BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO	Case 7 No. 45171
and	A-4751
BETHANY-RIVERSIDE NURSING HOME	

Appearances:

Mr. John Wittenberg, Business Representative, appearing on behalf of the Union.

Rider, Bennett, Egan & Arundel, Attorneys, by Mr. Timothy J. Pawlenty, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Chris Roberts.

The undersigned was appointed and held a hearing on April 1, 1991 in La Crosse, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on May 28, 1991.

ISSUES

1. Is the grievance arbitrable?

2. Did the Employer violate the collective bargaining agreement by disciplining the Grievant?

3. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VIII

HOURS OF WORK

> 8.10 - The Employer reserves the right to require the performance of overtime by any bargaining unit employee, when in the opinion of the employer an emergency exists (i.e., minimum staffing requirements, clinical judgment, etc.). The application of overtime work shall fall under the guidelines set under Article 8, Section 4. Employees will be asked to volunteer for overtime descending the seniority list after section 4 has been applied. If an insufficient number of employees volunteer, employees will be required to work overtime, ascending the list. Extenuating circumstances shall be taken into consideration when an employee is unable to comply with an overtime assignment.

ARTICLE IX

GRIEVANCE PROCEDURE

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9.5 - All grievances, except termination cases, shall be handled and adjusted in accordance with the procedure set forth below. Grievances involving terminations shall be appealed directly to Step 2 within seven (7) days of the termination.

> STEP 1 - The grieving employee and his/her steward shall present his/her written grievance, which shall be signed by the employee and his/her steward, to the employee's supervisor within seven (7) days of the event which gave rise to the grievance. The immediate supervisor shall respond, in writing within seven (7) days.
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> STEP 2 - If the grievance is not settled in Step 1, the grievance may be appealed to Step 2 within seven (7) days after receipt of the Step 1 reply. The written grievance will be presented to the Department Head or his/her designee. The Union may request a meeting be held with the Department Head (or designee) to review facts and arguments concerning a grievance. Upon receiving such request, a meeting will be held within seven (7) days of request unless the parties agree to an extension. The Employer will respond to the grievance in writing within seven (7) days of receiving the grievance or the date of the Step 2 meeting, whichever is later.
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> STEP 3 - If the grievance is not settled at Step 2, the grievance may be appealed in writing to the Administrator or his/her designee, within seven (7) days after receipt of the Step 2 reply. The Administrator or his/her designee shall meet with the Union within seven (7) days of request to discuss the grievance, unless the parties agree to an extension. The Administrator, or designee, shall respond in writing within seven (7) days of receiving the appeal or after the meeting, whichever is later.

9.6 - A grievance not resolved through the above procedure may be appealed by either party to arbitration. Such appeal shall be given by the appealing party to the designated representative of the other party in writing within seven (7) days after receipt of the answer at Step 3. The appealing party

will also then file, within seven (7) days of receipt of the Step 3 reply, a request to the Federal Mediation and Conciliation Service for a panel of seven (7) arbitrators from whom the appealing party will strike the first name. Nothing, herein, shall prevent the parties from agreeing, on a case by case basis, to have the Wisconsin Employment Relations Commission appoint a single arbitrator, by and from its staff.

9.7 - The arbitrator shall not have the power to add to, omit or modify any provisions of this Agreement. The award of the arbitrator shall be final and binding on the parties to this Agreement.

FACTS

Grievant Chris Roberts, a nursing assistant who had been employed for two years at the nursing home, was given a three-day suspension as a result of an incident which occurred on October 13, 1990. There is no dispute that on that date the Grievant was "mandated," i.e. ordered, to work overtime at the end of her regularly scheduled night shift, because of a shortage of nursing assistants for the day shift on that Saturday. There is also no dispute that the Grievant refused to work the overtime, and did not give a reason for doing so at the time. Three other nursing assistants acted similarly, constituting the entire night shift. All were, following investigation by the Employer, given three-day suspensions. Only Roberts grieved the suspension.

The charge registered nurse working that Saturday morning, Donna Bettis, testified that when she arrived at work she was informed that one employe had not shown up and another had called in sick. This reduced the number of available nursing assistants to five on one of the home's to "hubs" and three on the other. Bettis and Nursing Director Nancy Johnson testified that five assistants per hub, with one R.N. or L.P.N., constituted minimum staffing on a day shift even on the weekend. Both Johnson and Bettis testified that six or seven assistants would be the ideal situation.

Bettis testified that she first went to the four nursing assistants who were working the night shift (two assistants per hub is minimum staffing at night) and asked each of them to volunteer to stay over for some period of time. She testified that each of the four refused. Bettis then, according to her testimony, telephoned Nursing Director Nancy Johnson and asked her what to do. Bettis and Johnson testified that Johnson told Bettis to mandate the employes already at work to stay there, because Johnson had already tried to obtain volunteers for that weekend in order to make up previously-known absences and had been able to get the numbers up to five per shift, but no higher. Bettis testified that she then went to all four of the employes still working, about 6:15 a.m., and mandated each to remain at work. It is undisputed that there were less senior employes who were not at the facility at the time. Bettis testified that each of the four refused to stay, even though she asked each to stay "for a few hours," not for a full shift. According to Bettis, all four refused, and none gave a reason. The four night shift employes left at the conclusion of their shift, and Bettis contacted other employes by telephone. By 8:00 a.m., she had found two employes who agreed to work. Later that morning, Johnson came to work and discussed the matter with Bettis; Johnson subsequently determined, with Administrator Tom Rislow, that discipline was appropriate, and issued a three-day suspension to each of the four employes who had refused the "mandating."

On October 19, the Grievant filed her grievance, which states under "nature of grievance:"

> (1) Article 8 hours of work; 8.10 (2) Article 20 discipline and discharge 20.1 and 20.6 (3) Article 28, 28.1 and (4) any and all provisions that apply.

Under "Adjustment Desired" the Grievant stated:

> (1) Monetary compensation for all hours lost due to situation and any benefits she could have accrued including seniority (2) immediate removal from Chris' personnel file any and all documentation relating to this occurrence, and (3) immediate removal of this incident from any file or files in the employee's possession. Chris has drs. excuse not to work more than her scheduled hours of work.

The grievance was signed by the Grievant and by steward Joanne Johnson.

The Grievant testified that she was approached only once by Bettis, and that Bettis simply told her she was mandating her to work overtime. The Grievant testified that no details were given, she was not asked to volunteer first, and she was not told anything to indicate that she could work less than a full shift. The Grievant admitted, however, that she gave no reason for refusing, but simply said no.

The Grievant testified that she was unfit to work overtime, because of a recent operation. The Grievant stated that she had had an operation in early August to correct a condition known as myasthenia gravis, and had been off work with a doctor's excuse from August 7 to September 7. The Union introduced into evidence a July 17, 1990 letter from Dr. Erik Gundersen to Nursing Director Nancy Johnson stating in pertinent part that: "I anticipate she will be out of work for one month following this procedure. I also anticipate she will be able to return to her nightly duties, 10:30 p.m. to 7:30 a.m., approximately one month from the date of her surgery." The letter also contains a handwritten notation by the Grievant's regular physician, Gregory Fischer, to the effect that "I agree fully with the above. Mrs. Roberts has been my primary patient in the neurology clinic."

On August 28, 1990 the Grievant received a medical discharge from Dr. Gundersen, handwritten on a prescription slip, which simply said "may return to work on September 10, 1990." This slip was countersigned by Dr. Fischer on the same date with the handwritten text "agree with above - no restrictions." This document was given to the Employer at the time.

On September 30, 1990 the Grievant was hit in the chest area, the area of her recent surgery, by a resident of the nursing home. She reported this to L.P.N. Cindy Shefelbine, and filled out an accident report. Under "what immediate action did you take to prevent a similar accident," a section of the report, either Roberts or Shefelbine filled in "report to supervisor; filled out acc. report; unknown if medical rx needed." This report was submitted to Nancy Johnson, but it is clear from the record that there was no further discussion of the matter between the Grievant and Johnson, and Johnson testified without contradiction that on the date of the refusal to work overtime, she was not in possession of any information to the effect that the Grievant was not able to work any amount of overtime.

On October 23, 1990, Dr. Gundersen wrote to Johnson as follows:

> Dear Ms. Johnson:

> As I think you know, Christine Roberts is a person who has been a patient of mine in the recent past when she underwent a thymectomy for her condition known as myasthenia gravis. Christine has, at this point, had a reasonably good result from her thymectomy in that she has experienced some improvement of her myasthenia, but unfortunately she still suffers from some of the symptoms of this disease. The problems which she still faces are, namely, weakness of hand grasp and some limitations on ability to lift. To add to these problems, which I would gauge as mild to moderate, she has recently been struck in the chest by one of the residents there at Bethany-Riverside and now has some chest pain at the point where she received the blow. She experiences pain in this area of her chest when she tries to do upward lifting maneuvers.
>
> Christine has a problem with pain on lifting, particularly during the day shift activities there at Bethany-Riverside, whereas she is able to do her duties at night more easily, as apparently the work routine is somewhat different in the day and harder for her to carry out. She feels that her weakness makes it very difficult, if not almost impossible, for her to do overtime work, something which is understandable in view of her underlying myasthenia gravis.
>
> The purpose of this letter is to tell you that from this physician's point of view, Christine's request not to work overtime and to work her night shift is a reasonable one because of the items which I mentioned above.
>
> If I could be of any help in clarifying Christine's disabilities relative to the work place, please feel free to contact me.

There is no dispute, however, that this information was unknown to management at the time the Grievant refused the October 13 overtime.

L.P.N. Cindy Shefelbine testified that she was standing a few feet away when Bettis and Roberts had a conversation on the morning of October 13. Shefelbine testified that Bettis said that the Grievant was mandated to work and that the Grievant said no or that she could not stay, but that Bettis did not identify how long she wanted the Grievant to remain. Bettis subsequently testified that during that conversation she and Roberts were in a coffee area which was half-way down the hall from the nursing desk where Shefelbine stated she was, and that normal conversation could not be heard at that distance.

The Grievant testified that on other occasions she was aware of, other employes had been mandated to work and had refused, without being disciplined. The Grievant identified Cindy Levendowski, Bernie Larry, Jayne Casey, Sharon Rinarts, and Cheryl Johnson as such employes. The Grievant conceded that she did not know the circumstances of these refusals. Nancy Johnson, recalled, testified that with respect to one of the incidents identified by the Grievant, Levendowski had given two reasons for not working, one of which was that it was her off day and she had already worked a four-hour call-in earlier in the day. Johnson testified that she needs employes to communicate their reasons, and that this affects management's judgement of whether discipline is appropriate.

Rislow testified that the home is subject to state minimum staffing requirements, which require 2.25 nursing hours per day per skilled care resident and two hours per intermediate resident. He testified that these numbers translate into the staffing numbers used by the Employer, but that how many employes need to be present at what time is a matter for the Employer's determination, not state or federal policy.

The Grievant testified that she objected to the fact that the Employer mandated employes already at work rather than mandating starting with employes who may have been at home, but were lower in seniority, in addition to objecting to working because of her medical condition.

The Employer's Position

The Employer contends that the grievance is not arbitrable, because it is vague and lacking in information that would provide proper notice to the Employer of the issues to be presented. The Employer acknowledges that grievants are not rigidly bound by ineptly-worded grievance statements, but contends that the Grievant's claims were "evasive" and that the grievance simply recites a rambling series of contract provisions and unrevealing requests for relief. The Employer argues that it was forced to speculate as to the facts and issues the Grievant would present at the hearing, and that its case was prejudiced as a result.

With respect to the merits, the Employer contends that the Grievant was insubordinate because she refused to follow a direct order during an emergency situation. The Employer argues that even if the Grievant was medically unfit to work, she had the obligation to inform the Employer of this, and concededly did not do so. The Employer further argues that it is a well established principle that an employe should first obey an order, even if the order is unreasonable, and then grieve the matter. The Employer argues that this particularly applies during emergency situations.

The Employer contends that it has broad authority under Section 8.10 of the contract to mandate overtime in emergency situations, and that that clause allows the Employer to make the determination as to when an emergency really exists. The Employer notes that that section specifically refers to minimum staffing requirements as an emergency-generating problem. The Employer further notes that the Union stipulated that it is not challenging the Employer's right to mandate overtime in the circumstances presented here, only who should have been mandated. The Employer further argues that it can be exempted from strict requirements of the contract in emergency situations, even if Section 8.10 is read as requiring that the Employer follow seniority order in mandating employes, and that it considered all known extenuating circumstances when mandating the employes. The Employer notes that in the weeks following this incident, the Grievant did volunteer for overtime, contending that this demonstrates that there was no reason the Employer should have thought her unfit to work.

The Union's Position

The Union contends that the Employer's action clearly violates Section 8.10 of the Agreement, first because Nancy Johnson's testimony shows that the matter was not an emergency. Johnson knew ahead of time that the schedule for that weekend was short-staffed, and therefore an emergency was not created by the events of that morning; the Employer was forewarned. The Union argues that the Grievant was unfit to work longer than one regularly scheduled shift at a time, because of the reasons identified by Dr. Gundersen, and that the Grievant has not irresponsibly avoided additional work, as shown by her subsequent willingness to work overtime.

The Union further contends that Cindy Levendowski had refused to work mandated hours on two separate occasions and was not disciplined, thus showing that the Employer is using the work "emergency" to describe only the present instance in order to distinguish it from those involving Levendowski. Furthermore, the Union argues, the Grievant was properly assuming that she was expected to work for an entire additional shift, because Bettis did not identify a timeframe to her according to the Grievant's and Cindy Shefelbine's testimony.

The Union argues, for these reasons, that the Grievant was disciplined without just cause, and requests that the Arbitrator order the Grievant made whole and that her record be cleared.

DISCUSSION

The issues described above are a modified form of those proposed by the Employer; the Union did not stipulate to the Employer's proposed issues, but did not explicitly propose an alternate, and I find that the above represents an accurate depiction of what is really in dispute.

I find no reason in the record to judge the grievance non-arbitrable. The grievance may not be artfully worded, but it does refer to the discipline and discharge clause, and to the Grievant having a "doctor's excuse not to work more than her scheduled hours of work." It requires little perceptiveness to conclude that the case probably involves an incident when the Grievant was disciplined for refusing to work more than her scheduled hours of work, and if the Employer was puzzled by such an allegation, it had three steps of the grievance procedure prior to arbitration to ask questions.

As to the merits, I find the credibility dispute as to the exact manner in which the Grievant was approached less significant than it first appears. It is of less importance whether the Grievant was asked to volunteer prior to being mandated, because Johnson testified without contradiction that previous attempts had been made to obtain volunteers and that these were successful only up to the minimum staffing level of five employes. The Union stipulated that the Employer was entitled under the circumstances to mandate someone to work, and the question therefore turns on whether the Grievant was that someone.

The evidence is undisputed that the Grievant did in fact have a medical problem which might arguably make it unwise for her to work overtime. The Grievant in effect admitted, however, that the Employer could have no reasonable basis for knowing that at the time. The letter explicitly saying so was not filed with the Employer until two weeks later, and I agree with the Employer that the bare statement that the Grievant could return to her regularly scheduled night shift, on her pre-surgery doctor's notice, does not suggest one way or the other whether the Grievant can work overtime beyond that shift. The fact of having been hit in the chest by a resident on September 30 may, in good faith, have influenced the Grievant's perception of whether she should accept additional hours, but this too was never communicated to the Employer, and there is nothing in the record to suggest that the Grievant mentioned to any supervisor that this might contribute to a feeling that she should not work more than the regularly scheduled hours.

Meanwhile, the collective bargaining agreement clearly provides for the Employer to mandate employes in emergency situations. I reject the Union's contention that the morning in question did not constitute an emergency, because it is clear, contrary to the Union, that the Employer's previous attempts to secure volunteers had in fact brought it up to the minimum staffing of five, but no further. Thus, under these circumstances, I find that the Employer had already met any implied requirement in Section 8.10 that it seek

volunteers in seniority order before mandating. When all employes had already been canvassed, the mere fact that additional vacancies occur for the same shift cannot reasonably be held to require that the Employer canvas all employes once again in order to re-ascertain their unavailability; this would make nonsense of the concept of an emergency. And I accept the Employer's contention that an emergency was, in fact, in progress when only three employes appeared for work on a shift which required five. The Employer is in a business in which a medical emergency of a given patient, or combination of patients, may occur at any moment; its staffing requirements were not seriously challenged by the Union; and the Union stipulated that the Employer could in fact mandate an employe to work under these circumstances.

I find Levendowski's experience of refusing to work overtime without punishment less persuasive, as to consistency of the Employer's treatment of employes, than the fact that all four employes involved in the present instance were given the same suspension. At least one of the two instances testified to concerning Levendowski appears to have involved her giving reasons for her refusal to work which might well trigger the "extenuating circumstances" language in Section 8.10, and testimony as to the other incident was cursory. This applies also to the other employes identified by the Grievant as having refused mandated overtime without discipline; except that in their cases, the dates and circumstances are entirely missing from the record.

It is thus clear that the Employer was confronted on the morning of October 13 with four employes refusing to work under apparently identical circumstances, in which they almost contemptuously refused to provide any "extenuating circumstances" for management to consider. In the Grievant's case, the record persuades me that she had a combination of reasons for refusing: on the one hand, her uncontradicted (but subsequent) doctor's statement that she should not be working overtime somewhat justifies her position retrospectively, but her testimony makes clear that she was also annoyed at the fact that Bettis was not calling in employes in reverse order of seniority prior to mandating those who were already on the spot. Since calling in employes inevitably results in some delay before they can present themselves for work, and since the unavailability of the proper complement of employes was known only at the last minute, the fact that the Grievant made no explanation of her reasons and made no offer to remain for a short period of time to permit a call-in to appear influences me in concluding that she acted improperly and insubordinately in refusing the mandated overtime. Thus, even though in retrospect the Grievant might be said to have a somewhat better case than the other employes who refused the overtime, the Employer had to act on the basis of information available to it, and that information was that the Grievant was behaving in the same manner as the other three night shift employes, and refusing to work without any conspicuous justification. Furthermore, the level of discipline given to all four employes is consistent with the seriousness of refusing a direct order during an emergency situation, but not unusually harsh. Under these

circumstances, I decline to substitute my judgement for that of the Employer and to lessen the discipline imposed.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievance is arbitrable.

2. That the Employer did have just cause to suspend Chris Roberts for three days.

3. That the grievance is denied.

Dated at Madison, Wisconsin this 23rd day of August, 1991.

By _____
Christopher Honeyman, Arbitrator