BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
RICHLAND COUNTY (PINE VALLEY MANOR)	Case 72 No. 42121 MA-5574
and	
PINE VALLEY MANOR EMPLOYEES UNION LOCAL 3363, AFSCME, AFL-CIO	

Appearances:

Mr. Benjamin Southwick, Corporation Counsel, Richland County Courthouse, Richland Center, Wisconsin 53581, appearing on behalf of the County.

Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of the Union.

ARBITRATION AWARD

Richland County (Pine Valley Manor), hereinafter referred to as the County, and Pine Valley Manor Employees Union Local 3363, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission, hereinafter the Commission, to designate a member of its staff to hear and determine the instant grievance. The Commission designated Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on June 29, 1989, in Richland Center, Wisconsin. The parties did not file post-hearing briefs.

STATEMENT OF THE ISSUE:

The parties have stipulated to the following statement of the issue:

> Did the County violate the collective bargaining agreement when it modified the hours of work of Alice Nicks on seven days in January and February, 1989?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

Article 4 - Management Rights

> 4.01 The management of Richland County and the Pine Valley Manor and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, promote, demote, discharge or otherwise discipline, and to layoff employees. Further, the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify operational methods or controls, and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement.

* * *

Article II - Hours of Work

> 11.01 Work Day: The normal work day shall consist of one (1) consecutive eight and one-quarter (8:15) hours shift except where noted in Section 11.03 below, including a twenty (20) minute rest period scheduled by supervision, and a one-half (1/2) hour

unpaid meal period. Employees working on a shift other than eight and one-quarter (8:15) hours, as noted in Section 11.03 below, shall receive meal and break periods pursuant to the current practice.

11.02 Work Week: The normal work week for full-time employees shall consist of at least nine (9) work days in a fourteen (14) calendar day period, except the present kitchen cycle.

11.03 Schedules of work shall be posted in advance. The shift schedule system will be maintained, except that upon a determination by the Administrator that a change in the schedules and hours of work is necessary, and, after consultation with the employees and Union regarding said change, the Administrator shall have the prerogative to initiate modifications in schedules and hours of work upon sixty (60) days notice to the employees and the Union. The current shift schedule is as follows:

A)	Nursing:	6:00 a.m. to 2:15 p.m. 2:00 p.m. to 10:15 p.m. 10 p.m. to 6:15 a.m.
B)	Dietary:	4:45 a.m. to 1:00 p.m. 4:30 a.m. to 12:45 p.m. 5:00 a.m. to 1:15 p.m. 5:30 a.m. to 9:30 a.m. 9:15 a.m. to 5:30 p.m. 10:30 a.m. to 6:45 p.m. 2:45 p.m. to 6:45 p.m.
C)	Housekeeping:	7:45 a.m. to 3:00 p.m. 7:45 a.m. to 4:00 p.m.
D)	Maintenance:	7:45 a.m. to 4:00 p.m. 3:45 p.m. to Midnight
E)	Ward Clerk:	8:00 a.m. to 4:15 p.m.
F)	Laundry:	5:45 a.m. to 2:00 p.m. 6:45 a.m. to 2:00 p.m. 7:45 a.m. to 4:00 p.m. 7:45 a.m. to 3:00 p.m. 5:45 a.m. to 1:00 p.m.
G)	Activities:	7:45 a.m. to 4:00 p.m.
H)	Switchboard Operator:	7:45 a.m. to 4:00 p.m. 8:00 a.m. to 4:15 p.m.

11.04 Employees will be paid time and one-half for all hours worked in excess of eight (8) hours per day or eighty (80) hours in a fourteen day period.

11.05 Employees called to work outside and not consecutive with their assigned shift will be given a minimum of two (2) hours of straight time pay, or pay at the applicable rate for time worked, whichever is greater.

BACKGROUND:

Alice Nicks, hereinafter the Grievant, is a Food Service Worker II and is employed by the County at Pine Valley Manor, which is a County-owned nursing home. The Grievant normally works four days on and two days off. The Grievant's normal work shift is from 4:45 a.m. to 1:00 p.m. At 8:30 a.m. on January 23, 1989, the County was informed that Joan Carley, a Cook I, was not available for work due to a wrist fracture. The County was further informed that Carley would not be available for work for some indefinite period of time.

On January 23, 1989, Carley was scheduled to work from 10:00 a.m. to 6:15 p.m. Carley's regular work schedule is four days on and two days off. On the first two days of Carley's regular work schedule, her normal shift is from 10:00 a.m. to 6:15 p.m. On the third and fourth days of her regular work schedule, Carley's normal work shift is 4:30 a.m. to 12:45 p.m.

On January 23, 1989, the Grievant's supervisor, Barbara Detra, asked the Grievant to work Carley's normal work hours in addition to the Grievant's normal work hours. The Grievant declined to work Carley's hours, but did work

her own regularly scheduled shift. Carley's normal work shift was worked by Joanne Richter, a Food Service I employe, who volunteered to perform the work.

On January 24, 1989, Detra asked Nicks to work Carley's normal shift on January 28 and January 29, 1989 in lieu of the Grievant's own regularly scheduled shift. On that date, the Grievant was told that if she did not work Carley's shift, the Grievant would be subject to discipline on the grounds of insubordination. The Grievant did work Carley's normal work shift on January 28 and January 29, 1989 in lieu of the Grievant's normal work hours.

Pursuant to the request of the County, the Grievant also work Carley's 10:00 a.m. to 6:15 p.m. shift on February 3, 4, 10, 16, and 28, 1989. On each date, the Grievant worked Carley's normal shift in lieu of the Grievant's normal work shift. At no time has the County held the Grievant to be insubordinate and the Grievant has worked the hours she has been directed to work.

All of the days that the Grievant worked Carley's normal work shift, were days that the Grievant would have normally worked. On days that the Grievant worked Carley's shift, the Grievant did not work her regular shift. On or about February 1, 1989, a grievance was filed alleging that the County violated Section 11.01-11.03 of the collective bargaining agreement when it modified the Grievant's hours of work without providing 60 days notice. The grievance was denied at all steps of the grievance arbitration and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES:

Union:

The clear and unambiguous language of Article 11.03 requires the Employer to provide sixty (60) days notice prior to changing any hours of work, or the work schedules. There is no other contract language which supersedes or contradicts this contract language.

The Employer has never forced an employe to work outside of the employe's regular work hours. Any deviation from the employe's work hours has been by mutual consent of the employer and the affected employe. Prior to this incident, the Employer and the Union worked cooperatively to resolve a change which involved less than sixty (60) days notice.

An employe may volunteer to work a changed schedule, but cannot be required to work a changed schedule. In the present case, the Grievant agreed to work the changed hours only after being threatened with disciplinary action. In the past, an employe had the right to refuse a request to work a changed schedule. Under such circumstances, the employer would then ask the next person in seniority to work the hours.

Article 11.03 does not express, or imply, that there is any exception to the sixty day notice requirement. The grievance must be sustained. The Employer should discontinue its illegal action and make the Grievant whole.

Employer:

The language of Article 11.03 addresses permanent changes affecting departments and groups of employes. Article 4.01 recognizes that the Employer has the right to make temporary assignments to provide employe coverage. The Food Service Worker II job description recognizes that an employe in that classification will fill in for cooks on a temporary basis.

The Employer must have cooks to provide meals to residents of the Home. The Carley situation was an emergency situation. The Employer needed a qualified employe to work on a short-term basis. The Grievant was qualified for the work. The Employer did not violate the collective bargaining agreement by requiring the Grievant to work Carley's hours.

DISCUSSION:

On seven days in January and February of 1989, the Grievant, a Food Service Worker II, was assigned to work as a Cook to replace a Cook who was unable to work due to a wrist fracture. On these seven days, the Grievant worked the Cook's normal shift, i.e., either 10:00 a.m. to 6:15 p.m. or 4:30 a.m. to 12:45 p.m., in lieu of the Grievant's normal shift, i.e., 4:45 a.m. to 1:00 p.m. The Union, relying upon the language of Article 11, Sec. 11.03, maintains that the Employer was required to provide the Grievant with sixty days notice prior to involuntarily assigning the Grievant to work the Cook's shift. The Employer denies that Article 11, Sec. 11.03 is applicable, maintaining that the provision governs permanent changes, affecting departments and groups of employes.

The language relied upon by the Union is contained in Article 11, Sec. 11.03, and, in relevant part, states as follows:

> 11.03 Schedules of work shall be posted in advance. The shift schedule system will be maintained, except that upon a determination by the Administrator that a change in the schedules and hours of work is necessary, and, after consultation with the employees and Union regarding said change, the Administrator shall have the prerogative to initiate modifications in schedules and hours of work upon sixty (60) days notice to the employees and the Union. The current shift schedule is as follows:
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> * * *
>
> B) Dietary: 4:45 a.m. to 1:00 p.m.
> 4:30 a.m. to 12:45 p.m.
> 5:00 a.m. to 1:15 p.m.
> 5:30 a.m. to 9:30 a.m.
> 9:15 a.m. to 5:30 p.m.
> 10:30 a.m. to 6:45 p.m.
> 2:45 p.m. to 6:45 p.m.

The second sentence of Sec. 11.03 expressly addresses changes in "the schedules" and "hours of work". The preceding sentence references posted "schedules of work", while the succeeding sentence references "shift schedules"

and defines the hours of each shift in each department. It is plausible, therefore, that changes in "the schedules" could be a reference to either changes in posted work schedules or changes in the shift schedules. Given the parties' care to specifically define the shifts in each department, it is more likely that the term "the schedule" is a reference to changes in the schedule of shifts. That is, the provision is limiting the Employer's right to create any shifts not set forth in Sec. 11.03 and/or to alter the hours of the shifts set forth in Sec. 11.03. Having concluded that "the schedules" most reasonably refers to the shift schedules set forth in Sec. 11.03, then it must be further concluded that changes in "hours of work" refers to something other than the alteration of existing shifts, or the creation of new shifts. Given the reference in the first sentence to posted schedules of work, it is likely that "hours of work" refers to an employes scheduled hours of work.

While the language of Sec. 11.03 is not a model of clarity, the most reasonable construction of the language is not, as the Employer argues, that it governs changes affecting departments and groups of employes, but rather, that it governs changes in the shifts set forth in Sec. 11.03, as well as changes in the normal work hours of individual employes. However, given the ambiguity of the language of Sec. 11.03, it is reasonable to examine the evidence of prior practices to determine whether such evidence demonstrates that the parties interpreted Sec. 11.03 in a manner which is inconsistent with the construction reached herein.

The record contains evidence that on two occasions the Employer instituted changes which were recognized to be subject to the provisions of Sec. 11.03. The first of these occurred on November 28, 1986, when the Employer sent the following to the Union:

> This is to notify the union that I have determined it necessary to change the shift schedule for the house-keeping department.
>
> The result of this change will mean that one less house-keeper will be assigned on the day shift and the hours of work and schedule of one of the housekeepers will be changed. The new schedule for this housekeeper will be a Monday through Friday workweek, totaling 72 hours per pay period. The hours of work will be 2 p.m. to 10:15 p.m. two days per pay period and 2 p.m. to 9:15 p.m. eight days per pay period.
>
> The intent of this change is to provide better house-keeping coverage and thus improve the efficiency of the department. Please be informed that the change will become effective 60 days from receipt of this notice.
>
> Should there be questions regarding this change please contact me.

On September 21, 1987, the Employer provided the following notice to unit employes:

> SUBJECT: Shift and Meal Changes
>
> Starting on Wednesday, Sept. 23, 1987, the new shifts and meal changes will take effect.
>
> Meal Times
> Breakfast/Trayline will start at 6:45 a.m.
>
> Dinner/Trayline will start at 11:00 a.m.
>
> Supper/Trayline will start at 4:45 p.m.
>
> Carts are not be sent out before 7:00 a.m. for breakfast, 11:15 a.m. for dinner, and 5:00 for supper.
>
> Shift Changes
> 4:30 a.m. - 12:45 p.m./No Changes
> 4:45 a.m. - 1:00 p.m./No Changes
> 5:00 a.m. - 1:15 p.m./Changed to 4:45 a.m. - 1:00 p.m.
> 9:15 a.m. - 5:30 a.m./Changed to 10:00 a.m. - 6:15 p.m.
> 10:30 a.m. - 6:45 p.m./Changed to 11:15 a.m. - 7:30 p.m.
>
> Morning Shift's break and lunch will stay the same. Afternoon Shift's lunch will stay the same, break will be from 4:20 p.m. - 4:40 p.m.

> The responsibilities of the 10:30 shift between 10:30 - 11:00 will be done by the following: Afternoon cook and morning shift.
>
> The staff members who will be coming in at 11:15 a.m. will help with finishing the trayline.
>
> * This change is due to Federal and State Regulations, any questions, comments, or suggestions, speak to me or Mr. Pauls.

Prior to issuing the September 21, 1987 notice, the Employer sought and obtained the Union's consent to a waiver of the sixty day notice requirement of Sec. 11.03.

The notice of September 21, 1987 referenced a change in hours of existing shifts. However, the notice of November 28, 1986, referenced a change in "the hours of work and the schedule of one of the housekeepers". While two notices may not be sufficient to demonstrate a binding past practice, they support the undersigned's conclusion that the language of Sec. 11.03 governs not only changes in the shifts set forth in Sec. 11.03, but also changes in the normal work hours of employes. The evidence of past practice does not persuade the undersigned that the parties intended the language of Sec. 11.03 to be given any construction other than that which is warranted by the plain language of the provision. Under the plain language of Sec. 11.03, the consultation and notice requirement is applicable to changes in the shift schedules set forth in Sec. 11.03, as well as to changes in an individual employe's normal work hours.

As the Union argues, Sec. 11.03 does not expressly provide any exemption from the sixty day notice requirement. However, a contract provision does not exist in isolation and must be construed in a manner which is consistent with all of the contract provisions. Article 11.04 requires the payment of time and one-half for all hours worked in excess of eight (8) hours per day or eighty (80) hours in a fourteen (14) day period. Article 11.05 provides that employes called to work outside and not consecutive with their assigned shift will be given a minimum of two (2) hours of straight time pay, or pay at the applicable rate for time worked, whichever is greater. Neither provision requires a sixty day notice before the employe can work overtime or be called in to work. It is evident, therefore, that the parties did not intend the language of Sec. 11.03 to be a proscription against every change in employe work hours unaccompanied by a sixty day notice. 1/

Even absent language which implies that the parties recognized exceptions to the sixty day notice requirement, it is reasonable to imply such an exception in cases where an emergency, an Act of God, or conditions beyond the control of the Employer make it impossible to comply with the sixty day notice requirement. Further, to imply such an exception would be consistent with the Employer's Article 4 management rights to make "temporary assignments".

1/ Neither side argues and the record does not demonstrate that the change in the Grievant's work schedule was made pursuant to either Article 11.04 or 11.05.

As the Employer argues, its business operation required the presence of a Cook. The Cook's absence was due to an emergency beyond the control of the Employer, i.e., the Cook's fractured wrist, and it was not possible for the Employer to have provided the Grievant with a sixty day notice of intent to change the Grievant's work schedule. The Union does not argue, and the record does not demonstrate, that the Grievant could have performed the requisite Cook's duties on the Grievant's normal work shift. Under the circumstances presented herein, necessity relieved the Employer of any contractual obligation to provide the Grievant with a sixty day notice of an intent to change the Grievant's normal work schedule. 2/

With respect to the Dietary Department, the evidence establishes that employes have voluntarily agreed to work outside their normal shifts, but have not been required to do so. The record further establishes that, with respect to the Dietary Department, the Employer has not needed to involuntarily assign employes to work outside their normal work schedule because the Employer has always found an employe volunteer to perform any needed work. In seeking volunteers, the Employer has utilized the call-in list, marked at hearing as Employer Exhibit #3. There is, however, insufficient evidence concerning the use of the Dietary Department call-in procedure to persuade the undersigned that the call-in procedure was violated when the Employer assigned the Grievant, a Food Service Worker II, to work as a Cook. The record does not demonstrate that the Employer had any contractual obligation to assign an employe other than the Grievant to perform the Cook's duties.

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

AWARD

1. The County did not violate the collective bargaining agreement when it modified the hours of work of Alice Nicks on seven days in January and February, 1989.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 15th day of February, 1990.

By _____
Coleen A. Burns, Arbitrator

2/ The issue, which was stipulated to by the parties, addresses the change in the Grievant's work hours and does not raise an issue as to whether the Grievant was entitled to be paid at the Cook's rate of pay.