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IN THE MATTER OF THE ARBITRATION
BETWEEN

OREGON PUBLIC EMPLOYEES UNION,)
LOCAL 503, AFL-CIO, CLC,)
and)
THE STATE OF OREGON, ADULT)
AND FAMILY SERVICES DIVISION)
_____)

OPINION
AND AWARD

Grievance: AFS OFFSET Duties

Janet L. Gaunt
Arbitrator

July 29, 1991

REPRESENTATION:

For the Union:

Charlene Sherwood, Esq.
Barnett, Sherwood & Coon
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Portland, Oregon 97204-3540

For the Employer:

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PROCEEDINGS

This arbitration was initiated by the Oregon Public Employees Union ("OPEU" or "Union") on behalf of certain members of its bargaining unit ("Grievants") pursuant to the terms of a collective bargaining agreement with the State of Oregon Executive Department ("Employer"). At issue is the entitlement of certain Welfare Assistant Worker 2s ("WAW 2") to work-out-of-class pay.

The Arbitrator was selected through proceedings of the Oregon Employment Relations Board, and a hearing was held in Salem, Oregon on November 7 and 8, 1990 and March 11, 1991. Charlene Sherwood of Barnett, Sherwood & Coon represented the Union. The Employer was represented by its Labor Relations Manager, Paul Meadowbrook. The parties stipulated that the Arbitrator had jurisdiction to render a final and binding decision, but the Employer contends the grievances should be dismissed as untimely.

At the hearing, both sides had an opportunity to make opening statements, submit documentary evidence, examine and cross-examine witnesses (who testified under oath), and argue the issues in dispute. The hearing was tape recorded solely for the Arbitrator's use with an understanding the tapes would not be retained once a decision was issued. The parties elected to make closing argument in the form of post-hearing briefs which were timely mailed. The Arbitrator officially closed the hearing on May 9, 1991 after receipt of the final brief in the matter. Due to a delay in the scheduled submission of briefs and the Arbitrator's vacation schedule, this decision was due when possible in July, 1991.

STATEMENT OF THE ISSUE

The parties were unable to agree upon the wording of the issues being submitted and left that to the Arbitrator to resolve. Having considered their respective arguments, I find the issues are appropriately described as follows:

1. Were the group OFFSET grievances timely?
2. If so, did the State violate Article 84 when it denied WAW 2s, who performed OFFSET duties, work out of class pay?
3. In the event of a contract violation, what is an appropriate remedy?

RELEVANT FACTS

The Union and Employer are parties to a three (3) year collective bargaining agreement ("Agreement") dated 1989-1991. Ex. J-1.¹ One of the state agencies covered by the contract is the Adult and Family Services Division ("AFS"), which has branch offices located throughout the State of Oregon. AFS administers a variety of public assistance programs, including General Assistance ("GA"), Food Stamps ("FS"), Aid to Dependent Children ("ADC"), Medicaid, and Jobs/WIN ("JOBS"). Program services are primarily handled by employees classified as Welfare Assistance Workers

¹ Exhibits are referred to as either Joint ("Ex. J-___"), Employer ("Ex. E-___") or Union ("Ex. U-___"). For brevity, witnesses' names are abbreviated as follows: Lorrie Briles (LB), Donna Glathar (DG), Charlotte Hartwig (CH), Dennis McMahon (DM), Carol Stoebig (CS), Jenette Wagner (JW), and David Wentz (DW). References to exhibits or testimony are intended to be illustrative, not all-inclusive, of evidence in the record that supports a particular statement.

("WAW").² At some branch offices, WAWs were responsible for determining eligibility for all programs. In other branches, WAWs specialized in a particular case load, e.g., ADC or FS cases.³ WAWs work with both applicants and benefit recipients, collectively referred to hereafter as "clients".

The JOBS Program

JOBS is a federally funded program designed to assist welfare recipients in finding employment. Unless exempt, all ADC recipients had to participate in JOBS ("JOBS mandatory"). Approximately 40% of ADC clients were JOBS mandatory; roughly 60 % were exempt. JOBS was originally a responsibility of the State's Employment Division, but in 1981 administration of JOBS was transferred to AFS. Until July 1, 1989, employees classified as Employment Specialists ("ES" or "JOBS worker") administered the JOBS program. Exs. U-8, U-9.⁴

From 1981 until July, 1989, most of the branches involved in this grievance administered an initial JOBS program ("Old JOBS")

² The WAW classification has three levels. Most eligibility workers were WAW 2s paid at salary range 16. Un. Ex. 8. A few WAWs, who managed high risk case loads, were classified as WAW 3s, paid at salary range 17.

³ Those with an ADC caseload are referred to herein as "ADC WAWs". Those with a caseload of clients receiving just food stamps and no other assistance are referred to as "FS WAWs".

⁴ The ES salary range 18 was two (2) steps above that of WAW 2s and one step above that of WAW 3s.

that emphasized finding any kind of employment for ADC clients. There was little emphasis on retraining to improve long term career prospects.

At intake, a JOBS worker would determine if an applicant was JOBS mandatory or exempt. If a client was exempt on a medical basis, new information regarding diagnosis and prognosis would have to be obtained and reviewed periodically. A client who appeared eligible for Social Security SSI or SSD benefits would be assisted in trying to qualify, which involved compiling and evaluating medical information. Ex. E-57; CH.

The ES would do an assessment of a client's background (e.g., education, work history, transferable skills, knowledge of job search techniques) and barriers to obtaining employment (e.g., family problems, needed child care and/or transportation, lack of tools, licenses, communication skill, physical limitations). Id.

Following the assessment, an ES would develop an action plan that included, when needed, necessary training and a requisite job search. The program required 8-10 employer contacts and 1-2 interviews/applications a week until a job was found. The ES would provide leads on potential employers and assist clients through job development services, a job bank and a client bank. Supportive payments to cover dependent care, transportation, and other costs of obtaining employment might also be provided. Id.

An ES monitored compliance with the Action Plan and periodically reviewed with the client the outcome of interviews. Clients were counseled regarding job search skills and a periodic reassessment of the action plan was required every 6 months. Even

after a job was found, an ES might check to see how the client was doing and whether any additional transition services were needed. If a client failed to comply with the Action Plan, the ES would investigate to determine whether the client should be disqualified from benefits ("good cause determination"). Id.

The OFSET Program

Since July 1, 1987, the Food Stamp programs at most AFS offices have included an Oregon Food Stamp Employment Transition ("OFSET") component. Exs. E-56, E-64; testimony of JW, DM.⁵ Like JOBS, the OFSET program is a mandatory work search program designed to get FS recipients self-supporting. Exemption from the program is more readily granted, however, with less verification of reasons offered for exemption. Ex. E-56; DW, DM, CS.⁶

FS WAW 2s administer the OFSET program.⁷ At intake, they do an assessment of a client's background (review of the client's employment history, education/training and personal circumstances to determine the potential for employment. Barriers to employment are identified and some limited supportive payments can be authorized to cover dependent care, transportation and other costs

⁵ Certain branch offices have been exempted from the administration of OFSET because of their geographical makeup.

⁶ Less than 25% of FS clients are OFSET mandatory. DM.

⁷ These employees carry caseloads of about 350 non-assistance FS recipients, i.e. persons who receive food stamps but not ADC, GA or other welfare benefits. From July 1, 1987 to March 31, 1990, FS WAWs were classified and paid as WAW 2s.

directly related to program participation.

The Work Search Action Plan/Agreement used by the OFSET program is more limited than that developed with JOBS clients. Non-exempt FS clients are required to participate in OFSET for eight consecutive weeks each year, unless they are found to be exempt.⁸ Participation means engaging in an independent job search by contacting at least three prospective employers a week and filing weekly or monthly reports with AFS listing the contracts. There is no requirement of continued participation until a job is found and no branch placement goal for OFSET clients. Work search is independently verified only when there is reasonable cause as to the validity of contacts reported by a client. Id.

Other components of the Action Plan include job search training and/or vocational training. Approximately 7% of mandatory OFSET clients are enrolled in job search training, which includes employment workshops, skills classes and classes for the illiterate. Approximately 1% are provided with some sort of vocational training. Ex. E-56. If a client fails to comply with the Work Search Action Plan/Agreement, the FS WAW will investigate and determine whether the client should be disqualified from benefits.

⁸ Federal law permits AFS to extend the annual participation requirement to sixteen consecutive weeks.

The "New JOBS" Pilot Project

In 1988, the Oregon legislature decided to fund a "New JOBS" pilot project . Under New Jobs, there was more money available to recipients for training and education, and greater emphasis was placed on finding employment with greater long term benefit for ADC clients. The New JOBS program was implemented in seven branch offices in February 1988, while the remaining branch offices continued to administer the Old JOBS program.⁹

"Bare Bones JOBS" and the ADC WAW Group Grievance

Commencing in July, 1989, AFS began administering a scaled down version of its Old JOBS program. The revised program called "Bare Bones JOBS" still involved essentially the same duties as before but less time was spent monitoring job search logs, counseling clients, finding community resources, reducing barriers, and caseworkers had less money to work with. Ex. U-21; CS, CH.

Effective July 1, 1989, AFS eliminated the position of Employment Specialist. In a letter of Agreement ("LOA"), the parties determined that until a new classification system was implemented, Employment Specialists would be placed in WAW 2 or WAW 3 positions but kept at their current rate of pay, i.e. range 18. Ex. U-27.

Administration of Bare Bone JOBS was assigned to ADC WAW 2s and WAW 3s. This led to a group grievance filed in October, 1989,

⁹ Of the AFS branches involved in this grievance, only the South Salem branch administered New JOBS. Ex. E-54.

alleging that because of JOBS duties assigned in September, 1989, WAWs not previously employed as Employment Specialists were performing work out of class. In February, 1990, AFS settled the grievance by agreeing to pay those WAW 2s, who performed JOBS duties, work out of class pay at the WAW 3 level from the beginning of the JOBS assignment until April 1, 1990. Ex. U-28.¹⁰

FS WAW Classification Appeals

On April 1, 1990, the State implemented a new classification system that the parties had negotiated in the summer of 1989. The new system substituted the classification Human Resource Specialist ("HRS") for the classification of Welfare Assistance Worker.¹¹ ADC WAW 2s and 3s were reclassified to HRS 3s at salary range 19.¹² Food stamp certifiers performing OFSET duties were classified as a HRS 2s under the new system. Some appealed that class allocation to Allocation Appeal Boards created by contract to decide contested allocations into the new classifications. None of the Allocation Boards sustained any appeals based on OFSET

¹⁰ The grievance was resolved as to WAW 2s but not as to WAW 3s.

¹¹ The new compensation plan, with revised classifications and salary ranges, had been agreed to by the Union and State of Oregon in the summer of 1989.

¹² The parties' 1989 LOA provided that upon implementation of this new classification system on April 1, 1990, Employment Specialists doing ADC work would be allocated to the HRS 3 classification at salary range 19. Those who had chosen work assignments other than the ADC program were allocated to the HRS 2 classification at salary range 17. Ex. U-27.

functions. Ex. E-25; LB. One Board, which heard an appeal involving some of the grievants, decided that OFSET duties fit well within the description and relative duties of the HRS 2 class. Contentions that the appropriate classification was HRS 3 or Administrative Specialist 2 were rejected. Ex. E-25.

FS WAWs OFSET Grievances

Commencing in February, 1990, before implementation of the new classification system, FS WAWs in five branch offices filed separate group grievances alleging that their duties administering the OFSET program entitled FS WAW 2s to work out of class pay pursuant to Article 84.¹³ The grievances were subsequently combined and denied by the Employer. Ex. J-2. When the parties were unable to resolve the dispute through their intervening grievance procedure, the Union invoked this arbitration.

RELEVANT CONTRACT LANGUAGE

ARTICLE 21-GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Grievances are defined as acts, omissions, applications or interpretations alleged to be violations of the terms or conditions of this Agreement

Grievances shall be filed within thirty (30) calendar days of the date the grievant or the Union knows or by reasonable diligence should have known of the alleged grievance.

....

All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances. However, grievances arising under the following Articles shall be subject to the alternative procedures specifi-

¹³ The grievances were filed between February 7, 1990 and March 19, 1990. Branches involved are Beaverton, North Portland, Southeast Portland, North Salem and South Salem.

cally outlined in those Articles:

Article 5, Complete Agreement/Past Practices

Article 20, Discipline and Discharge

Article 22, No Discrimination

Article 28, Compensation Plan/New Classification Adjustments

Article 81 & 82, Reclassification Upward/Downward

Section 2. Time limits specified in this and the above-referenced Articles shall be strictly observed, unless either party requests a specific extension of time, which if agreed to, must be stipulated in writing, and shall become part of the grievance record.

If at any step of the grievance procedure, the Employer fails to issue a response within the specified time limits, the grievance shall automatically advance to the next step of the grievance procedure unless withdrawn by the grievant or the Union. If the grievant or Union fails to meet the specified time limits, the grievance will be considered withdrawn and it cannot be resubmitted.

....

....

Section 4. Group Grievances. Where there are group grievances in agencies involving two (2) or more supervisors, such grievances shall be submitted and processed in accordance with Step 2 of the grievance procedure. The grievance shall specifically enumerate, by name, the affected employees, when known. Otherwise, the affected employees will be generically described in the grievance.

....

Section 6. Arbitration Selection and Authority.

....

(c) The arbitrator shall have the authority to hear and rule on all issues which arise over substantive or procedural arbitrability. Such issues if raised must be heard prior to hearing the merits of any appeal to arbitration.

Upon motion by either party to bifurcate the hearing on procedural or substantive arbitrability issues, the arbitrator will make the determination on bifurcation. Should the arbitrator choose to take the arbitrability issue under advisement and proceed with the merits, he/she shall issue a written decision on the arbitrability issue only should the issue be found to be nonarbitrable.

(d) The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties. The arbitrator shall have no authority to rule contrary to, to amend, add to, subtract from, change or eliminate any of the terms of this Agreement.

(e) Fees and expenses of the arbitrator shall be borne

entirely as designated by the arbitrator with the arbitrator assigning such expense to the losing party. If, in the opinion of the arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

ARTICLE 28-COMPENSATION PLAN/NEW CLASSIFICATION ADJUSTMENTS

Section 1. Implementation.

(a) Implementation of the new classifications will be effective April 1, 1990....

....

Section 2. Allocation Appeals.

(a) Employees shall be informed by the State of their allocation into a new classification no later than September 1, 1989.

....

(e) There are hereby created the following four (4) Allocation Review Boards:

....

The purpose of these Boards is to resolve initial challenged allocations. Each Board will be composed of two (2) Union representatives and two (2) State representatives. The parties agree that no later than August 1989, the board members shall receive joint training in the principles and understanding of position classification, review techniques and other pertinent material to properly assess allocation appeals....

(f) For the appeal of initial allocation to the new classification system, the Union must clearly demonstrate that at least fifty percent (50%) of the duties as defined by the official position description, on an annualized basis, are described by the class specification proposed by the Union and that the class specification proposed by the Union better describes the duties, purpose and distinguishing characteristics of the job than the class specification selected by Management. A majority decision of a Board shall be binding.

ARTICLE 81-RECLASSIFICATION UPWARD

Section 1. Reclassification upward is a change in classification of a position by raising it to a higher classification. Reclassification must be based on a finding that the duties and responsibilities of a position have been significantly enlarged, diminished, or altered, but the knowledge, skills, and abilities required are still essentially similar to those previously required.

....

Section 6. A decision of the Agency to deny a reclassification request may be submitted by the Union to final and binding arbitration The arbitrator shall allow the decision of the Agency to stand unless he/she finds that the decision of the Agency was arbitrary.

ARTICLE 84-WORK OUT OF CLASSIFICATION

Section 1. When an employee is assigned for a limited period to perform the duties of a position at a higher level classification for more than fifteen (15) consecutive calendar days, the employee shall be paid at what would be the next higher salary step.

When assignments are made to work out of classification for more than fifteen (15) consecutive days, the employee shall be compensated for all hours worked beginning from the first day of the assignment for the full period of the assignment.

RELEVANT CLASS SPECIFICATIONS

WELFARE ASSISTANCE WORKER 2

GENERAL DESCRIPTION

The Welfare Assistance Worker 2 determines eligibility of applicants and clients for financial assistance and for special financial assistance programs; does related work as required.

DISTINGUISHING FEATURES

The Welfare Assistance Worker 2 interviews applicants and clients to secure personal and financial data in order to assist applicants in establishing eligibility for financial assistance and to determine clients' eligibility for such assistance and/or necessity for changes in amounts of financial assistance. Employee makes decisions as to the eligibility for the amounts of financial assistance, and eligibility for special financial assistance programs as related to individual clients, and is held accountable for these decision; and makes public and personal contacts pertinent to financial eligibility. Work requires resolution of the more complicated eligibility factors and assessment of the financial aspects of specific cases. Work is reviewed for effectiveness and conformance to agency policy.

CHARACTERISTIC DUTIES

Interviews applicants and determines their eligibility for financial assistance and special financial

assistance programs; reviews eligibility periodically for continuing need as provided by statutes and regulations.

Assists applicants and clients in obtaining information pertinent to their income, resources and financial obligations; verifies information with collateral resources as necessary.

Advises applicants, clients and the general public regarding their rights and responsibilities with reference to financial assistance programs.

Prepares and maintains necessary case records, documents and reports.

Makes referrals to appropriate community resources and social work staff.

Identifies problems and explains benefits of social services to those who appear to be in need of such services and informs social service staff.

Confers with members of the social service staff in identifying and determining nature of needs and amounts of financial assistance as related to special cases.

Un. Ex. 6.

EMPLOYMENT SPECIALIST

GENERAL DESCRIPTION

The Employment Specialist calls on employers to describe agency services, monitor effectiveness of placement programs, and provide job market information.

DISTINGUISHING FEATURES

The Employment Specialist calls on employers to describe agency services, to recommend programs to meet specific employer needs, and to secure jobs for workers, including those with special needs, such as handicapped, older workers, youths, veterans, and ex-offenders. The employe gathers information regarding job market and general economic conditions for use by the agency in program planning and provides this information to employers. The employe calls on employers and applicants placed in jobs to monitor progress and to ensure the effectiveness of the programs. Upon request of employers, provides other personnel services, such as job restructuring and evaluation, position descriptions and promotion systems. After gaining experience, employes in this class may be called upon to participate in training and orientation of new employees or to provide periodic technical direction to other employees including those in the same class. Such assignments will however be periodic and short term.

CHARACTERISTIC DUTIES

Plans schedule of field visits to include specific employers to be called on.
Calls on employers to discuss employer needs and acquaint employer with services available and records visits on appropriate records.
Upon request, furnishes employer accounts with services such as job content and evaluation, job restructuring, and possible internal reorganization.
Provides information to employers on such matters as appropriate compensation levels based on local market conditions and initiation of staff development programs.
Participates in cooperative employment service high school programs, various rehabilitation programs, employ-the-handicapped programs, older worker programs and other programs to aid job applicants.
Maintains records and periodically performs follow-up visits to counselees to determine if satisfactory progress is being made toward vocational adjustment.
Interviews applicants and refers applicants to appropriate jobs.

Un. Ex. 9.

WELFARE ASSISTANCE WORKER 3

Characteristics

Analyzes case records secured from Public Welfare and Children's Services Division for completeness of file, documentation of eligibility, and comparability of all documents and statements. Conducts home visits with clients to secure any missing documentation of eligibility, compare record statements with actual conditions in the home, obtain pertinent information regarding possible changes in eligibility and/or need, secure "leads" to other possible factors yet unknown, and obtain a list of other collateral contacts necessary to complete review of eligibility. Analyzes results of record analysis and home interview to focus the direction and intensity of further investigation. Conducts collateral interviews or contacts as necessary to obtain verification of income, resources or other benefits, verifies statements of the client as per ownership of property, and clarify any conflicting statements, evidence or documentation found during the review process. Corresponds with other agencies, offices, businesses or professional people in regard to obtaining documentation of facts gathered during the review process. Analyze all documentation, evidence, statements and information gathered and arrive at a decision

regarding the client's eligibility for Public Assistance. Reports and documents findings in each case.

OR

Eligibility Documentor

This is a non-supervisory position requiring the employee to work with considerable independence to carry out the following responsibilities: conducts special fact-finding studies of complex case situation to determine accuracy of the eligibility determinations; conducts field investigations to locate and establish facts relating to eligibility; makes recommendations on grant closings, overpayments and fraud proceedings; locates or develops employment opportunities and other resources which will reduce dependency.

Ex. E-29.

CONTENTIONS OF THE PARTIES

The parties' respective arguments, although presented in much more detail, can be summarized as follows:

Union

1. The Employer's arbitrability issue of timeliness was considered and rejected in a prior case between the parties. Therein, Arbitrator Jane Wilkinson found that unpaid work out of classification is a continuing violation of the contract. Pursuant to that ruling, the AFS grievances should be found timely because they relate to a continuing violation of the contract. If a violation of Article 84 is established, any appropriate remedy should be made retroactive to July 1, 1989 which was the first day of the OFSET assignment for the grievants in the five affected branch offices.

2. Article 84 specifies that the remedy in a work out of classification grievance should include all hours worked from the first day of the assignment. A recent decision by Arbitrator William Dorsey rejected the Employer's argument that any remedy should be limited to 30 days prior to the filing of the grievance. Arbitrator Dorsey's ruling is consistent with the Employer's own actions when it settled the prior ADC WAW work out of class grievance. The settlement compensated employees back to the starting date of their assignment.

3. A violation of Article 84 is established by showing that an employee is performing the key or core elements of a higher level

position. The 50 percent rule utilized for reclassification grievances is not relevant to a work out of class grievance. Reclassification grievances filed pursuant to Article 81 or allocation appeals filed pursuant to Article 28 each have specific standard of review. Article 84 is applicable when employees are performing duties of a higher level but not to the extent necessary to be permanently reclassified. If the 50 percent standard were applied to alleged violations of Article 84, that would render the Article meaningless unless it were limited to temporary assignments. Article 84, though, has never been interpreted to apply only to temporary assignments, and such an interpretation would lead to illogical results. Accordingly, the Arbitrator should find that Article 84 applies to the permanent or temporary assignment of duties of a higher classification and that the 50 percent test does not apply.

3. The key or core duty of an Employment Specialist is the administration of an employment program, e.g. the JOBS program (Old JOBS, New JOBS or Bare Bones JOBS). The key or core duty of a WAW is eligibility determination. The OFSET program is an employment program virtually identical to the JOBS program but directed at FS recipients rather than ADC recipients. Certain requirements of the programs may vary, but the key or core duties are the same, i.e., registration, screening, development of employment plans, work search support services and barrier identification and removal.

4. The similarity of the two programs can be seen in the fact that JOBS and OFSET are combined into a single chapter in the Eligibility Manual, similar forms are used in the administration of both programs, and combined workshops were created for JOBS and OFSET participants. An individual who performed both JOBS and OFSET duties testified that Bare Bones JOBS and OFSET were essentially the same program. An FS WAW spends more time on OFSET tasks than an ADC WAW does on Bare Bones JOBS. Accordingly, the Arbitrator should find that the performance of OFSET duties constitutes the performance of the key or core duties of the Employment Specialist classification.

5. The Employer's argument that OFSET duties are not of a higher classification because they are not as complex as JOBS duties should be rejected. The administration of any employment program, regardless of its size or technical requirements, is appropriately classified as Employment Specialist work. It is not the Union's position that the grievants are Employment Specialists, but the administration of an employment program (OFSET) does constitute the assignment of a key or core duty of that higher classification. There is no dispute that the grievants have been performing OFSET duties for more than 15 consecutive days. The Grievants, accordingly, are entitled to work out of class pay in accordance with Article 84.

6. The grievance settlement in which AFS agreed to pay ADC WAW 2s work out of class pay for performing bare bones JOBS duties

demonstrates that the performance of employment program duties constitutes work of a higher classification. Regardless of whether bare bones JOBS duties belong at the level of an Employment Specialist or at the level of a WAW 3, the Employer acknowledged through the settlement agreement that the performance of "bare bones" JOBS duties was at a level somewhere higher than WAW 2. There was no requirement that employees perform the JOBS duties 50 percent or more of the time in order to qualify for work out of class pay. Any contention that the basis of the settlement was the complexity of an ADC case load is simply untrue. It was the addition of JOBS related duties to the ADC case load that resulted in the work out of classification payment.

7. For all of the foregoing reasons, the Arbitrator should find that the grievants are entitled under Article 84 to work out of class pay for the performance of OFSET duties. Under the classification system effective April 1, 1990, the Employer continues to identify the administration of an employment program as a duty of a higher level classification, i.e. that of HRS 3. Therefore, the Arbitrator should find that the performance of OFSET duties by HRS 2s continues to constitute work out of class pursuant to Article 84. As the losing party, the Employer should be assigned the Arbitrator's fees and expenses pursuant to Article 21, Section 6(e).

Employer

1. Pay violations are continuing violations. The deadline for grieving each continuing violation runs from receipt of each short paycheck. The earliest of the group grievances was filed in January 1990. Pursuant to Article 21, grievance allegations regarding pay periods before January are untimely. Had the parties wanted to exclude Article 84 from the time constraints of Article 21 they would have done so expressly as they did with other articles in the Agreement. This Arbitrator, as did Arbitrator Wilkinson, should limit any remedy to 30 days before the first of the grievances was filed. The fact that AFS once settled a group grievance without regard for the 30 day time limit is, as Arbitrator Wilkinson ruled, of no consequence.

2. Work out of class pay is appropriate only when employees perform key and relatively exclusive duties of a higher class. An unpublished arbitral award involving the parties to the instant grievances mirrors arbitral precedent in holding that work out of class pay is not owed absent proof an employee performs the bulk of the exclusive duties of a higher classification. That approach to classification disputes is also reflected in Article 28, which addresses requests for reclassification and appeals to joint union/management Allocation Appeal Boards.

3. The Allocation Appeal Boards found the grievants to be properly allocated as HRS 2s in the new classification system.

Article 28 provides that the decision of such Boards shall be final. Under Article 21, Section 6(d), the Arbitrator lacks authority to set aside the decision where, as here, the grievants do not claim their duties changed following Board decisions. With regard to duties preceding implementation of the new classification system on April 1, 1990, testimony that the OFSET program is indistinguishable from the JOBS program is not credible. Time records show that food stamp certifiers in the five group grievances spent an average of only 18.7 percent of their time administering OFSET. The remaining time was spent on food stamp certification work described by the WAW 2 class. No grievant even arguably devotes a majority of time to performing core, key or exclusive duties of the Employment Specialist classification.

4. OFSET duties fall within the scope of duties described in the WAW 2 class specification, e.g., determining eligibility of applicants for financial assistance programs and related work. The grievants do not perform distinguishing features of the Employment Specialist class specification, e.g., calling upon employers to recommend programs, gathering job market information, monitoring job placements, providing other personnel services. Employment Specialists interview applicants, but that is also a characteristic duty of the WAW 2 classification.

5. OFSET is a minor program, handled in a mechanical, largely clerical way with no significant funding attached. The OFSET requirement is normally met by requiring food stamp applicants and recipients to contact three prospective employers a week for a maximum of sixteen weeks. JOBS has a placement program; OFSET does not. JOBS expenditures are far greater on average than the average OFSET benefit. A JOBS caseload requires vastly more time than OFSET to administer. The grievants, unlike Employment Specialists, do not carry an ADC caseload, and they do not carry a JOBS caseload.

6. Neither the Letter of Agreement, nor the prior grievance settlement regarding ADC WAW 2s support the work out of class claim in this case. The LOA specifically states that it may not be used against the employer in subsequent negotiations or any other forum. As a result of the settlement, AFS agreed to pay ADC WAW 2s work out of class pay as WAW 3s, not as Employment Specialists. AFS was not arbitrary in concluding that the complexity of the combined ADC/JOBS assignment warranted crediting employees as WAW 3.

7. Equating the OFSET program with the ADC/JOBS programs is premised on the misguided notion that because both involve work searches, they are equivalent employment and training programs. The record indicates that is not true. In any event, the issue is whether grievants were entitled to out of class pay as Employment Specialists. The Union cannot equitably be heard to argue post hearing regarding the WAW 3s. Accordingly, the grievances should be dismissed and arbitration costs assessed against the Union as the losing party.

OPINION

The record indicates that the five affected AFS branch offices have been assigning OFSET duties to FS WAW 2s working in those branches since July 1, 1987. Ex. E-46. The first grievance alleging that the performance of these duties constituted work out of class was not filed until February 7, 1990. Ex. J-2. Since the duties at issue were performed for over two and one-half years before the filing of a grievance, AFS alleged the grievances should be dismissed as untimely. At the hearing, the Arbitrator found the group grievances timely, at least as to the period commencing within thirty days of when the grievances were filed until the present.¹⁴ A ruling was reserved as to the exact period of time for which alleged work out of class would be arbitrable and for which any remedy would be made retroactive.

I. THE GROUP GRIEVANCES WERE TIMELY AS TO WORK OUT OF CLASS ALLEGEDLY PERFORMED DURING A PERIOD COMMENCING WITHIN 30 DAYS OF THE GRIEVANCE TO THE PRESENT.

This Arbitrator's authority to rule on the merits of grievances arises from the contract and is subject to any limitations in that contract. One such limitation can be found in Article 21 which establishes certain time limits for the filing and

¹⁴ This decision was based on the continuing violation rule and a prior arbitration decision involving the same parties. The decision by Arbitrator Jane Wilkinson held that the continuing violation rule was applicable to grievances alleging work out of class. State of Oregon, Adult and Family Services Division and Oregon Public Employees Union, (Wilkinson, December 19, 1990).

processing of grievances. In Section 1 of that Article, the parties have agreed that grievances must be filed within thirty (30) calendar days of the date the grievant or Union "knows or by reasonable diligence should have known or the alleged grievance". The penalty for failing to meet the requisite timeline is specified in Article 21, Section 2: "the grievance will be considered withdrawn and it cannot be resubmitted".

In adopting timelines for the filing of grievances, the parties were obviously attempting to ensure that grievances would be presented promptly while witnesses' memories were still fresh and relevant evidence was readily available. Timelines are also presumably intended to allow an employer to investigate and remedy a violation before significant liability accrues. Accordingly, the rule is well established that grievances not filed within clear contractual time limits will be dismissed absent waiver or some unusual circumstance. *See, e.g.,* Bornstein and Gosline (eds.), Labor and Employment Arbitration, §13.03[1][a] (1990); Elkouri and Elkouri, How Arbitration Works, 193 (4th ed. 1985); Fairweather, Practice and Procedure in Labor Arbitration, 83 (3rd ed. 1991).

In applying contractual time limits, a distinction is sometimes made between an occurrence which is past and completed as compared to an occurrence of a recurring nature. The latter is commonly referred to as a "continuing violation". The theory is that certain contract violations occur again and again and may be challenged each time they occur regardless of when they first arose.

Many arbitrators have held that "continuing" violations

of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day - each day there is a new "occurrence"...

Elkouri, *supra* p. 197; Bornstein, *supra* Section 13.03[5].

With reference to the matter of the continuous recurring type of grievance, such a grievance may properly be filed at any time within (the specified) days following the original occurrence or following any subsequent repetition or occurrence of the action or behavior which is the basis for the grievance... The basic logic underlying this is simply that a current occurrence of a repeated or continuous violation reasonably and properly and should be given the same status as if the same current violation were occurring for the first time ...

Sears Roebuck & Company, 39 LA 567, 570 (1967) (emphasis added).

It is sometimes difficult to distinguish between a continuing course of conduct and a finite, completed transaction. Generally speaking, disciplinary actions, layoffs, promotion decisions, overtime call-ins are examples of actions viewed as non-continuing violations. Incorrect seniority, and improper rates of pay are typically held to be continuing violations. Board of Education, 81 LA 41, 48 (Rotenberg, 1983); Bornstein, *supra* Sec. 13.03[5]; Fairweather, *supra* at 93.

Arbitrators are often inconsistent in their application of the continuing violation rule. Some even question whether the doctrine is well principled in all instances. Nevertheless, the continuing violation principle is a well established doctrine; one applied by a majority of arbitrators at least some of the time, and one which the parties can be presumed to have known might apply.¹⁵ Since

¹⁵ In Methodist Hospital, 94 LA 619 (1990), Arbitrator Bognanno describes the continuing violation doctrine as the "overwhelming majority rule in labor arbitration".

Arbitrator Wilkinson has already ruled in a prior proceeding that work out of class wage claims fall within the continuing violation rule, I find it appropriate to give that decision stare decisis effect.¹⁶

Arbitrator Wilkinson also ruled that any remedy or period of arbitrability should run from 30 days preceding the filing of a work out of class grievance. That ruling is consistent with normal application of the continuing violation rule. The continuing violation rule arose from a desire to achieve equity, and is itself subject to some equitable limitations. Thus, a continuing grievance is normally found timely as a challenge to only contract violations occurring within the grievance filing period. Any remedy is almost always limited to either the date of the last incident or to the earliest date possible within the grievance procedure time limits. See, e.g., Hillel Day School, 89 LA 905 (Lipson, 1987); Fairweather, *supra* p. 86.

After issuance of the Wilkinson decision, the parties received a contradictory decision on the remedy issue from Arbitrator

¹⁶ Arbitration ill serves the parties' mutual need for finality if awards are disregarded because the losing party thinks another arbitrator might take a more sympathetic view towards contract language. Whether arbitrators speak of "res judicata", "authoritative force", "heavy precedential value", or "stare decisis", the weight of arbitral opinion strongly supports holding a prior arbitration award that involves the same issues, parties, and contract provisions to be controlling on the same issues in a subsequent case. See, e.g., Atlantic Richfield Co., 79 LA 765, 768 (Johannes, 1982). This is done in order to preserve the consistency of contractual interpretation. See, e.g., Board of Education of Cook County, 73 LA 310, 314 (Hill, 1979).

William Dorsey. Arbitrator Dorsey concluded that when work out of classification is established, affected grievants are entitled to damages for the full period of their assignment, regardless of when a grievance was filed. Oregon Public Employees Union and State of Oregon, Vocational Rehabilitation Division, (Dorsey, March 22, 1991). I have considered the latter decision, but must respectfully disagree. In this Arbitrator's judgment, the contract language better supports the reasoning of Arbitrator Wilkinson.

The question presented is the intent of that portion of Article 84 which states:

When assignments are made to work out of classification for more than fifteen (15) consecutive days, the employee shall be compensated for all hours worked beginning from the first day of the assignment for the full period of the assignment.

Ex. J-1 (emphasis added.) Arbitrator Wilkinson read this provision as being subject to the procedural strictures of Article 21, i.e., the timelines for filing grievances. Arbitrator Dorsey read Article 84 as superceding the timelines in Article 21. He reasoned that the parties did not intend a limit on the damages for a violation of Article 84 because they did not say so expressly or impliedly. I believe they did.

As Arbitrator Wilkinson correctly noted, a collective bargaining agreement typically provides a host of rights, but those rights are deemed lost if a claim is not asserted in a timely manner. Article 84 establishes a right to work out of class pay from the first day of the assignment, but to enforce that right through the contractual grievance procedure, an employee must file a grievance within 30 calendar days of the date the grievant or

Union knew or reasonably should have known there was a violation of Article 84.

The fact that Article 84 was not intended to supercede limitations in Article 21 is indicated, I believe, by the parties' statement that "All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances." Ex. J-1, Article 21, Section 1 (emphasis added). Only grievances arising under six listed articles were excluded from the foregoing statement. Article 84 was not one of those listed exclusions.¹⁷ Consequently, it can be implied that the parties intended a violation of Article 84 to be subject to the provisions of Article 21; just as rights established elsewhere in the contract were.

In reaching this conclusion, I have considered the Employer's willingness to provide a fully retroactive remedy for those ADC WAW 2s, whose group work out of class grievance was settled in February, 1990. Ex. U-28. I do not find that settlement indicative of a negotiated intent that Article 84's specified remedy was to prevail over Article 21's grievance timelines.

There are two basic types of settlements. One type is intended to reflect an agreed interpretation of contract language. Another type simply reflects the compromise of a dispute without agreement on the proper interpretation of disputed language. The two types of settlements have been well described as follows:

¹⁷ The mentioned Articles that were expressly made subject to alternative procedures were Articles 5, 20, 22, 28, 81 and 82. Ex. J-1, Section 1.

The prospective significance of most grievance settlements is speculative The reason for the settlement is not stated. It could have been part of a 'wheel and deal' session, or for whatever reason. The value of citing such a grievance settlement in arbitration over a similar or even identical issue as a precedent is questionable. In other cases, grievances are settled 'on a nonprecedent basis'. The limited value of such grievance settlements is apparent.

But, there are grievances which are surely viewed as resolving disputes between the parties in no less a definitive way than a final and binding arbitration award. And as such they carry the same weight as contract language or past practice, because those grievance settlements may clarify what may otherwise have been obscured in talmudic-like contract language.

Scott & Fetzer Co., 79 LA 1091 (Sabgher, 1982).

As can be seen from the foregoing quote, one must be careful not to read too much into settlements, since they often do not reflect agreement as to what was originally negotiated but simply reflect compromises one or both sides are willing to make to maintain labor peace, avoid the costs of proceeding to arbitration, and/or avoid the possibility of an adverse result at arbitration. There is no indication that the ADC WAW 2 settlement was anything other than such a compromise.

In settling the ADC WAW 2 group grievance, AFS agreed to a pay adjustment retroactive to the first day on which work out of class was performed. The facts were quite different in that case, however. The ADC WAW 2 grievance was filed on October 25, 1989 and alleged work out of class duties commencing on an unspecified day in September 1989. Thus, on the face of the grievance only a small period of backpay was arguably precluded by the grievance timelines of Article 21. Ex. U-28.

Union Field Representative Donna Glathar testified that the

settlement reached between the parties extended back even earlier than the grievance asked for and some ADC WAWs received work out of class pay dating back to July, 1989. Since it sometimes takes awhile to judge whether newly assigned duties involve sufficient skill and responsibility to support a work out of class allegation, and Article 21 only requires a grievance to be filed within 30 days of when the alleged grievance was known or reasonably should have been known, the Employer probably recognized that an arbitrator would not automatically sustain an arbitrability objection to claims predating September 25, 1989 by a month or two. It is understandable, therefore, why AFS would agree to settle the ADC WAW 2 group grievance with a full retroactive pay adjustment even though it may have had a tenable argument that one or two months of that remedy should have been time barred.

In the present case, the Union would have the Arbitrator allow a far great amount of retroactivity. By the time AFS was put on notice that the grievants felt they were working out of class, the Employer had accrued over two and one-half years of potential backpay liability. That is precisely the kind of accruing liability without notice of and an opportunity to correct an alleged violation that Article is intended to protect against. I agree, therefore, with the ruling of Arbitrator Wilkinson to the effect that any grievances are timely only as to work out of class duties allegedly performed during the period commencing within 30 days of a grievance placing the Employer on notice of the allegations.

II. OFFSET DUTIES DO NOT CONSTITUTE WORK OUT OF CLASS FOR WAW 2S.

A. The Core Element Test Constitutes An Appropriate Standard For Determining Whether Work Out Of Class Is Being Performed.

This case arises under Article 84 of the Agreement wherein the parties have agreed that if an employee is assigned to perform "the duties of position at a higher level classification for more than fifteen (15) consecutive calendar days", that individual will be paid at the next higher salary step. The contract does not specify how many of the duties of a higher classification must be performed in order to be entitled to work out of class pay. In other parts of the contract, though, two different tests have been used.

Article 28 was negotiated to address the issue of how positions were allocated to new classifications that were implemented in April 1, 1990. That Article set up special Allocation Boards to hear appeals of initial allocations under the new system, and sets up a standard for establishing that a class specification proposed by the Union better describes the duties, purpose and distinguishing characteristics of a job than the class specification selected by management.¹⁸ Because its provisions are unique to the initial implementation of a new classification system, Article 28 is not especially persuasive regarding the parties' likely intent as to subsequent work out of class claims.

¹⁸ To prevail, the Union must show in effect that its class specification better describes at least 50% of the duties defined by the official position description. Ex. J-1, Article 28, Section 2(f).

Article 81 is the more typical contract provision regarding reclassifications. In a prior arbitration decision, Arbitrator Tom Levak described two kinds of tests commonly applied by arbitrators in resolving work out of class claims: (1) the 50% rule, under which at least that percentage of the duties of a higher classification must be performed; or (2) the "core element" rule, under which reclassification or work out of class pay is ordered when an employee regularly performs the "core elements" of the job classification sought. Arbitrator Levak concluded that the "core element rule" was the more accurate indicator of work out of class. The State of Oregon, Department of Human Resources and Oregon Public Employees Union, p.25 (January 17, 1987).¹⁹ This Arbitrator agrees.

The "core element" rule has been well described in a frequently cited decision by Arbitrator Carroll Daugherty:

... (1) In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that 'invaded' said core elements?

Wilson Jones Co., 51 LA 35 (1968). An employee in one job cannot properly be said to have assumed the work of another job unless he/she has been required to perform tasks that distinguish the higher paid classification from the lower one. See, e.g., Alaska Department of Transportation, 78 LA 999, 1005 (Tilbury, 1982); Hanna Mining Co., 73 LA 123, 125 (Axon, 1979).

¹⁹ Arbitrator Levak then found that the Union's evidence met neither test, and the grievance was denied. *Id.*

... before an employee in a lower rated classification can be said to be doing the work of a higher rated classification ... he must have been engaged in work which forms the central core of that higher rated classification, not just an isolated, marginal, relatively insignificant duty. To hold otherwise, would result in undermining and blurring the distinctions between classifications and wage rates so carefully negotiated by the parties.

Union Carbide Nuclear Co., 37 LA 411, 412-413 (Seligson, 1961).

The Employer recognizes in its posthearing brief that the critical questions in work out of class cases are those posed by the core element test. The Employer also seems to want a requirement imposed that any core duties be performed more than 50% of a grievant's time. Absent a clearer indication that this was the negotiated intent of Article 84, I do not feel it is appropriate to superimpose such a 50% requirement for work out of class eligibility under Article 84.

The core element test described by Arbitrator Daugherty does not necessarily require that key or core elements of the higher rated job be performed more than 50% of the time by a lower rated employee. A grievant must demonstrate that the work at issue is performed regularly and to a significant degree, but absent express contract language to the contrary, the work need not represent more than 50% of the grievant's overall time. See, e.g., Oregon Public Employees Union and Linn County, unpublished (Axon, July 22, 1987); Union Carbide Nuclear Co., *supra* at 412-13. Accordingly, the test I have applied is whether the grievants have been shown to perform, on a regular and significant basis, the duties that distinguish a higher classification. Whether the grievants spent more than a majority of their time on those duties has not been determinative.

B. OFSET Duties Were Not Shown To Be Equivalent To
JOBS Duties.

Regardless of which test is used, the Union bears the burden of proving a work out of class violation. See, e.g., Bornstein & Gosline (eds), Labor and Employment Arbitration, §31.05[5], p. 31-48 (1990). OPEU has sought to meet that burden by arguing that the distinguishing feature of the Employment Specialist classification is administration of any employment program. This contention is greatly undercut by the absence of any work out of class claim until February, 1990. From 1987 until 1990, no FS WAW 2s contended that since they were also administering the OFSET employment program, they were necessarily performing ES work. The lack of any such claim leads this Arbitrator to conclude that the FS WAW 2s recognized that administrating any employment program, regardless of its technical requirements, did not automatically entitle FS WAW 2s to work out of class pay as ESSs. Whether work out of class pay was merited depended on the relative skills and responsibilities required by such program administration.

It is not uncommon to find two or more job classifications performing the same generic task.²⁰ When formal systematic job evaluation plans are used by employers to establish equitable pay structures, they typically consider: skill, effort, responsibility, and working conditions. See, e.g., Corning Glass Works v. Brennan, 417 U.S. 188 (1974). One classification might receive a higher

²⁰ The core elements test recognizes that the duties of different classifications often overlap.

salary range because individuals in that classification deal with more complicated cases or have more responsibility. WAW 2s and 3s, for example, both deal with eligibility determinations, but the WAW 3s receive a higher pay rate because they handle more complicated cases requiring greater skill and responsibility. Ex. E-29.

Here the class specification for the WAW 2 position describes the following distinguishing features:

- interviews clients to secure personal and financial data to determine clients' eligibility for financial assistance;
- makes decisions as to eligibility for amounts of financial assistance and eligibility for special financial assistance programs;
- makes public and personal contacts pertinent to financial eligibility;
- Work requires resolution of the more complicated eligibility factors and assessment of the financial aspects of specific cases.

Ex. U-6. OFSET is administered as part of determining eligibility for food stamp financial assistance. For those who are eligible, OFSET benefit payments constitute a special financial assistance program. Thus, the foregoing features, though not specifically mentioning an employment program, do encompass the kinds of tasks that OFSET involves.

The following characteristic duties also describe many of the tasks performed as part of OFSET:

- interviews clients;
- reviews eligibility periodically for continuing need;
- assists clients in obtaining information and verifies information with collateral resources as necessary;

- prepares and maintains necessary case records, documents and reports;
- makes referrals to appropriate community resources;
- identifies problems and explains benefits of social services to those who appear to be in need.

Id. In comparison, distinguishing features of the Employment Specialist position focus on greater employer contact and job development. For example, tasks mentioned include:

- calling on employers;
- gathering information regarding the job market;
- monitoring the progress of clients after job placement;
- providing job restructuring and evaluation;

Ex. U-9. FS WAW 2s were not shown to perform these kinds of tasks as part of their OFSET duties.

Even though OFSET tasks might seem to fall within the characteristic duties of the WAW 2 classification more than the ES classification, when certain generic duties are performed by more than one classification, a key consideration is the relative skill and responsibility required by the assigned tasks. Here, both FS WAW 2s and ESSs were shown to administer employment programs, and the the Union argues that OFSET and JOBS are virtually identical employment programs; the main difference being that OFSET is directed at food stamp clients and JOBS is directed at ADC clients. If true, then work out of class pay might well be justified.

The Union did establish that both programs had similar components, but after carefully comparing documentation regarding both OFSET and JOBS program requirements, and the testimony of

What appears to have occurred is that some services provided more routinely under Old JOBS have become an exception rather than the rule under Bare Bones JOBS. For example, field visits are not regularly scheduled, but they did still occur irregularly. Extended assessments and barrier removal that could have been performed at the outset under Old JOBS are not now done until a client has spent three months in a fruitless job search. The same is true of classroom vocational training and some kinds of counseling. Ex. U-21; CS, CH, JW. In comparison to OFSET, Bare Bones JOBS still has job placement goals, and the caseworkers still do have occasion to provide more complicated intervention and counseling. Consequently, I find that until April 1990 there remained enough of a difference in the requisite skill and responsibility of JOBS workers to deny work out of class pay for FS WAW 2s even after the JOBS program was scaled back.

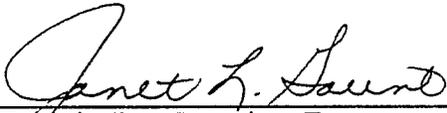
In April, 1990, FS WAWs were reallocated to the classification of HRS 2. Allocation appeals under Article 28 were denied, and there has been no showing that the duties of what were previously FS WAW 2s have been changed since then. Absent any change in duties since the Allocation Board decision, a ruling that OFSET duties constitute work out of class would completely undercut the contractual agreement in Article 28 that decision of the Allocation Boards would be binding. I find, therefore, no grounds to support a claim that OFSET duties constitute work at the HRS 3 classification level; especially since at least one of the Union's own witnesses conceded that the administration of OFSET does not really fit the HRS 3 classification.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the foregoing Opinion, it is awarded that:

1. The group OFSET grievances were timely as to work out of class allegedly performed during a period commencing within 30 days of the grievance to the present.
2. The State did not violate Article 84 when it denied WAW 2s, who performed OFSET duties, work out of class pay.

Dated this 29th day of July, 1991 by



Janet L. Gaunt, Esq.

