BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
ST. CROIX COUNTY HEALTH CENTER EMPLOYEES, LOCAL 2721, AFSCME, COUNCIL 40, AFL-CIO	Case 109 No. 44713 MA-6394
and	
ST. CROIX COUNTY (HEALTH CARE CENTER)	

Appearances:
Ms. Margaret McCloskey, Staff Representative, AFSCME Council 40, AFL-CIO, on behalf of the St. Croix County Health Center Employees, Local 2721, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. William G. Thiel,

ARBITRATION AWARD

St. Croix County Health Center Employees, Local 2721, AFSCME, Council 40, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and St. Croix County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 15, 1991 in New Richmond, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by March 1, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE:

The parties were unable to agree on a statement of the issue and agreed that the Arbitrator will frame the issue to be decided:

The Union offers the following statement of the issues:

> 1. Did the Employer violate the Collective Bargaining Agreement by failing to post positions where hours had been increased? If so, what is the appropriate remedy? and
>
> 2. Did the Employer violate the Collective Bargaining Agreement by failing to confer with the Union over the addition of new hours to existing positions? If so, what is the appropriate remedy?

The County requests that the issue may be stated as follows:

> Whether or not the Employer violated the collective bargaining agreement when it assigned additional hours to certain Union employment positions without having first posted each such position so as to allow interested Union employees to elect to pursue the same? If so, what is the appropriate remedy?

The undersigned concludes that the Union's statement most accurately frames the issues to be decided.

CONTRACT PROVISIONS

The following provisions of the parties' 1989-90 Agreement are cited:

> ARTICLE 1 - RECOGNITION
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> SECTION 1. Recognition: The Employer recognizes the Union as the sole and exclusive bargaining agent for the purposes of establishing salaries, wage hours and other conditions of employment for:
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> Bargaining Unit - All regular full-time and regular part-time employees of the St. Croix County Health Center, excluding the Administrator, Assistant Administrator, professional, supervisory, confidential and temporary employees of St. Croix County. Temporary employees shall be defined as those employees hired for the express purpose of filling temporary vacancies, not to exceed one (1) year. This provision shall not include on-call employees. The Union shall receive verbal or written notification of all such employees hired.
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> SECTION 2. Management Rights: The County possesses the sole right to operate County government, and all management rights repose in it; subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to, the following:
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> c. to hire, promote, schedule and assign work;
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> . . .
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> f. to maintain efficiency of County operations;
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> . . .
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> i. to determine the kinds and amounts of service to be performed as parties to County government operation, and the number and kinds of positions and job classifications to perform such services;
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> . . .
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> k. to determine the methods, means and personnel by which County operations are to be conducted;
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> . . .
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> ARTICLE 4 - SENIORITY

. . .

SECTION 4. Lay-Off In the event it becomes necessary to lay off employees for any reason, employees shall be laid off in the inverse order of their seniority, by classification, provided that the employees retained have sufficient skill and ability to perform the work remaining. An employee being laid off under this Article, who possesses the qualification to perform work in a different classification, may displace the most junior employee in that classification. Preference for determination of qualifications, as indicated herein, shall be given to an employee who has previously worked in a given position within the Health Care Center/ classification since the employee's original date of hire at the Health Care Center. The County retains the sole right to determine the qualifications for each classification; such qualifications shall be uniformly applied, and commensurate with the duties of the position in question.

. . .

SECTION 6. Job Posting All new and vacated positions shall be posted at each applicable bulletin board, for a period of five (5) calendar days. Such posting shall state the job to be filled, the date the job is to be filled, qualifications for the job, the designated shift, rate of pay and rotation where it is applicable. Interested employees may apply for posted vacancies by notifying the Business Office, in writing, of their interest. Employees, however, will not be awarded a position in the same classification more than twice in a contract year. (Examples: attendant, maintenance, dietary positions; does not include LPN positions.)

SECTION 7. Filling of Vacancies Vacancies shall be awarded to the most senior applicant, providing qualifications to perform in accordance with the Employer's standards for the position are met. The County retains the sole right to determine qualifications for each classification; such classification shall be uniformly applied and commensurate with the duties of the position in question. . . .

SECTION 8. Retrocession Employees not able to satisfactorily perform the work on an awarded position shall be returned, by the County, to their former position, and former rate of pay, including applicable Steps. If a successful applicant is not satisfied with the new position, he/she may return to their former position, and former rate of pay, including applicable Steps, within ten (10) calendar days.

ARTICLE 5 - HOURS OF WORK - WORK WEEK - OVERTIME COMPENSATION

. . .

SECTION 4. Schedule The basic work schedule shall consist of fourteen (14) working days during twenty-one (21) calendar days. The present system for scheduling regularly scheduled employees, and their hours and shifts, shall continue for the life of this Agreement.

Changes in shifts, and hours of employment, shall be with reasonable notice, upon request. The Employer shall confer with authorized Union representatives regarding the need for, and the reasonableness of, such change. If possible, the conference shall be held before the change is made. If the Union is not satisfied with the explanation, it has the right to present the question of the reasonableness, or the need for the change as a grievance, under Article 2 of the Contract.

. . .

ARTICLE 6 - GENERAL PROVISIONS

SECTION 1. Work Rules The Employer may establish reasonable work rules. The Employer agrees to furnish each employee in the bargaining unit with a copy of work rules. New employees shall be provided with a copy of the rules at the time of hire.

Employees shall comply with all existing reasonable rules that are not in conflict with the terms of this Agreement; provided the rules are uniformly applied and uniformly enforced.

Any unresolved complaint as to the reasonableness of any new, or existing rule, or any complaint involving discrimination in the application of new, or existing rules, shall be resolved through the grievance procedure.

BACKGROUND

The County maintains and operates the St. Croix County Health Center facility in New Richmond, Wisconsin, which provided care for approximately 126 residents at the time of hearing. The Union is the recognized exclusive bargaining representative for the employes of the Health Center in the bargaining unit described in Article 1 - Recognition, Section 1, of the Agreement.

Between April and June of 1990 the management of the Health Center increased the hours in a total of seven part-time Nursing Attendant positions, four of which went to full-time, 1/ without posting these positions for

1/ The following reflects the changes in the positions:

61% to full-time
86% to full-time
15% to 20%
88% to full-time

bidding. When jobs are posted for bidding, the shift is noted on the "Notice of Job Vacancy" posting, as well as whether the position is full-time or part-time, and if it is part-time, what percentage of a full-time position it constitutes. The parties' Agreement also provides that employes employed 50% or more receive fringe benefits on a prorated basis. 2/

The Union filed grievances on the changes in April, May and June of 1990. 3/ In filing the grievance in April, the Union President, Nelson, and Vice President, Roettgers, had been approached by an employe who was upset that certain positions were not being posted. They then went to the Center's Administrator, Kuefler, who informed them that the positions had not yet been increased, but would be, and that it was a prerogative of management to do so on an as needed basis and that it had done so in the past.

The grievances were denied and the parties, unable to resolve their dispute, proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the County violated the parties' Agreement both by failing to post the positions in question and by not informing the Union of the intended changes. With regard to the latter, the Union asserts that Article 5, Section 4, paragraph 2, of the Agreement clearly states that the Union is to be informed of intended changes in hours of employment and the reasonableness and the need for such changes. It is asserted that the testimony of the Union President, Nelson, and the past Acting President, Roettgers, shows that this was not done.

As to the failure to post the positions, the Union notes that the Administrator stated at the grievance hearing that it was a management prerogative to increase hours. The Union contends that management right is restricted by Article 4, Seniority, and Article 5, Hours of Work - Work Week-Overtime Compensation, which state that changes in hours must be discussed with the Union and that seniority shall prevail in the awarding of new positions and the filling of vacancies, as long as the applicant is qualified. The Union takes issue with the County's view that the positions were not "new", but merely continuations of the existing positions. The Union cites the four job postings (Union Exhibit 1A-D) as typical job postings with each noting whether the position is full-time or part-time, and if part-time, they are further described in terms of the percentage of full-time equivalency. This is so that when an employes signs a posting, that employe is bidding for a position with a given percentage of full-time. The Union contends that when a full-time equivalency is changed, the job is changed and is no longer the job the individual employe bid. When the changes are an improvement in the position, such as the increase in hours, then seniority rights should prevail as set forth in Article 4. Seniority in job postings among part-time employes is extremely important at the Health Center, since pay and benefits are prorated on the basis of full-time equivalency in employment.

86% to 93%
80% to full-time
55% to 75%

2/ Article 8, Section 5.

3/ That part of the grievance dealing with LTE positions was dropped.

The Union also cites the following dictionary definition of the term "new" in support of its position:

> "Recently obtained or acquired; additional; recently arrived or established in a place, position, or relationship; and changed for the better."

It is asserted that those definitions all describe this situation, which establishes that the positions are in fact "new".

As to the instances relied upon by the County to establish a past practice of not posting such changes, the Union asserts that in one instance the County followed the contractual provisions for layoff and recall - where several positions had been previously reduced in hours according to departmental seniority in the office and then the cut hours were restored to the employes, and in the other instance the Union was consulted and agreed to temporary increases in hours without posting - positions that went from 80% to full-time temporarily in 1989 due to the possibility of the sale of the nursing home. The only other instance cited is the one that the Union did not become aware of until after the grievance had been filed - the position in the office. Hence, the instances cited by the County do not establish a past practice of permitting the County to ignore the Agreement.

In response to the testimony of the County's witness regarding the difficulties inherent in training transferred employes when jobs are posted, the Union asserts that regardless of the County's reasons for not posting the positions, it remains that the Agreement calls for those positions to be posted. The Union concludes that in failing to do so, the County violated both the letter and spirit of the Agreement. As a remedy, the Union asks that the County be ordered to post all such positions and to notify the Union of its intent to increase hours in positions and to discuss the need and reasonableness of such changes.

County

The County first takes the position that the language of Article 4, Section 6, of the Agreement pertaining to job posting has no bearing on the situation giving rise to the grievances. The examples of job postings offered by the Union each involved a position without an incumbent at the time of the posting, while the position changes in question pertained to existing positions with incumbents who desired to continue in the positions notwithstanding a change in their hours. The County contends that Article 4, Section 6, is clear and unambiguous that positions are subject to being posted only where there are "new" and "vacated" positions. A "new" position refers to one that has been recently created and has never yet been filled, and a "vacated" position refers to a position where the incumbent employe has left the position for whatever reason. Since the language of that provision is clear and unambiguous, resort to other sources for interpretation should not be applied. The County further asserts that management has the right to determine when a vacancy exists and whether and when it should be filled, and contends that neither occurred in the situations at hand. Citing a number of arbitration awards, the County also contends that arbitrators have recognized that changes in work schedules do not trigger posting provisions such as that found in Article 4, Section 6. The County concludes that neither of the circumstances requiring posting under the Agreement apply to the instant situations.

Next, the County cites its reserved management rights under Article 1, Section 2 of the Agreement, specifically, subsections e, f, i, and k. It is asserted that Kuefler acted within the scope of her responsibilities to take

all reasonable steps to provide qualified personnel to insure the health, safety and rights of the residents in assigning work and in determining the kinds and amounts of services to be provided through the Union positions. Kuefler testified that both an increase in resident population and an increase in the amount of care needed by the individual residents necessitated her action. She also testified that if the positions had been required to be posted, the Center would not have been able to meet the current demand for services, since filling a position by posting would have required between 15 days and three weeks to complete. It also could have created a domino affect of posting and bumping amongst the employes affected. It is asserted that such a process would have a negative impact on the provision of care to the residents. The County notes that it could have exercised its right to use temporary part-time or on-call employes, which would have taken bargaining unit work away from the represented employes, but avoided doing so by assigning the additional time to the positions in question. The County also asserts that it exercised its management rights by making minor adjustments in the hours of the positions, but did not create new or different job duties, nor did it change working conditions but for the increase in hours.

The County contends that it acted consistent with its responsibilities under Article 5, Section 4, of the Agreement regarding giving the Union notice of changes in shifts and hours of employment and conferring with the Union regarding the need for and the reasonableness for such changes. It asserts that as both Nelson and Roettgers testified on behalf of the Union, they did confer with Kuefler prior to the time the grievances were filed and that Kuefler acknowledged that management was going to increase the hours for the positions to meet the increased patient demand. The positions in question were increased in hours on or about April 30, 1990, the beginning of May and on or about June 11, 1990. Nelson testified she spoke with Kuefler in April and was advised that the practice would be engaged in on as needed basis as had been done in the past. As a result, the first grievance was filed. The County asserts that this buttresses the conclusion that the management/union conference took place and occurred prior to both the first grievance and any addition of hours to the positions. The County also asserts that it does not matter if it conferred with regard to all of the positions in the April discussion, since the relevant language of the Agreement states: "If possible, the conference shall be held before the change is made . . . . " The County concedes that the Union has the right to grieve the question of reasonableness or the need for the change, regardless of whether management confers with it. It asserts that has in effect transpired; however, the thrust of the Union's position appears to be that no change in hours for a given position may be ordered by management without posting the position. Assuming arguendo that management action can be thwarted on the basis that it is "unreasonable" or "unneeded", the Union presented no evidence on either of those grounds to refute the testimony of Kuefler and the Director of Nursing, Jurisch, to the effect that an increased resident population and an increased individual patient care needs combined to necessitate the increase in hours. Absent presentation of evidence by the Union that the changes in question were unreasonable and unneeded, the Union cannot prevail in its argument that Article 5, Section 4 was violated. It also notes that there is no specific provision in the Agreement that requires that seniority be applied to the situation where the number of hours attributed to a specific position are increased or decreased.

The County notes that the Union cited Article 6, Section 1, of the Agreement on the grievance as being violated and asserts that it has no application to the situation, since the Employer has not issued any new work rules.

The County also asserts that past practice, in addition to the reserve management rights, validates management's actions. The Accounting Supervisor,

Zigler, testified with regard to a number of positions that were increased from part-time to full-time, or were decreased from full-time to part-time and then restored to full-time, or reduced from full-time to part-time and eliminated, without grievances resulting. She also distinguished between those situations and the situation involving the creation of two separate regular part-time bookkeeper positions which were posted. With regard to the latter, there was not only a change in hours, but also a change in job content. Jurisch also testified that several ward clerk positions had their hours altered in the past without being posted and without any protest from the Union. The County notes the Union's contention that if such changes had occurred, they were solely amongst the "office" staff and the Union had no way of realizing they had occurred. The County asserts that this is not persuasive since Roettgers admitted that Union stewards have filled positions in the office for many years and the ward clerk positions that have been altered in the past are performed on the floor, as are the positions in question. The County cites Elkouri and Elkouri, How Arbitration Works, 4th ed., at pages 442-443, and arbitral precedent for the proposition that in the absence of restrictive language in the Agreement preempting its exercise of management rights in the manner in dispute, the existence of the management rights, in conjunction with the past practice supporting the exercise of those rights, substantiates the conclusion that the exercise of those rights should be confirmed.

Lastly, the County asserts that Article 5, Section 4, of the Agreement does not require a formal notification process relative to the County's intent to invoke its right to create changes in hours of employment. It is asserted that the only requirement under that provision is that management "confer with authorized Union representatives regarding the need, and the reasonableness of, such change." Although it is preferable that the conference occur prior to the change being made, that is not required by the Agreement. Further, at least one, if not several, meetings occurred between Kuefler and Union representatives in which the subject of the change in hours of employment with respect to these positions were discussed.

DISCUSSION

The Union essentially asserts that the increased hours in the positions in question created "new" positions that must be posted for bidding in accord with Article 4, Section 6, of the Agreement and that the County failed to inform the Union of the changes as required by Article 5, Section 4, of the Agreement. The County contends that it has simply exercised its management rights, as it has in the past, in increasing or decreasing hours in a position based on its needs, and that the Union's recourse is via Article 5, Section 4, under which it may question the need or reasonableness of such a change.

The Union makes a good case for equity, noting that the Agreement provides that fringe benefits for part-time employes are prorated on the basis of percentage of full-time equivalency. The Arbitrator's role, however, is not to do equity, rather, it is to interpret the parties' Agreement. In this case Article 4, Section 6, requires that all "new" and "vacated" positions shall be posted. Despite the Union's citation of the dictionary definition of "new", it does not appear that the term includes the positions in question. The employes performing the work, and the work duties remained the same. A "new" position was not created. The only change in the positions is the change in hours. Article 5, Section 4, of the Agreement covers changes in "hours of employment" and provides the Union with a basis and a route for challenging such changes. Article 5, Section 4, provides, in relevant part, as follows:

> Changes in shifts, and hours of employment, shall be with reasonable notice, upon request. The Employer shall confer with authorized Union representatives

> regarding the need for, and the reasonableness of, such change. If possible, the conference shall be held before the change is made. If the Union is not satisfied with the explanation, it has the right to present the question of the reasonableness, or the need for the change as a grievance, under Article 2 of the Contract.

Thus, the parties recognized that the hours of a position could be changed, as in the instant case, and negotiated a method for dealing with such changes.

Although there was no notice given to the Union of the impending changes, 4/ it appears from the testimony of Nelson, Roettgers and Kuefler that they met in mid-April and discussed the changes in hours that were to go into effect. It is not clear from the testimony how specific the discussion was as to the positions to be changed in hours, but it does appear that it was prior to any actual changes taking effect and that Kuefler explained that the changes were needed due to an increase in the number of patients and asserted that it was management's prerogative to make such changes. Thus, albeit at the Union's initiative and in the form of a grievance discussion, there was a conference of sorts held with the Union's representatives prior to the changes taking effect. Thus, as required by Article 5, Section 4, the Union was afforded the opportunity to discuss and challenge the reasonableness of the changes or whether they were needed.

Article 5, Section 4, of the Agreement does not require the Union's agreement for the changes to take place, rather, it provides a route for challenging the changes through the grievance procedure on the bases of reasonableness and need. The Union has grieved the changes in hours on the bases of the lack of notice and lack of a conference required by Article 5, Section 4, and the failure to post the positions changed in hours for bidding under Article 4, Section 6. Those bases have been rejected for the reasons discussed above. The County offered the testimony of Kuefler and Jurisch that the increase in the hours of the positions in question was needed in order to meet state standards due to the increase in the number of patients and the higher level of care needed for some of those patients. The positions in question are all Nursing Attendants and, as such, are involved in the daily patient care. The Union did not present any evidence to the contrary or to show that management's actions were unreasonable under the circumstances. Thus, it is concluded that the County's increase in the hours of the positions in question did not violate the parties' Agreement.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

4/ It is not clear from the wording of Section 4 whether the notice is to be given to the affected employe or to the Union and no evidence was presented in that regard. Also, it states "upon request", and although it does not say from whom, there is no indication that a request was made.

The grievances are denied.

Dated at Madison, Wisconsin this 12th day of August, 1991.

By _____
David Shaw, Arbitrator