agreement clearly distinguished between hours scheduled to work and hours worked. Vacation was based upon all hours actually worked and there was no dispute the grievant therein received the correct vacation benefit. Sick Leave and Holiday benefits were based upon an employe's "regular schedule" of work. Further, there was no provision as in the instant matter that provides the percentage assigned changes if the average hours worked increases or decreases and that an employe, if the employe made a request, can have the Personnel Department determine whether the percentage assigned had changed because of the increase in the average hours worked.

Safeway Store, 92 LA 1285 (Thornell, 1989) is also not on point. As noted above the employe must request to have there actual hours worked reviewed, thus there is no automatic movement as argued in Safeway Store.

The Arbitrator finds a review can not be made until there is a request to the Personnel Department to do so. Herein, the original grievance filed by the Union on January 29, 1994 did not identify any specific employe. While the grievance claimed the County had violated the collective bargaining agreement, at that time there is no evidence any employe had requested a review. At that time there is no evidence the County had denied any requested review. The County was not made aware until August 30, 1994 of the specific individuals who sought to have there hours reviewed. A calculation of there hours demonstrates the following:

<u>Employe</u>	<u>Assigned</u>	<u>Actual</u>
Albrecht	64% (51.2 Hours)	64% (51.3 Hours)
Ames	20% (16 Hours)	68.5% (54.8 Hours)
Bonthilet	20% (16 Hours)	64.7% (51.8 Hours)
Briese	50% (40 Hours)	88.4% (70.7 Hours)
Christopherson	40% (32 Hours)	51% (40.85 hours) 1/
Cook	78% (62.4 Hours)	88.8% (71.1 Hours)
Davis	80% (64 Hours)	89.3% (71.4 Hours)
Fagnan	50% (40 Hours)	55.5% (44.4 Hours)
Lewis	50% (40 Hours)	81.3% (65.1 Hours)

1/ Calculations for Christopherson's hours include the none hours reported for the pay period ending September 24, 1994. Excluding the none hours reported actual would be 53.75% (43 hours).

Lindberg	50% (40 Hours)	86.4% (63.1 Hours)
McNamara	50% (40 Hours)	54% (43.2 Hours)
Radtke	20% (16 Hours)	42.2% (33.8 Hours)
Ramirez	20% (16 Hours)	56.4% (45.1 Hours)
Winberg	75% (60 Hours)	77.5% (62 Hours)
Zimmerman	79% (63.5 Hours)	88.6% (70.9 Hours)

The three employees, Olson, Person and Stuart, are not included above because they did not request a review of their hours prior to becoming full-time employees. The review by the Arbitrator demonstrates the following. Only one (1) of the fifteen employees, Albrecht, is actually working the hours originally assigned. The other fourteen (14) employees all actually work hours above what they are assigned. Four (4) of the five (5) employees who are assigned to work less than fifty percent (50 %) and thus do not receive benefits, actually work hours which exceed fifty percent (50%). The parties' collective bargaining agreement clearly states in Article 6.03 that each employe is to be assigned a percentage that reflects the usual average hours worked each week. The above analysis demonstrates this is not being done. The parties' collective bargaining agreement also clearly states that employes can request to have their actual hours worked reviewed to determine if they should have a percentage adjustment made. The record demonstrates that such a request was made on August 30, 1994 and the County has refused to review the hours worked of the disputed employes. The Arbitrator concludes, based upon the above and foregoing, and the arguments, testimony and evidence presented, that the County is in violation of the collective bargaining agreement's provisions on the proration of fringe benefits and seniority. The County is directed to cease refusing to review the hours of employes when a request is made and to make the identified employes in Joint Exhibit Five (5) whole by prorating their fringe benefits and seniority, as of August 30, 1994, on the actual average hours worked.

AWARD

The County violated the collective bargaining agreement when it failed to review employees percentage assignments to determine whether actual average hours worked had increased or decreased. The County also violated the collective bargaining agreement when it failed to prorate employees fringe benefits and seniority on the average actual hours worked. The County is directed to make the disputed employees whole based upon the actual average hours worked as of August 30, 1994.

Dated at Madison, Wisconsin this 1st day of December, 1995.

By Edmond J. Bielarczyk, Jr. /s/