STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PLEASANT VIEW EMPLOYEES UNION LOCAL 1162, AFSCME, AFL-CIO, Complainant,

vs.

GREEN COUNTY (PLEASANT VIEW NURSING HOME), Respondent.

Case 144
No. 59213
MP-3681

Decision No. 30355-A

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, for the labor organization.

Attorney William E. Morgan, Corporation Counsel, Green County, Green County Courthouse, 1016 16th Avenue, Monroe, Wisconsin 53566, for the municipal employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 22, 2000, Pleasant View Employees Union Local 1162, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Green County had violated sec. 111.70(3)(a) 4 and 1, Wis. Stats., by transferring the existing duties of scheduling from a bargaining unit position (Ward Clerk) to a non-unit supervisory nursing position without first bargaining with the union on the proposed change. Green County denied that it had committed any prohibited practices. In its complaint, the union asserted that it was a party to a collective bargaining agreement with the county which had expired on December 31, 1998. In its answer of October 12, 2000, the county alleged that "the parties have been operating under the terms of that contract through the present date." The matter was held in abeyance pending efforts to resolve the matter. On April 25, 2002, union staff representative Thomas Larsen informed commission General Counsel Peter G. Davis that the union wished to have the matter assigned to a commission hearing examiner for

purposes of scheduling a hearing. On May 24, 2002, the commission appointed Stuart Levitan, a member of its staff, to serve as Examiner with authority to make and issue findings of fact, conclusions of law and an order. On July 18, 2002, hearing in the matter was held before Examiner Levitan, at which time county corporation counsel William E. Morgan raised a jurisdictional issue, namely that the dispute should be deferred to grievance arbitration. The examiner denied the motion to dismiss without hearing. A stenographic transcript of the proceeding was made available to the parties by July 31. The parties submitted written arguments by August 28, 2002, and reply briefs by September 18, 2002. On November 25, 2002, in response to an inquiry from the Examiner, the respondent's counsel submitted a statement regarding the respondent's position on the availability of grievance arbitration. On February 4, 2003, the union filed a written response to a further inquiry from the Examiner as to its position on the nature of the parties' relationship after December 31, 1998. The Examiner now and hereby issues the following

FINDINGS OF FACT

1. Pleasant View Employees Union Local 1162, AFSCME, AFL-CIO, "the union," is a labor organization with offices at 1734 Arrowhead Drive, Beloit, Wisconsin.

2. Green County, "the county," is a municipal employer with offices at 1016 – 6th Avenue, Monroe, Wisconsin. Among its other general government activities, the county owns, maintains and operates the Pleasant Valley Nursing Home. The licensure of the home requires round-the-clock assignment of certified nursing assistants, among other personnel. The state investigates annually to determine the home's compliance with minimum staffing requirements, where failure to comply exposes the county to civil fines and penalties.

3. From January 1, 1997 to December 31, 1998, the union and the county were parties to a collective bargaining agreement which recognized the union as the exclusive representative of a bargaining unit described as "all employees of the Green County Pleasant View Nursing Home, excluding supervisory, confidential, craft and professional employees...," and including certified nursing assistants ("CNA's") and ward clerks. The agreement provides that "any dispute or misunderstanding relative to the provisions" of the agreement may be submitted to a grievance procedure which includes final and binding arbitration. That agreement also defined as a Management Right "the right to decide the work to be done, and the location of the work," while providing that "(r)easonableness of management's decisions are subject to grievance procedure." The agreement also stated that the provisions of the article on Management Rights "shall not be used for the purpose of undermining the Union or discriminating against any of its members." The agreement also provides as follows:

> 30.01 THIS AGREEMENT shall go into effect January 1, 1997, and continue until December 31, 1998, and shall be considered automatically renewed from year-to-year thereafter, unless prior to July 1, 1998, either party shall serve written notice upon the other that it desires to renegotiate, revise or modify this Agreement. In the event such notice is served, the parties shall operate temporarily under the terms and provisions of this contract until a new contract is entered into.
>
> Nothing in this section or this Agreement prohibits the Employer from implementing its proposals or parts thereof if such implementation is otherwise lawful.

4. Donna Mackesey began work as a ward clerk for the county's Pleasant Valley nursing home in 1991, at a time when the scheduling function was being performed by the non-unit assistant director of nursing pursuant to that supervisory employee's job description. Mackesey's general job description was to perform clerical and other support duties related to nursing services under the direction and supervision of a registered nurse or licensed practical nurse. The scheduling duties range from processing requests and notices of leaves to assigning particular staff to the various nursing home units. Prior to the assistant director of nursing assuming the scheduling function, the director of nursing had performed that task. In about August 1993, after some separate personnel transactions and during a period when the nursing home was experiencing a nursing shortage, Mackesey assumed the scheduling function except for the night shift, which remained, and remains, scheduled by the nurse supervisor. At that time there were two other ward clerks, one primarily concerned with ordering and stocking supplies, the other primarily responsible for handling physician's orders and lab tests. Mackesey's position description, which had not included scheduling duties, was not amended either contemporaneously or upon a 1995 restatement. In the early spring of 2000, in anticipation of the retirement of the lab test ward clerk, Mackesey indicated her interest in taking over those responsibilities but without the scheduling duties. The employer reassigned Mackesey to the lab work ward clerk position and, in April 2000 temporarily assigned a certified nurse's assistant who was then on light duty to perform the scheduling duties. The scheduling duties occupy about two-to-three hours of a ward clerk's time, or about one-third a full-time position. At that time, the employer decided to return the scheduling duties to a non-unit nursing position, either a staff nurse or nursing supervisor. 1/ Subsequently, Stoor added the scheduling responsibilities to a staff nurse who is also responsible for doing certain patient assessments. The assessments, which require a nursing degree, do not by themselves account for a full-time nursing position. Having a registered nurse perform the scheduling function results in the county paying more for that job duty than it did when Mackesey performed the duties, and more than it would if a ward clerk were to perform them again. In seeking to fill the ward clerk position Mackesey vacated when she assumed her new assignment, Stoor on

April 6, 2000 posted a job opening notice for a full-time ward clerk. Three members of the bargaining unit signed the posting, but were all deemed to be unqualified because they lacked the necessary health unit coordinator certification the position required. There were no further applicants from the bargaining unit.

1/ While it is presumed the nurse supervisor is outside any bargaining unit, the record is silent on whether the staff nurse position is covered by a collective bargaining agreement.

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5. On May 16, 2000, County Corporation Counsel William E. Morgan wrote to Council 40 Staff Representative Thomas Larsen as follows:

> You had asked me to check into an issue regarding the unit clerk and some job duties being assigned to an RN. I have spoken with Dan Stoor and, as I understand it, this is the scenario. Apparently, historically we have had three ward clerks who, over time, have become somewhat specialized in their job duties, one being in charge of ordering supplies, one in charge of scheduling, etc. As you had indicated, the position became available and was posted but not filled. Then, apparently another of the ward clerks, Donna, indicated that she would take over the job duties of the vacant spot if she did not have to continue doing the scheduling of CNA's. Since scheduling was not part of the job description of a ward clerk, and is in essence a management type of function, in as much as it entails approving vacation request, etc., the decision was made to add those job duties to a currently vacant staff nurse position. In talking with Mr. Stoor, it is my understanding that those duties that would perhaps comprise three hours out of an eight hour day. In any event, the position remains unfilled at this point. That leaves us with two full-time ward clerks, one unfilled ward clerk position and one unfilled staff nurse position with new job duties managerial in nature.
>
> It would be our intention to fill the staff nurse position at the earliest as possible, and to fill the ward clerk position as our census rises. Hopefully our census will rise and we will be able to fully staff our CNA's, which would justify filling the ward clerk position.
>
> If you should have any further questions or concerns regarding this, please feel free to contact me.

6. During the period in which Mackesey performed the scheduling duties, the union filed a grievance alleging that she had been discriminating against certain unit members in her scheduling. As remedy, the union sought:

> Management to monitor more closely on her scheduling to make sure that it is done fairly and to enforce that Donna is just a union member, + to see that she does not overstep her boundaries.

7. At hearing on the complaint, county corporation counsel William E. Morgan stated that it was "inappropriate" for the commission to assert jurisdiction herein because "this matter is subject to the binding arbitration of the contract." On November 19, 2002 I wrote to inquire of Mr. Morgan whether the county was willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator. On November 25, Mr. Morgan responded as follows:

> Thank you for your inquiry with regard to the above-entitled matter. My position at that time, as well as now, is that the issues raised by the Union were subject to the grievance procedures established in the agreement between the parties. However, while I frequently do waive technical issues such as time limits, I generally only do so when I have discussed it in advance and it is for the purpose of trying to resolve the matter without having the necessity of going through the full grievance procedure. In this case, the issue was raised by the Union during negotiations and I responded by offering to discuss it further. When they failed to do that, I thought the matter was ended. Certainly, any time limit for filing a grievance has long since passed. Unless Mr. Larsen can convince me that perhaps the time limits were somehow tolled, I do not believe it appropriate to waive them.
>
> If you wish this matter to be referred to the grievance procedure, I have no objection. However, I will undoubtedly raise the issues of time limits at that time.

8. On January 28, 2003, I wrote to Mr. Larsen to request clarification on the union's position on the following question: "Were the parties in a hiatus period after December 31, 1998, or were the terms of the contract still in force pursuant to Section 30.01 of that agreement?" On February 4, 2003, Mr. Larsen responded as follows:

This matter concerns the "Complaint" of the Union that Green County failed to bargain in good faith by transferring bargaining unit work to an employee outside of the bargaining unit. The Complaint does not raise an issue of a violation of the collective bargaining agreement.

Section 30.01 of the collective bargaining agreement does provide for the parties to continue to "operate temporarily under the terms and provisions of this contract." The Employer has not sought to have the matter deferred to arbitration, but is stating that the Commission does not have jurisdiction to hear the case. Further, they do not declare if they would waive a timeliness argument if this matter were so deferred.

It is our position that the Commission must resolve this matter on its merits to determine if the statutory provisions of Sec. 111.70 have been violated. While the Commission could defer to arbitration a complaint of prohibited practice, failure to initially proceed to arbitration does not bar the Union's request for statutory relief.

9. The county's procedural defense of timeliness makes it speculative that submission of a grievance to arbitration would result in an award which would fully resolve the union's complaint as to an alleged violation of Secs. 111.70(3)(a)1 and 4, Stats.

10. At all times material herein, the parties were subject to the terms and provisions of a collective bargaining agreement which included among the rights reserved to the county the "right to decide the work to be done, and the location of the work."

On the basis of the above and foregoing Findings of Fact, the examiner makes and issues the following

CONCLUSIONS OF LAW

1. Because it is speculative that submission of the grievance to arbitration would result in an award which would fully resolve Complainant Union's Sec. 111.70(3)(a)4, Stats. claim, it is not appropriate for the Commission to defer to the parties' contractual grievance arbitration procedure for resolution of the issues of contractual construction and interpretation related to that claimed violation of Sec. 111.70(3)(a)4, Stats.

2. Because the subject of assignment of work is addressed in the parties' collective bargaining agreement, thereby relieving the parties of any statutory obligation to bargain over such topic, Green County did not commit a prohibited practice within the meaning of

Sec. 111.70(3)(a) 4 or 1, Wis. Stats. by its transference of scheduling duties to a non-bargaining unit position.

On the basis of the above and foregoing conclusion of law, the examiner makes and issues the following

ORDER

That the complaint filed herein is denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

Green County (Pleasant View Nursing Home)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Labor Organization

In support of its position that the complaint should be sustained, the labor organization asserts and avers as follows:

> The employer improperly transferred the duties of scheduling from a position represented by the union to a position outside the bargaining unit. The respondent's answer admits to much of the underlying substance of the complaint, as does the evidence and testimony taken at hearing.
>
> While there is a history of having the scheduling performed by non-unit personnel it is also true that this responsibility had become a primary duty of the Ward Clerk position, such that it occupied the majority of the time of one of the three incumbents. The employer's decision to transfer this function to a registered nurse outside the bargaining unit had the effect of eroding the integrity of the bargaining unit.
>
> The employer unilaterally took this action without consultation or negotiation with the union. This reverses the applicable procedure, which makes it incumbent on the party seeking to make a change in the *status quo* to present that issue for negotiations.
>
> That the scheduling function is not included in the job description for the Ward Clerk represents the employer's failure to properly update the job description, since it is undisputed that a former incumbent Ward Clerk was indeed performing this function over a period of time that the job description was being updated.
>
> The recognition clause of the parties collective bargaining agreement makes the union the exclusive representative for all employees, excluding supervisory, confidential, casual and professional employees. So while the work of the

"scheduler" was transferred to a professional employee excluded from the bargaining unit, the work so transferred is not. It represents a direct attack on the integrity of the bargaining unit to reduce the number of bargaining unit positions and add those to a position outside the bargaining unit.

Accordingly, the commission should declare that the county has committed the prohibited practices alleged above and should order the county to cease and desist from further such violations. The commission should also order that the union be made whole financially for the loss of dues together with interest as provided by the commission rules.

The Municipal Employer

In support of its position that the complaint should be dismissed, the employer asserts and avers as follows:

The Commission should not assert jurisdiction in this matter because it was not first submitted to grievance arbitration, which is presumed to be the exclusive remedy for contract violations absent express language to the contrary.

Here, the collective bargaining agreement clearly states that the reasonableness of management's decisions are a proper subject of grievance arbitration. And contrary to the assertion of the union, a contract was in force at the time of the actions giving rise to the complaint. Since a contract was in force, the commission ought not assert jurisdiction and the complaint should be dismissed.

It is also surprising that the union raises this issue now when it failed to make use of bargaining to discuss the matter. It can hardly be said that the employer committed a prohibited practice when it clearly offered to discuss these matters. Again, this should cause the matter to be summarily dismissed.

Further, the employer did not commit a prohibited practice when it transferred the duties of scheduling CNA's from the vacant Ward Clerk position to a non-bargaining unit supervisory position. There is little disagreement between the parties on most of the factual issues; clearly, scheduling and assigning work is a management right reserved by the parties' collective bargaining agreement. The parties further agree that this scheduling has historically been done by managerial/supervisory personnel. At no time, with the exception of the immediate past incumbent, did any bargaining unit member perform these tasks on a regular and consistent basis.

The scheduling tasks were not actually transferred to a position within the bargaining unit, they were rather transferred to an individual who had great proficiency in the relevant tasks. When that individual chose no longer to do those duties, which had never been part of her formal job description, the employer acted reasonably and rationally in directing non-unit personnel to perform those duties.

The need and appropriateness for having these tasks handled by non-unit personnel is made all the more clear by the union's earlier grievance regarding Ms. Mackesey's performance.

Accordingly, the commission should either decline to exercise jurisdiction or else determine there has been no violation.

The Labor Organizations' Reply

The union waived its right to file a reply brief.

The Municipal Employer's Reply

In its reply, the employer further posits as follows:

Contrary to the union's assertions, the employer did offer to negotiate and discuss its actions in this regard with the union. Further, the employer did in fact post the position but no one qualified to take it signed the posting. None of these facts have been disputed or in any way challenged by the union; for these reasons alone, the complaint should be dismissed.

Further, it is difficult to understand how the employer could have committed a prohibited practice when it did in fact offer to bargain. Moreover, the original transfer of these duties was not a transfer to duties to the bargaining unit, but rather a transfer of duties to a particular individual. That individual later chose no longer to perform the duties, and, as it was not part of the position description nor in fact something a bargaining unit member should be doing, the county reassigned those duties. The union errs in stating that decision-making remained with the administration, when it in fact was performed by Mackesey. That this gave rise to conflicts is highlighted most clearly by the grievance the union filed against Ms. Mackesey for her job performance. It is because of conflicts like those that management chose to exercise its right to assign the duties to a supervisory employee. It was certainly not done to dilute the bargaining unit.

As this matter was not submitted for arbitration and because the county did offer to negotiate the change during a period of ongoing negotiations, the complaint should be dismissed.

DISCUSSION

This case involves two levels of analysis, jurisdictional and substantive. The union prevails against the employer's motion for deferral to arbitration, but is ultimately unable to meet its burden of proof 2/ on the merits. Accordingly, I have dismissed the complaint.

2/ Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Historically, the scheduling duties at Pleasant Valley were always performed by a high-ranking non-unit employee, either the director or assistant director of nursing. There came a time in the early 1990's when a nursing shortage and the particular personal skills of an incumbent ward clerk combined to occasion the reassignment of those some of those duties (two out of three shifts) to a particular ward clerk. Throughout, however, scheduling duties on the third shift were borne by a non-unit third-shift nurse supervisor.

Subsequently, that incumbent wished to surrender those duties and assume another ward clerk position. After temporarily assigning the scheduling tasks to a certified nurse's assistant, the county returned the duties to a nursing position outside the bargaining unit. By assigning the scheduling duties to a nurse, the county paid substantially more to have these duties performed than it would have had it continued to have the duties performed by a ward clerk represented by the union.

At hearing, the employer raised a jurisdictional challenge to the proceeding, asserting that the complaint were more appropriately taken to grievance arbitration. The union protested as untimely such an argument being raised for the first time at hearing.

I agree with the union that there is nothing in the employer's answer to indicate it would be challenging the very existence of this proceeding. But while it is certainly bad form to wait until hearing to do so, I do not find this flaw fatal – especially since I told the county it was "certainly free to raise a jurisdictional issue in subsequent briefs." Given the historic

laxity of Commission procedure, and the current transitional state our administrative rules are in, I conclude it is appropriate to give the employer's deferral argument greater consideration that I gave when surprised with the motion at hearing.

The Commission has "long held that it will defer to the contract grievance arbitration forum appropriate cases in which the Respondent objects to the Commission exercise of jurisdiction in the matter." BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83); MENOMONIE SCHOOLS, DEC. NO. 16724-B (WERC, 1/81) at 5-6; MILWAUKEE SCHOOLS, DEC. NO. 11330-B (WERC, 6/73) at 17.

However, if the Respondent raises a procedural defense before the arbitrator, such as untimely grievance filing, the merits of the dispute would remain unresolved and subject to subsequent Commission review of the Examiner's decision on the merits. For the Commission's discretionary decision to defer -- for probable resolution via contractual procedures -- alleged non-contractual violations of the Statutes it enforces ought not and does not preclude the Commission from fully adjudicating such claims if they are not resolved on the merits in a fair and timely fashion and in a manner not repugnant to the Act. MILWAUKEE ELKS, 7753 (WERC, 10/66); MILWAUKEE SCHOOLS, DEC. NO. 10663-A (WERC, 3/72); MILWAUKEE SCHOOLS, DEC. NO. 11330-B.

As rooted in SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94); *aff'd* 197 WIS.2D 46 (Ct. App., 1995), and re-stated in CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, ET. AL., DEC. NO. 29671-A (8/99), the Commission's criteria for deferral to arbitration are:

(1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;

(2) The collective bargaining agreement must clearly address itself to the dispute; and

(3) The dispute must not involve important issues of law or policy.

As the Commission explained in CADOTT COMMUNITY, I have the statutory jurisdiction and obligation to decide Sec. 111.70(3)(a)4 complaints that employer conduct during a contract breached the employer's duty to bargain. When an employer defends against such allegations by alleging that existing contractual provisions establish that it has met its duty to bargain, interpretation of said contract provisions has the potential to resolve the merits of the refusal to bargain complaint. Thus, where grievance arbitration is available to interpret the critical contract provisions and it is otherwise appropriate, an examiner should defer the dispute to the

parties' contractual dispute resolution mechanism. However, consistent with our overriding statutory jurisdiction and obligation, even where deferral is appropriate, the Commission retains jurisdiction to ensure that the merits of the statutory claim can be resolved if deferral does not produce a fair and timely resolution which is consistent with the Municipal Employment Relations Act.

Thus, it is the interpretation of the substantive contract provisions by a grievance arbitrator which gives deferral its utility. As the CADOTT COMMUNITY Commission stated:

> Absent such an interpretation, the merits of the employer's defense to the refusal to bargain complaint remain unresolved. Deferral is of no value unless interpretation of the substantive provisions occurs. Thus, we will not defer where, as here, the procedural defense of timeliness makes it speculative that the interpretation of the holiday and any other relevant contractual clauses will occur. DEC. NO. 27776-C, at 10-11.

Here, because the County declined to waive its timeliness defense, Commission case law renders deferral inappropriate.

I turn, therefore, to consideration of the complaint on its merits.

Refusal to Bargain

Section 111.70(3)(a)4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. . . .

A violation of Sec. 111.70(3)(a)4, Stats., results in a derivative violation of Sec. 111.70(3)(a)1, Stats.

Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the bargaining representative of its employees with respect to mandatory subjects of bargaining. Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which

"primarily relate" to the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 Wis.2d 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 Wis.2d 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 Wis.2D 43 (1976).

A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82). As Examiner Raleigh Jones stated in ROCK COUNTY, DEC. NO. 29970-A (1/01):

> . . . an employer may not normally make a unilateral change during the term of a contract to a mandatory subject of bargaining without first bargaining on the proposed change with the collective bargaining representative. 2/ Absent a valid defense then, a unilateral change to a mandatory subject of bargaining is a *per se* violation of the MERA duty to bargain. 3/ Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 4/ The duty to bargain incorporates a duty to maintain the *status quo* with regard to most mandatory subjects of bargaining even after the collective bargaining agreement has expired, unless the duty to bargain has been discharged by negotiating to the point of impasse. 5/

2/ CITY OF MADISON, DEC. NO. 15095 (WERC, 12/76) at 18 citing MADISON JT. SCHOOL DISTRICT NO. 8, DEC. NO. 12610 (WERC, 4/74); CITY OF OAK CREEK, DEC. NO. 12105-A, B (WERC, 7/74); and CITY OF MENOMONIE, DEC. NO. 12564-A, B (WERC, 10/74).

3/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85).

4/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) at 12 and GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/94) at 18-19.

5/ GREENFIELD SCHOOL DISTRICT, DEC. NO. 14026-B (WERC, 1977).

Thus, there are three issues involved in this analysis – was the subject at hand a mandatory subject of bargaining, and if so, was it either covered by the agreement or otherwise explicitly waived by the union. In order for the union to prevail, the answers must be yes, no and no, respectively.

At the outset, I believe that it is to the employer's legal benefit that it did not initiate the transfer of the scheduling function, but only responded after Mackesey decided to drop the duties when posting into the lab tech ward clerk position. Had the county unilaterally and arbitrarily taken the duties away from an existing incumbent, the union would have a more persuasive argument. But that would be a different case. The case before me has the county allowing Mackesey to drop the duties, then assigning them temporarily to a ward clerk on light duty. It was only then that the employer determined to return the scheduling function to a staff or supervisor nurse.

It was Mackesey who brought the scheduling assignment into the unit in 1993, and Mackesey who put the duty back into play by transferring positions in 2000. When she did so, the county decided to make an independent evaluation of its proper placement – and thus began this controversy.

The employer asserts that the union falls on the first standard, in that "the Union recognized that a transfer of supervisory-type duties from a unit member to a non-unit member is, at best, a permissive subject of bargaining." Without delving too deeply into what the union knew or believed, I do note that nowhere in its brief does the union maintain that the assignment of duties to one particular employee or another is indeed a mandatory subject of bargaining.

Indeed, commission case law may well indicate that the re-assignment of scheduling duties from a ward clerk to a nurse is a permissive subject of bargaining, in that the duties could fairly be within the normal duties of either position. As the commission explained in SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, DEC. NO. 17302 (WERC, 5/79):

> . . . if a particular duty is fairly within the scope of responsibilities applicable to the kind of work performed by the employees involved, the decision to assign such work to such employees is a permissive subject of bargaining. Only when the duties involved are not fairly within that scope does the matter of whether the employees may be assigned such work become a mandatory subject of bargaining.

Although the union is here contesting not the assignment of duties *to* one of its members (as in the MILWAUKEE SEWERAGE case), but rather the re-assignment of duties *from* one of its members, the teaching of this case remains substantially on point – the decision to assign work to employees for whom such work is fairly within their scope of responsibilities is a permissive subject of bargaining.

The duties of scheduling certified nursing aides in a public health care facility certainly appear to be "fairly within the scope" of responsibilities of a position outside this bargaining unit, as established by the parties' actual practice. The director and assistant director of nursing both did the duties previously, and a nurse supervisor has done them throughout for the third shift. Mackesey is the only unit employee to ever have this duty as a permanent assignment.

In claiming that the scheduling function is a duty exclusively for unit personnel, the union must also find awkward its earlier grievance that Mackesey was acting too much like the employer's agent. Certainly, the fact that the union filed a grievance over the enforcement of scheduling rules' would seem to indicate that it could be "fairly within the scope" of a non-unit position to hold these duties.

Assuming, however, for the sake of a fuller discussion that the underlying issue is a mandatory subject of bargaining, I turn now to the question of whether the subject is covered by the collective bargaining agreement.

The Commission's standard of whether a subject is covered by the collective bargaining agreement is fairly easily met.

In JANESVILLE SCHOOLS DEC. NO. 15590-A (DAVIS, 1/78) aff'd by operation of law (WERC, 2/78) a dispute arose during the contract as to whether the employer was obligated to bargain over the right of an employee to accrued vacation benefits upon termination.

Although the record clearly indicated that the parties had never specifically discussed that subject, they had bargained a vacation clause which, in conjunction with other possibly relevant contractual provisions, defined an employee's rights or lack thereof to vacation benefits. Finding that the "subject of the vacation rights of terminating employees is in fact embodied in the existing bargaining agreement," the examiner, and by operation of law the commission, concluded that Respondents did not have a duty to bargain with respect thereto.

In CADOTT COMMUNITY SCHOOLS, *supra*, the employer deducted sick leave and unpaid medical leave instead of paying holiday pay for employees who were sick on holidays as identified in the collective bargaining agreement. The contract provided for the existence of holiday pay on certain named holidays, but was silent on such eligibility issues as this. The examiner, finding that the parties had "clearly negotiated over the subject of holiday pay," dismissed the union's duty to bargain complaint because "holiday pay eligibility ... is already addressed" in the agreement "and contractual waiver applies." DEC. NO. 27775-B (Schiavoni, 1/94).

In affirming the examiner, the commission readily agreed that employee eligibility for holiday pay was a matter already covered by the contract, by virtue of the provision naming Memorial Day, Thanksgiving and Labor Day as "paid holidays in the school calendar." Explicitly applying JANESVILLE, the commission concluded that "(a)lthough the parties did not specifically discuss the eligibility issue at the heart of the dispute, they do have a holiday pay provision. CADOTT COMMUNITY, DEC. No. 27775-C (WERC, 6/94). That provision, when

read in conjunction with the rest of the contract, defines employees' holiday pay rights." The CADOTT COMMUNITY commission was straightforward that this conclusion "ends the inquiry we need to make to resolve the duty to bargain issue. The parties have bargained on holiday pay and are not obligated to bargain further on the issue. The scope of the parties' rights under their bargain need not be defined here and are appropriately left to the grievance arbitration process." DEC. NO. 27775-C at 12.

On appeal, Chippewa Circuit Judge Roderick Cameron affirmed the commission decision. The court of appeals did likewise, explicitly endorsing the commission's interpretation and application of JANESVILLE. CADOTT EDUCATION ASSOCIATION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 197 WIS. 2D 46 (1995), DEC. NO. 27775-E.

In the case before me, the collective bargaining agreement recognizes the county's "right to decide the work to be done, and the location of the work." That same paragraph on management rights also establishes the standard for such decisions – their "reasonableness" – and the forum for challenges, namely grievance arbitration.

That is, while the collective bargaining agreement lacks provisions regulating the preparation of position descriptions, the agreement does address the basic topic of assignment of duties and establishes it as a management right. Because the parties bargained on assignment of duties, this ends the inquiry I need to make to resolve the duty to bargain issue. The parties are not obligated to bargain further on this issue at this time.

Accordingly, I have dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 4thday of April, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

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