BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DODGE COUNTY	Case 184 No. 50169 MA-8171
and	
DODGE COUNTY HEALTH FACILITIES EMPLOYES, LOCAL 1576, AFSCME, AFL-CIO	

Appearances:
Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 212 Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the County.

ARBITRATION AWARD

Dodge County, hereinafter referred to as the County, and Dodge County Health Facilities Employes, Local 1576, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over holiday work scheduling. Hearing in the matter was held in Juneau, Wisconsin on February 18, 1994. A stenographic transcript of the proceedings was prepared and received by the undersigned on February 25, 1994. Written arguments were received by March 29, 1994. The County's reply brief was received by April 18, 1994 and the Union informed the undersigned in writing on April 22, 1994 that it would not file a reply brief.
Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

> "Did the County violate the parties' collective bargaining agreement when it commenced assigning only one maintenance employe to work at the Clearview Nursing Home on holidays which fall during the week?"
>
> "If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE III
MANAGEMENT RIGHTS

Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the Facilities including the hiring, promotion, transferring, demoting, suspending, or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provision of this section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

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ARTICLE VI

HOURS OF WORK AND OVERTIME

6.1 **Workweek/Schedules/Hours:** The normal workweek for regular full-time and regular part-time Employees shall consist of those hours presently worked by the Employees and they shall not be changed unless mutually agreed to by both parties.

6.2 The normal workday for Nursing Employees and Restorative Nursing Employees shall consist of eight and one-quarter (8 1/4) hours, including a one-half (1/2) hour meal period.

6.3 Nursing Employees and Restorative Nursing Employees shall be entitled to a fifteen (15) minute break and a thirty (30) minute lunch period during each eight and one-quarter (8-1/4) hour shift.

6.31 Regular full-time Employees who are scheduled to work forty hours per week shall be entitled to two (2) fifteen minute breaks in addition to their thirty (30) minute lunch period during each eight and one-half (8-1/2) hour shift.

6.4 An Employee called in to work shall receive a minimum of two (2) hours pay, or pay for actual

time worked, whichever is greater. An Employee called in to attend a required educational or staff meeting shall receive a minimum of one (1) hour pay or pay for the actual time in attendance, whichever is greater. It is the understanding of both parties to this Agreement that Management, whenever possible, will try to schedule such meetings during the Employee's normal schedule of hours. The minimums in this Section shall not apply to call-ins which are either consecutively prior to or subsequent to the Employee's regular schedule of hours.

6.41 If the Employer requires or approves an Employee to attend or take any course training or schooling as part of their employment, the entire cost of fees, tuition and materials will be paid by the County in addition to receiving a minimum of one (1) hours pay or pay for the actual time of attendance, whichever is greater.

6.5 A regular schedule shall not exceed five (5) successive workdays. The Employer shall attempt to formulate a work schedule which will provide alternate Saturdays and Sundays off, but due to the nature of the work at the Facility, such scheduling may not always be possible.

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BACKGROUND

The County operates two nursing homes (Clearview and Health Center) located approximately a quarter mile apart in Juneau, Wisconsin. Since 1984 the two facilities have been operated jointly. A tunnel connects the two locations and all operations governing meals, laundry, dishwashing and trash removal are performed at the Health Center. Tuggers, battery operated vehicles, haul carts or wagons containing laundry, meals, etc., from one location to the other. Employes at both nursing homes are represented by the Union.

At Clearview the County employs two (2) Maintenance Mechanics, a Maintenance I and a Maintenance II. The two (2) Maintenance Mechanics work from 6:30 a.m. to 3:00 p.m., Monday through Friday, and the Maintenance I and II work from 6:00 a.m. to 2:30 p.m., Monday through Friday. The four (4) employes take turns working weekends (Saturday and Sunday) with each employe working one (1) weekend out of every four (4). When holidays fall on a weekend the same schedule is maintained. Prior to November, 1993 when holidays fell during the week two (2) of the four employes were assigned to work. Beginning with the Thanksgiving holiday in 1993 the County took action to begin assigning only one (1) of the four (4) employes to work when, on October 12, 1993 Gerry Schoppe, the County's Director of Environmental Services, issued the following memo:

MEMO

TO: All Maintenance Staff/Clearview Bldng.

DATE: October 12, 1993

> FROM: Gerry Schoppe/Director, Environmental Services
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> RE: Holiday scheduling change.
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> Due to changes in the assigned workload, beginning on the Thanksgiving Holiday, November 25, 1993, Maintenance staff in the Clearview Building will go to a rotating holiday schedule with one maintenance person scheduled for each holiday. If in the rotation your next holiday lands on a scheduled day off, you will be required to work either the holiday before or the holiday after that particular holiday. By doing the schedule this way you will stay on the same rotation as previously. The time scheduled to work will remain at 6:00 am to 2:30 pm.

On the same date the instant grievance was filed alleging the County's actions violated the parties' collective bargaining agreement. Thereafter the grievance was advanced through the grievance procedure to arbitration.

At the hearing Judy Wagner, a Maintenance II and an employe of the County for the last eleven (11) years, testified that the County had always scheduled two (2) employes to work when holidays fell during the week. 1/ Wagner also testified that as a result of the County's change in scheduling she lost one day of pay at time and a half in 1993, will lose one in 1994 and will lose one in 1995, a lose of $352.15 at 1993 rates. 2/ An exhibit prepared by the Union demonstrated employe Beekman will lose $489.60, Anderson will lose $683.57 and Larson will lose 489.60. 3/ At the hearing Schoppe, an employe of the County since 1968, testified that in 1986 the County eliminated a third shift, in 1987 the County changed the laundry from a five day, Monday through Friday, to a seven day operation, and that in 1987 they reduced housekeeping from working two people on weekends to only one person working on weekends. 4/ Schoppe further testified that none of these actions were negotiated by the County prior to the implementation and none of the County's previous actions were grieved by the Union. 5/

Union's Position

The Union contends that the instant matter is straightforward. Without reliance on any past practice Article VI, paragraph 1 of the collective bargaining agreement requires that the County negotiate any changes in "those hours presently worked by the Employees", and prohibits the County from making any changes absent a mutual agreement to do so. The Union points out there is no dispute the Union was not consulted prior to the change. The Union argues that any past instances recollected by Schoppe whereby the County changed

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1/ Transcript, p. 9, 10 and 18.

2/ Tr. p. 17.

3/ Union Exhibit No. 3.

4/ Tr. pp. 43-46.

5/ Tr. pp 45-46.

employe work schedules without bargaining that change is not relevant to the issue at hand. The Union argues the employes determination not to dispute the County's previous actions have nothing to do with the merits of the instant matter. The Union contends the language of the collective bargaining agreement is unambiguous, and, a secondary argument, that there was a long standing practice to schedule two employes to work when a holiday fell on a week day at Clearview.

The Union asserts the County has acknowledged it has scheduled two employes to work when a holiday falls on a week day for at least ten (10) years without exception. The Union contends all four elements of a binding past practice are present in the instant matter: 1, the practice is clear; 2, the practice is consistently followed; 3, the practice is followed over a reasonably long period of time; and 4, the practice is shown to be mutually accepted. The Union also points out each of the four (4) maintenance employes will experience a significant loss in wages as a result of the County's actions.

The Union also argues that the County contention that it reduced the number of employes because of lack of work is flawed. At most fifteen to twenty percent of the job duties were eliminated. The Union argues this is an insufficient amount to allow the County to eliminate the binding practice that has existed for several years. The Union contends the County's actions were a thinly veiled attempt to cost cut at the employes expense.

The Union concludes the County's actions are a unilateral change in the terms of the collective bargaining agreement. The Union would have the undersigned direct the County to cease and desist and to make the affected employes whole.

County's Position

The County contends the assigning on one maintenance employe to work on all holidays at Clearview is clearly a management prerogative. The County contends its actions clearly fall within the powers granted to it under Article III, Management Rights, specifically the right to determine the number of employes to be employed, the duties of each employe, the nature and place of work, and all matters pertaining to the operation and management of the facilities. The County contends the Union's reliance on Article VI, paragraph 1, is misplaced because said provision only applies to the "normal" work week. The County contends that had the parties not wanted to differentiate between "normal" work weeks and other work weeks they would not have put the word "normal" into the collective bargaining agreement. The County contends there is no specific limitation on it concerning scheduling holiday work. The County also points out there is no evidence that it has been limited it its ability to determine workload, shift assignments, and work assignments in the past.

The County also contends it had a sound business reason for assigning one maintenance employe to work holidays at Clearview. The County points out that Maintenance employe Debra Anderson acknowledged one employe can perform the necessary tugger work at Clearview on holidays. 6/ The County concludes there is never a need for two maintenance employes to work on a holiday and that the County did not act arbitrarily when it decided to assign only one maintenance employe to work holidays at Clearview.

6/ Tr. p. 53.

The County also points out it has made the same types of decisions in the past under the same contract language without consulting the Union and without receiving an objection from the Union. The County contends that on at least three occasions since 1984 it had taken similar actions in the interest of efficiency without consulting and without objection from the Union. The County contends the plain language of the agreement does not limit the County's right to schedule holiday work assignments. The County argues that if the language were susceptible to such an interpretation, clearly the past practice of the parties plainly shows that the County and the Union have never read the agreement to preclude the County from making changes in shift and work assignments where the County determined that the change would achieve a more efficient operation.

In its reply brief the County argues that the clear language of the agreement and the past practice does not in any way limit the County's ability to determine the number of employes to be employed, the duties of each employe, the nature and place of their work, and matters pertaining to the maintenance and operation of the facilities. The County points out that the Union fails to acknowledge Article VI, paragraph 1, speaks to the "normal" work week, but contains no limitations concerning non-normal workweeks. The County also points out that the duration of time during which two maintenance employes have been assigned to work holidays which fall during the work week is not the issue herein but whether Article VI limits the County's ability to determine workload, shift assignments, and work assignments. The County asserts this has never been the case as demonstrated by the instances in the past in which it has made changes and received no objections from the Union. The County also reasserts it had legitimate business reasons for making the holiday assignment changes.

The County would have the undersigned deny the grievance.

DISCUSSION

Article VI, paragraph 1, of the parties' collective bargaining agreement specifically precludes, as pointed out by the County, any changes in the hours presently worked by employes during the normal workweek unless there is a mutual agreement to do so. Paragraph 3.1, defines a regular work week as forty (40) hours and Paragraph 5, defines a regular schedule as five (5) consecutive days. The record demonstrates not all employes are scheduled to work on a holiday which falls during the work week. The undersigned therefore concludes that those work weeks during which a holiday occurs can not be construed as a normal work week because not all employes are assigned to work that day and because if they are assigned to work on the work week day the holiday falls on they receive additional compensation, the days pay plus holiday compensation. The undersigned therefore finds the County's actions did not violate Article VI.

The Union has also argued there is a ten (10) year practice of assigning two (2) employes to work holidays which fall during the work week. However, the Union has not disputed that the County has in the past changed work shifts and weekend schedules and it has not objected to those changes. The undersigned finds, given the mixed past practice and given the rights of the County under Article III, the right to assign and schedule work, that there is nothing in the instant record that would lead to a conclusion that the County violated the collective bargaining agreement when it directed only one (1) employe to work on holidays which fell during the work week.

The Union argument that there was sufficient work for two employes is without merit. A careful review of the parties' agreement demonstrates there is no minimum manning requirement and there is nothing in the agreement which

mandates that the County assign work to an employe if work is available.

Therefore, based upon the above and foregoing, and the evidence, testimony and arguments presented the undersigned concludes the County did not violate the collective bargaining agreement when it commenced assigning only one Clearview Nursing Home maintenance employe to work holidays which fell during the work week. The grievant is denied.

AWARD

The County did not violate the collective bargaining agreement when it commenced assigning only one Clearview Nursing Home maintenance employe to work holidays which fell during the work week.

Dated at Madison, Wisconsin this 7th day of July, 1994.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

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