BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO	Case 285 No. 43912 MA-6105
and	
MILWAUKEE COUNTY	

Appearances:

Mr. Robert Russell, Field Representative, Wisconsin Federation of Nurses and Health Professionals, 7700 West Bluemound Road, Milwaukee, Wisconsin 53213, for the Union.

Mr. Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, 901 North Ninth Street, Room 303T, Milwaukee, Wisconsin 53233, for the County.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the County, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Milwaukee, Wisconsin, on November 21, 1990. There was no transcript. The parties filed briefs, the last of which was received January 14, 1991.

ISSUE

The parties stipulated to the following statement of the issue:

> Did the County violate the Collective Bargaining Agreement when it failed to replace a scheduled Registered Nurse with another Registered Nurse? If so, what is the appropriate remedy?

BACKGROUND

The Milwaukee County Mental Health Center, operated by the County, employs Registered Nurses and Medical Technologists who are members of the bargaining unit represented by the Union. On April 2, 1990, a Registered Nurse who was scheduled to work a PM shift on Unit 44D was unable to work. The County made no attempt to call-in a Registered Nurse, but rather, the absent nurse was replaced by an employe who was not a Registered Nurse and not a member of the bargaining unit. Registered Nurse Paul Wutt, a member of the bargaining unit, filed a grievance. He alleged that the use of a Licensed Practical Nurse or a Nurse's Aide violated the overtime provision of the parties' contract, and that he should have been called-in to fill the shift. That grievance is the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

> 1.05 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the workforce; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil services procedures and the terms of the Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are

conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Federation.

. . .

2.02 OVERTIME.

. . .

(4) Every reasonable effort shall be made to meet overtime needs on a voluntary basis. Such overtime will be offered to the most senior qualified employe on a rotating basis.

. . .

(10) Every reasonable effort will be made to replace scheduled employes unable to report for duty with employes of the same classification.

. . .

4.02 GRIEVANCE PROCEDURE.

. . .

(8) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware that a grievable event occured, (sic) whichever is later. . . .

POSITIONS OF THE PARTIES

A. The Union

The Union disputes the County's contention that the word "classification" refers to such titles as "RN I" and "RN II" and an RN I could be replaced only by an RN I and not an RN II. The Union discounts the County's arguments referring to bargaining history. It contends the Union proposal referenced in County Exhibit 10 referred to the issue of mandatory overtime, and not to the instant issue, similarly, it dismisses the reference to the Union's proposal during bargaining for the 1979-80 contract as devoid of facts and too unsubstantial to constitute any evidence sufficient to affect the interpretation of the final contract language. The Union argues its interpretation is supported by the County's past practice regarding this provision, and notes the County did not call the Director of Nursing to testify regarding the practice. The Union views the grievance of a different bargaining unit as irrelevant as are the earlier arbitration awards cited by the County. The Union also sees the County action as prohibited by Section 1.06 entitled: Work of the Bargaining Unit. The Union insists Wutt is the appropriate recipient of any remedy since no other bargaining unit member has grieved this event.

B. The County

The County contends it is the management's right to determine the staffing pattern in the first instance and when an employe's absence prevents that original pattern from being fulfilled, it is management's right to alter that pattern in the light of appropriate factors such as patient acuity and govern-ment regulations. It notes that the Union did not argue that the

ultimate staffing pattern on the night in question was inadequate or that there was an invasion of the bargaining unit by non-unit personnel. The County insists it cannot be compelled to schedule overtime and, for support, cites other arbitrators' awards.

Additionally the County maintains that even if the arbitrator should determine that a violation took place, Grievant Wutt would not have been the employe called because he was not next in line on the rotation of employes to be called for overtime.

DISCUSSION

At the outset, it is important to note what is not in dispute: the County insists it has the right to determine the staffing levels at the Mental Health Complex, and the Union does not contest the County's right to make those staffing decisions in the first instance.

What is in dispute, however, is the correct course of action when the original staffing pattern has been established and an employe scheduled for duty is unable to report for work. This dispute flows from differing theories as to which contract provision governs the situation. The Union contends the relevant provision is Section 2.02 (10) whereas the County insists it is Section 1.05. The Union believes Section 2.02 (10) obligates the County to replace a Registered Nurse who is scheduled but unable to report with a second Registered Nurse. On the other hand, the County believes Section 1.05 gives it the right to re-examine the workload at the time a scheduled employe is unable to report and if, in the light of such factors as patient acuity and government regulations, it deems it appropriate, fill the vacancy with a different category of employe such as a Licensed Practical Nurse or a Nurse's Aide.

Under facts that relate to specific contract provisions, those specific provisions govern general provisions. In the instant case, an employe who was scheduled for work was unable to report for duty, thereby bringing the situation within the explicit purview of Section 2.02 (10) which reads

> Every reasonable effort will be made to replace scheduled employes unable to report for duty with employes of the same classification. (emphasis added)

Therefore, Section 2.02 (10) prescribes the parties' obligations in the matter of this grievance.

In an alternative argument, the County contends that, even if Section 2.02 (10) governs, it does not require that an absent Registered Nurse must be replaced with another Registered Nurse. The County points to the requirement that the replacement be an employe of "the same classification" and insists that, correctly interpreted, this provision requires that the RN I who failed to report to work be replaced by another RN I, not by Grievant who was RN II.

Addressing this argument, the undersigned notes that the word "classification" is ambiguous in this provision, since it is not defined within the provision and both parties' understandings of the word are plausible: the Union's understanding that it refers to "Registered Nurse" as differentiated from such classifications as "Licensed Practical Nurse" and the County"s understanding that it refers to such classification as "RN I" as differentiated from "RN II."

Given such ambiguity, it is appropriate to look at the parties' past practice for guidance. Here the history does not support the County's position. The employe who was unable to report was an RN I, but the County did not make any effort to call an RN I. Since the County's own actions call into question the County's assertion regarding its understanding of the word "classification" in this provision, and since there was no other evidence the County followed this interpretation in earlier incidents, this arbitrator is not persuaded that the County held such an understanding. Obviously, it is unnecessary to pursue the analysis further to determine whether such an interpretation had been confirmed by the parties' mutual assent. I conclude that "classification" in this provision does not mean RN I as opposed to RN II. 1/

I find the alterative interpretation, that "classification" refers to

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1/ The undersigned reaches this conclusion notwithstanding Grievant's answer, on cross-examination that RN I and RN II are not the same classification. Grievant's answer to this abstract question does not indicate how the parties treated the word "classification" within the meaning of Section 2.02 (10). Other portions of grievant's testimony clearly indicate that the parties treated RN I and RN II as the same classification for purposes of applying this provision.

Registered Nurse in contrast to an employe of another category such as Licensed Practical Nurse or Nurses Aide, to be the more reasonable. Consequently, in the instant case, the County was obligated to make every reasonable effort to call in a Registered Nurse to replace the unreporting Registered Nurse.

This result is not affected by the arbitration awards cited by the County. Of the four awards submitted, none interprets the agreement to which the County and the Union are parties, and none interprets a provision similar to Section 2.02 (10) of the parties' agreement. Whereas the County asserts the awards stand for the proposition that the employer has the right to schedule employes in such a way as to avoid or minimize overtime, in fact, the lack of a provision parallel to 2.02 (10) in those disputes means that the arbitrator did not consider the impact of such a specific provision on the employer's general rights.

THE REMEDY

Although the parties agreed at the hearing that the appropriate remedy would be the pay for the shift in issue, they disagreed as to whether Grievant was the employe entitled to such a remedy. The County contends that the Grievant was not entitled to any remedy because he was not the next employe on the rotation list for overtime.

As of the day of the November 21, 1990 hearing, the 90 calendar day time limit set forth in Section 4.02 (8) for filing any grievance regarding an event occurring April 2, 1990 had expired. Consequently, no other employe could grieve this event and Grievant, who belongs to the class of Registered Nurses represented by the Bargaining Unit, and who was available for work that shift, is in the position of being the only person eligible to receive the remedy for the County's contract violation. This fact makes irrelevant the question regarding who would have been next on the overtime rotation list pursuant to Section 2.02 (4) and the remedy ordered herein is properly awarded to Grievant.

In the light of the record and the above discussion, the Arbitrator issues the following

AWARD

1. The County violated the Collective Bargaining Agreement when it failed to replace a scheduled Registered Nurse with another Registered Nurse.

2. The County shall make Grievant Paul Wutt whole for all wages and benefits lost as a result of not being called in to work on April 2, 1990.

Dated at Madison, Wisconsin this 20th day of June, 1991.

By _____
Jane B. Buffett, Arbitrator