BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO and MILWAUKEE COUNTY (MENTAL HEALTH COMPLEX)	Case 394 No. 51430 MA-8609

Appearances:

Ms. Carol Beckerleg, Field Representative, appearing on behalf of the Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, hereinafter referred to as the Union, and Milwaukee County (Mental Health Complex), hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union, with the concurrence of the County, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin, on January 6, 1995. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on February 8, 1995.

BACKGROUND:

The facts underlying the grievance are not in dispute. The grievant is a registered nurse assigned to the Gero-Psych Unit, 53B at the Mental Health Complex. On March 23, 1994, the grievant submitted a written request to take a personal day on Sunday, June 12, 1994, to attend her grandson's graduation. 1/ This request was denied and the grievant was asked to change weekends with another employe but the grievant declined to do so. On May 12, 1994, the

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1/ Ex. 5.

grievant renewed her request to use a personal day on June 12, 1994, and indicated that a pool nurse had agreed to work for her that day. 2/ This request was again denied but the grievant was told that an exchange with another employe would be okay. On May 18, 1994, the grievant requested a day off without pay for June 12, 1994, with the pool nurse working the grievant's shift and this request was granted. 3/ The grievant filed a grievance over the denial of the personal day. The grievance was denied and appealed to the instant arbitration. 4/

ISSUE:

The parties stipulated to the following:

> Did the County violate Sections 1.05, 2.22 and 2.26 of the Memorandum of Agreement when it denied the grievant's request for a personal day on June 12, 1994?
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> If so, what shall the remedy be?

PERTINENT CONTRACTUAL PROVISIONS:

> 2.22 PERSONAL DAYS
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> (1) All regular full time employes, subject to the provisions of par. 2.22(3), shall receive 3 days (24 hours) leave per year known as "personal days", in addition to earned leave by reason of vacation, accrued holidays, and compensatory time. Employes who work half time or more shall accrue personal days on a pro-rata basis. Proration shall be based on established work week.

2/ Ex. 6.

3/ Ex. 7.

4/ Exs. 2, 3 and 4.

(2) Employes shall accrue personal days during their first fractional calendar year of employment as follows:

Days Accrued in Initial Fractional, Calendar Year

Date of Hire	Full Time	Half Time
On or before April 30	3 days (24 Hours)	12 Hours
May 1 to August 31	2 days (16 Hours)	8 Hours
September 1 and thereafter	1 day (8 Hours)	4 Hours

(3) Personal days may be taken at any time during the calendar year in which they are accrued, subject to the approval of the department head. Supervisory personnel shall make every reasonable effort to allow employes to make use of personal days as the employe sees fit, it being understood that the purpose of such leave is to permit the employe to be absent from duty for reasons which are not justification for absence under other existing rules relating to leave with pay.

(4) Employes are permitted but not required to schedule personal days in advance.

UNION'S POSITION:

The Union contends that Section 2.22 is clear and unambiguous which provides that full-time employes are granted their personal days during the calendar year and supervision is required to make a reasonable effort to allow employes to use these days as they see fit. It notes that the County denied the grievant's request because it did not involve an emergency situation on the weekend such as a fire, family illness or some other reason that would result in the employe not showing up for work even if the request were denied. It submits that the County is attempting to add language limiting the use of the personal day. The Union points out the language states that requests must be approved by supervision but also requires supervision to make an effort to accommodate the request. It asserts the language limits the County's freedom to make judgments about the reason for the request. It points out that the grievant made her request well in advance to alleviate the County's liability for overtime as part-time employes can sign up for open shifts before full-time employes sign up for overtime. It claims that the record failed to prove that the unit would have been understaffed or that overtime would have been required. It concedes that had the County attempted to fill the grievant's shift and been unable to do so, it would have a valid argument for its position. With respect to exchanging shifts, the Union points out that nothing in the contract requires this and personal days are a right under the contract and the County is

responsible for finding coverage. The Union cites Hennepin Technical Centers, 86 LA 1293 (Kapsch, 1986) in support of its position.

The Union argues that past practice supports its position in that employes at Doyne Hospital are allowed personal days on weekends without the restrictions the Mental Health Complex imposed. It supports this assertion by the County's memo of February 27, 1991, which put on restrictions for six months, which implies that there were no restrictions prior to this, and it points out that there was no agreement to extend it past the six-month period. It also notes that another employe was granted two personal days on the weekends at the time the grievant filed her request. The Union admits that the County can issue work rules but the work rules cannot conflict with the contract. Here, it alleges that limiting personal days on the weekend to emergencies conflicts with the contract as well as past practice and if the County wishes to restrict the weekend use of personal days, it must negotiate such a change in the language of the contract.

The Union takes the position that any comparison with the AFSCME contract must be rejected. It argues that whatever agreement AFSCME voluntarily agreed to has no bearing on the present case.

The Union requests that the grievant's request for a personal day be granted.

COUNTY'S POSITION:

The County contends that the contract language which clearly and unambiguously makes the allowance of personal days subject to the approval of the department head, must be interpreted in light of past practice. The County argues that the contract allows it the ability to exercise discretion to sometimes just say no. The County concedes that it has granted personal days on weekends but this was at its discretion based on workload and staffing. It claims that the Union's reference to a nurse being allowed two personal holidays on a weekend is misplaced as that nurse does not work at the Mental Health Complex and the two situations are not comparable.

The County contends that the evidence establishes the Mental Health Complex's pressing staff concerns and the impact of short staffing, including the filing of complaints by the Union over alleged "unsafe staffing." It claims the impact of allowing employes to take off at their personal whim is to have the County face the Hobson's choice of unsafe staffing, pyramiding overtime or violating the contract provision providing for every other weekend off. It maintains the better way is the past practice which is to allow employes to use personal days if exigent circumstances present themselves. The County notes that it allows employes to trade shifts to accommodate their private lives and still assure quality mental health treatment. The County also points to the letter by Arbitrator Gratz delineating an old grievance settlement as the way the benefit is administered. The County relies on its past practice in the administration of this benefit. It claims its practice which revolves around money and the budget, staffing and history of the benefit, must be

considered. It maintains the reason for the personal day was to provide a benefit to employes to deal with exigent circumstances in their lives and was not designed to

drive up costs and require overtime. It notes that if workload and staffing needs cannot accommodate an individual's needs, the County allows switching or shift trading. It argues that the grievance should be denied.

DISCUSSION:

Each of the parties have argued that the language of the contract is clear and unambiguous. The County focuses on the first sentence of Section 2.22(3) and argues that personal days must be approved by the department head which allows it to deny personal day requests in its discretion. The Union focuses on the second sentence of Section 2.22(3) and argues that supervision must make every reasonable effort to allow employes to take personal days as the employe sees fit which means that unless the County is unable to fill the shift, the County must grant the personal day. 5/ Both parties cite past practice to support their respective positions. The undersigned concludes that past practice does not support either position because the County admits that it has granted personal days on weekends for exigent circumstances but other than testimony about general anecdotal situations, there was no evidence that personal days were denied on a weekend where circumstances did not involve an emergency. The Union asserts that personal days were granted on weekends but similar circumstances as in the instant case were not shown. Additionally, employes who wanted a day off on a weekend may have swapped shifts to save personal days for emergencies or to cooperate with the County to save money. In any case, there is no clear practice binding on both parties which would support either's argument.

The reference to the settlement agreement involving the AFSCME unit is inapplicable to the present unit and a settlement by a different bargaining unit has no binding or persuasive effect on a different unit and thus the settlement agreement will not be considered.

The language of Section 2.22(3) must be read as a whole giving meaning to all provisions of this section. Clearly, the County has retained the right to approve or disapprove requests for personal days. It has also agreed to make every reasonable effort to allow employes to take personal days as the employe sees fit. The County can therefore disapprove a personal day where it has made a reasonable effort to allow the employe to take a personal day at a time the employe chooses, but for valid reasons, the County cannot grant the employe's request. A minimum number of nurses is required for a shift and if the County cannot cover a position, it seems eminently reasonable that the County can deny the personal day. Under such circumstances, the County has made a reasonable effort when it is unable to fill the position caused by granting a personal day, and it clearly can deny it. The County has also asserted that it is operating under a

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5/ The undersigned has reviewed Hennepin Technical Centers, 86 LA 1293 (Kapsch, 1986) cited by the Union, but the contractual provision in that case differs from Section 2.22(3) of the contract, and therefore, it is found not to be persuasive.

tight budget and should not have to fill the position by overtime. Nothing in the contract restricts the use of personal days because the County would incur overtime; however, the term, "reasonable effort," may not require the County to expend overtime to cover the position due to personal day usage. The undersigned need not decide this issue because the facts of the instant case establish that overtime was not involved. Here, the County is making additional arguments related to budget considerations by arguing that it has the minimum staff scheduled for the weekend, so no one can use a personal day then unless it is an emergency. The rationale is that during the week additional staff are available so an employe can use a personal day and there is no need for additional personnel (and additional cost) to cover the absence of the employe on a personal day. On the weekend, because employes get every other weekend off, there is minimum staffing and if some one is given the day off, someone else must be paid to work that time which may be at the same rate or a higher pool rate or overtime. As noted above, perhaps overtime would be a reasonable basis to deny a personal day but the mere replacement by another employes does not seem to meet the requirement that the County has made every reasonable effort to allow employes off as they see fit. Here, the County is automatically eliminating weekends except where it is likely that employes would not come into work anyway. This does not seem to be making every "reasonable effort." The County is attempting to limit personal days whenever it incurs a replacement cost.

Application of the above discussion to the facts reveals the following conclusion. The grievant requested a personal day on a Sunday months in advance and obtained a pool nurse to fill the position. This establishes that the County had minimum coverage and although a pool nurse makes more than a regular full-time Registered Nurse I, overtime was not involved. The County granted the grievant's request for the time off when the grievant agreed to take the day off without pay so the difference in pay between a pool nurse and a Registered Nurse I was not sufficient to deny the request. The case thus boils down to the issue of whether "every reasonable effort" is complied with if the County has to pay the salary of the replacement employe. The agreement allows for personal days with every reasonable effort by the County to allow employes off as the employe sees fit. It is generally accepted that the employe who takes a personal day gets paid for that day and in a seven day a week, three shift operation, replacement for an absent employe is logically costed in negotiations when personal days are granted. It appears that the County is attempting to restrict personal days to times where it only costs the employe's time and not the replacement costs except for emergencies but the undersigned concludes that by doing this, the County is not making every reasonable effort to allow employes to use personal days as the employe sees fit. In short, the restrictions by the County goes beyond coverage and overtime considerations and attempts to restrict usage beyond what the contract logically allows. Therefore, the undersigned finds that the County violated Section 2.22(3) when it denied the grievant's request for a personal day on June 12, 1994.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

1. The County violated Section 2.22(3) of the Memorandum of Agreement when it denied the grievant's request for a personal day on June 12, 1994.

2. The County shall grant the grievant's request for a personal day by paying her for eight hours at her regular rate of pay in effect on June 12, 1994.

Dated at Madison, Wisconsin, this 23rd day of March, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator