BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

1199W/UNITED PROFESSIONALS

and

ROCK COUNTY

Case 286
No. 51463
MA-8624

Appearances:

Mr. Thomas A. Schroeder, Corporation Counsel, Rock County, 51 South Main Street, Janesville, Wisconsin 53545, appeared on behalf of the County.

Ms. Helen Marks Dicks, Attorney at Law, and Mr. Paul Burmeister, Organizer/Staff Representative, 1199W/United Professionals, Service Employees International Union, 1619 Monroe Street, Madison, Wisconsin 53711-2021, appeared on behalf of the Union.

ARBITRATION AWARD

On August 19, 1994, the Wisconsin Employment Relations Commission received a joint request from Rock County and District 1199W/United Professionals for Quality Health Care, affiliated with the Service Employees International Union, AFL-CIO, to appoint the undersigned to hear and decide a grievance pending between the parties. On September 19, 1994, the Commission appointed me as the impartial arbitrator to hear and resolve this dispute. An evidentiary hearing was conducted on November 18, 1994, in Janesville, Wisconsin. The matter was not transcribed. Post-hearing briefs were submitted and exchanged by December 7, 1994.

This arbitration addresses a County-implemented work rule relative to use of work time for medical-related appointments by members of the bargaining unit who are Public Health Registered Nurses.

BACKGROUND AND FACTS

The parties to this dispute are signatories to a collective bargaining agreement, one of whose provisions, Article XI, Section J, set forth below, deals with time off for medical and/or dental appointments. This language, which forms the basis of the dispute between these parties, has existed in its current form for at least ten years, and as long as any witness who testified could recall. Bargaining unit employes have historically scheduled medical and/or dental appointments which fell within the work day, and have used leave authorized by this Section to be paid for the time spent at those visits. As a practical matter, there has been little, if any, oversight as to the nature and/or identity of providers seen by employes, or with respect to the necessity of seeing those providers during the normal work day.

Rebecca Stuvengen, a bargaining unit member, testified that doctors, dentists, nurse practitioners and chiropractors have historically all been seen by bargaining unit employes. Matthew Haeger, Director of Nursing, agreed that all of these practitioners were appropriate deliverers of medical care. Haeger further testified that he had not previously been aware of the kinds of practitioners employes visited under the terms of Article XI, Section J. Some medical providers have appointment hours after normal working hours and/or on weekends. Others do not.

Approximately three or four years prior to the hearing in this matter, Mr. Haeger advised then-Union President Bonnie Leute that he wanted nurses to submit the names of their doctors and appointment times for appointments falling within the work day. According to Haeger, the names and times were provided for awhile. Ann Klesic, a member of the bargaining unit since 1981, and a member of the Union's bargaining team, testified that she never provided such information. Compliance with this request appears to have been mixed. Whatever compliance existed evidently dissipated over time. Mr. Haeger testified that he did not follow up on the matter.

More recently, the County became concerned over the possibility that this leave was being overused and/or abused. This concern arose due to comments and statements overheard by Mr. Haeger and others which caused him to believe that employes were scheduling medical visits during work time that could comfortably have been scheduled during non-working hours. As a consequence, in the negotiations leading to a 1994-95 collective bargaining agreement, the County proposed that Article XI, Section J be deleted. The Union resisted that change, and subsequently made a counterproposal offering to cap utilization of that benefit in exchange for a monetary quid pro quo. The Employer rejected that approach and ultimately dropped its proposal to delete the Section. The bargaining table exchange between the parties was to the effect that the language would remain status quo. There is no indication that the parties ever discussed naming doctors and/or identifying medical appointment sites during the course of the negotiations.

The Employer continued to believe that nurses were using work time for medical appointments that could have been scheduled outside of working hours. The Employer also believed that different employes had different views as to what constituted a "medical" appointment under the terms of Article XI.

The Employer never advised the Union that it believed certain individuals were abusing the existing system. No examples were ever offered. Neither did the Employer confront individual employes with a concern that those individuals were abusing the system. Rather, the Employer determined to address its concern by issuing a work rule regulating employe conduct.

A staff meeting was held in June of 1994. A proposed work rule was distributed and discussed. That work rule is set forth as follows:

TITLE: Agency Work Rules

SUBJECT: Use of Appointment Time

Effective July 1, 1994, requests for time off from work using appointment time will only be granted for a medical or dental appointment. All other requests for time off from work for therapy, treatment, counseling, etc. will be charged to your sick leave benefit time.

To ensure that each appointment time request can be handled in a timely manner, nursing staff need to submit the name of the physician or dentist they will be seeing, time of the appointment, and location of the appointment with each request.

Nursing staff is reminded that all requests for time off using the appointment time benefit should first be scheduled off work time whenever possible.

. . .

The work rule was implemented on July 1, 1994, and grieved shortly thereafter.

As a result of this work rule, employes currently submit a request to take leave under Article XI, Section J. Upon receipt of such a request, the Employer checks with the provider to see if off-duty appointment times are available. As a practical matter, all requests have been granted. The Employer contends that there has been a decrease in the number of requests. The Union agrees with this characterization, but contends that the decrease occurred before the work rule was implemented.

ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement when a work rule was issued regarding the use of appointment time by members of the bargaining unit?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II - MANAGEMENT RIGHTS

The management of the Rock County Health Department and direction of the working force is vested exclusively in the County, including but not limited to the right to hire, suspend or demote, discipline, or discharge for just cause, to transfer, to layoff because of lack of work, discontinuance of service, or other legitimate reasons, to subcontract, to determine the type, kind and quality of service to be rendered to the public, to determine the location, operation, and type of physical structures or facilities of said nursing service, the right to create job descriptions and determine the composition thereof, the right to plan and schedule service, work and training programs, to determine what constitutes good and efficient service, and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its rights, duties and responsibilities.

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ARTICLE V - GRIEVANCE ARBITRATION

Step 4. If a satisfactory settlement is not reached in Step 3 within ten (10) working days after the date the County's written response is due, the Union or the County may serve written notice upon the other side that the difference of opinion or misunderstanding shall be arbitrated. Within seven (7) working days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within ten (10) working days following notice of arbitration, and if either party fails to agree that the Wisconsin Employment Relations Commission appoint an arbitrator, then the parties shall request that the Wisconsin Employment Relations Commission submit a panel of five arbitrators. In the event that the parties do not agree on any of the five, the moving party shall strike two names and the opposing party shall strike two names and the individual remaining shall serve as arbitrator to hear the dispute. The decision of the arbitrator shall be final and binding upon the parties. The cost of the arbitration shall be borne equally by the parties, except that each party shall be

responsible for the cost of any witnesses testifying on its behalf. Upon the mutual consent of the parties, more than one grievance may be heard before one arbitrator. The arbitrator shall have no authority to amend, delete or modify any of the existing provisions of this Agreement.

. . .

ARTICLE XI - HOURS OF WORK, CLASSIFICATION AND SALARY

. . .

Section J. Appointments. Up to two hours will be permitted during working time, when necessary, for each medical and dental appointments when unable to schedule them on off-duty time.

POSITIONS OF THE PARTIES

The County contends that it has the authority to promulgate and enforce the work rule at issue. Pointing to the Managements Rights Clause (Article II) the County notes that it has the authority to "promulgate reasonable rules and regulations governing the conduct of employees." The County contends that it is under no duty to obtain the Union's approval of the work rule prior to implementation. The County notes that the work rule is to ensure that the contractual provision is not being misused. This was an action identical, (except in writing, this time) to one that had been taken three or four years previously. The previous action (the oral work rule) was not grieved by the Union.

The County argues that the work rule in question is reasonable. Mr. Haeger, the author of the work rule, testified the rule was needed to allow management to gather information to ensure appointment time was being used in accordance with the collective bargaining agreement. Misuse of appointment time, according to Haeger, impacted on scheduling of staff and could cause service disruptions. Article XI, Section J begs for information to ensure that it is being appropriately used. The clause contains two clearly restrictive phrases that limit its application. Medical and dental appointments will be allowed during work time "when necessary" and "when unable" to be scheduled on off-duty time.

Adherence to the labor agreement and the ability to schedule staff and service are clearly legitimate objectives of management. The County argues that to the extent that the reasonableness of a work rule can be measured after the fact, it is interesting to note that all requests for appointment time since July 1 have been granted. There have been no specific complaints about any breach of confidentiality concerning information given to Mr. Haeger. The County allows use of appointment time for all "medical" personnel mentioned by the Union.

The Union contends that the effect of the work rule is two-fold: the work rule would require employes to submit the name of the physician or the dentist they are seeing, time, and location of the appointment; second, the work rule limits the appointments to only medical or dental personnel. Bargaining unit employes have raised concern in both areas of the work rule. First, employes have been able to use appointment time to visit any type of licensed health care professional. This includes chiropractors, psychotherapists, physical therapists or other licensed health professionals. The new work rule, as understood by employes, would limit the employe's right to visit these types of professionals as is currently allowed under Article XI, Section J of the contract. Second, employes would have to report which doctor they are visiting, at what time, and where. The employes involved are health care professionals who respect the confidentiality of their patients, and expect that their confidentiality would similarly be respected by their employer. There is no documentation of abuse by employes in the use of appointment time.

The Union brings forward three basic arguments. These arguments are: (1) the Employer violated clear and unambiguous contract language; (2) the Employer ignored the negotiating history of this piece of language, and (3) the Employer has reversed a workable past practice.

The Union contends that there is no restriction in the language of the labor agreement which allows for the Employer to require employes to submit the name of the physician or the dentist they will be seeing, time of the appointment, and location of the appointment with each request. Furthermore, the new work rule limits the type of appointments which the employes can make to physicians or dentists.

The negotiating history in this case allegedly favors the position of the Union. In the recent negotiations, the Employer tried to delete this particular section of the contract in its entirety. That proposal was withdrawn. Basically, argues the Union, the Employer is attempting to win a take-back of benefits that it could not negotiate at the bargaining table.

In this dispute, the Employer has changed a past practice which has been in existence and has worked well for over a decade. Employes have never been mandated to name the doctor they are seeing, nor the time and location of appointment. Furthermore, the Employer has never mandated the employes to see only certain types of health professionals.

The Union argues that during the course of the grievance procedure, it suggested to the Employer that if the Employer could prove abuse of appointment time by particular employes, those employes should be disciplined individually, and that the bargaining unit as a whole should not be punished. No evidence of abuse has been brought forward by the Employer.

The Union takes issue with the Employer's contention that appointment time has decreased since the promulgation of the work rule. The Union contends that a comparison of data submitted by the Union with that submitted by the Employer will demonstrate that appointment time on the whole for the bargaining unit decreased in the first half of 1994, prior to the drafting, discussion,

or implementation of the new work rule.

DISCUSSION

There are at least three consequences which I believe reasonably follow from the promulgation and administration of the leave work rule. The first, as argued by the Employer, is that the Employer is much better able to monitor compliance with the terms of the contract, and specifically, with Article XI, Section J. As noted by the Employer, Section J permits time off "when necessary", and "when unable to schedule them on off-duty time". On its face, the clause does not convey an unlimited, unqualified right. The second consequence is to establish the Employer as a control on potentially inconsistent uses of the benefit. To the extent employes had differing views and/or are confused as to what types of care are covered by the benefit, this system establishes a control mechanism by which the Employer can enforce some level of uniformity. The third consequence is the significant intrusion into the privacy and confidentiality of the individual, her health care needs and providers. This is a particularly sensitive matter in a professional health care unit, all of whose members, and their supervisors, are health care providers. Patient confidentiality is an ongoing part of the daily operation of the Public Health Department. The employe obligated to name her psychiatrist, or the address of an abortion clinic, and her attending physician, may well be compelled to reveal elements of her private life that she believes to be deeply personal.

The Employer contends that he has respected the confidentiality of bargaining unit members. However, the fact that the Employer is provided the information noted above constitutes the breach of privacy. Mr. Haeger, and perhaps others, are provided this information relative to physicians and/or appointments. This is a small department. These people see each other and work with one another on an ongoing basis. The disclosure of this type of information is inherently very personal.

The Union contends that the memo limits the scope of providers available to bargaining unit members. Testimony established that there was a wide range of medical providers historically seen under Article XI, Section J. The County contends that its administration of the policy is such that there has been no narrowing of the range of providers. Paragraph 1 of the memo makes reference to "medical or dental appointment". The phrase replicates that found in Section J. Paragraph 2 of the memo makes reference to "physician or dentist", seemingly narrowing the scope of medical providers to "physicians". On its face, the memo does narrow the scope of providers. It was Mr. Haeger's testimony that he was unfamiliar with the scope of providers utilized by bargaining unit members under the prior practice. Haeger further testified that there was an inconsistent view of the scope of appointments available under Section J. Given the duration of this practice and the very individualized nature of medical care that it addresses, I suspect that employes made differing uses of the leave. That is, different employes had different medical-type needs, and utilized the leave in varying ways to meet those needs.

I credit the Employer's contention that it was not his intent to narrow the scope of

providers available under Section J. To the extent that the second paragraph of the memo/work rule can be read to bring that consequence about, I believe the memo can be redrafted. I do not believe this policy should rise or fall on the inadvertent use of narrowing phraseology.

The administration of this work rule introduces a dimension not previously found. Employes who schedule medical and/or dental appointments are to submit the information requested to the Employer in advance. This is done in order to enable the Employer to call the medical provider to determine whether or not non-work hour appointments are available. I regard these monitoring calls as inherently patronizing. The purpose of the call is to determine whether the employe is satisfying her obligations under Section J. That is, was the employe able to schedule the appointment during off-duty time? If the phone inquiry is merely pro forma, that is, without consequences, it serves merely as an intrusion into the employe's personal life. The mere existence of the call may deter employes from scheduling appointments during working hours.

If, however, the call is intended to accomplish its stated purpose, i.e., the monitoring of the employe's appointment, this process becomes much more complex. If, for example, the caller is advised that there is an after-work appointment available, I assume the employe is subsequently confronted with that fact. If the employe responds that she has no access to child care on that particular day, what consequence follows? If a caller is initially advised that there is an after-hours appointment available two weeks hence, is that an appropriate delay? Certain medical visits can tolerate a two-week delay. Others should not. Will the Employer and employe thereafter engage in a discussion as to the medical necessity of a more urgent appointment? Under the existing system, all of these decisions are reconciled by the employe. The Employer inherently inserts himself into this process through the administration of the work rule.

There was a prior oral directive relative to appointments. I do not regard that directive as having any meaningful significance to this proceeding. It was oral, leaving no remaining evidence as to precisely what it demanded, and how it was administered. From all testimony, it appears that there was less than universal compliance. It appears that there was no sanction for non-compliance. The initiative was ultimately abandoned, for reasons that are unclear. Whatever compliance occurred, existed for an unspecified but relatively brief time period. The initiative was ultimately abandoned. The Employer contends that the directive was not grieved. That certainly appears to be true, however, it is equally true that the directive was ultimately ignored.

The Employer perceived a problem with the administration of Section J. A conscious decision was made to bring this matter to the collective bargaining table. In essence, a decision was made not to bring this matter to the attention of the individuals who allegedly were misusing the existing system. The Employer's approach to this problem was to eliminate Section J. The Union's response was to limit the utilization of Section J in exchange for some quid pro quo. It appears that those two positions framed the discussion of the issue. That is, it appears that there was no discussion relative to the potential monitoring of employes under the existing system. Ultimately, the Union's proffered exchange proved unsatisfactory to the Employer. Ultimately,

the Employer withdrew its proposal, and indicated a willingness to return to the status quo. The status quo language has existed for many years. It comes fully equipped with interpretive practice. I think it is entirely realistic for the Employer, in returning to the status quo, to reasonably anticipate that the interpretive practices would return with the language contained within the agreement.

I believe the Employer's work rule made substantive modifications of the practices interpreting Section J of the labor agreement. Specifically, there are substantial privacy intrusions, and monitoring consequences that I do not believe can be cured under the promulgated system. The practice cedes a good deal of the scheduling judgment to the individual employe, relying upon the good faith of the individual.

The Employer is certainly free to remind employes that they have a contractual obligation to look outside of working hours for their appointments. The Employer is free to ask employes if alternative, non-working hour appointments are available. Where possible, medical and dental appointments ought properly be scheduled during non-working hours. Should it come to the Employer's attention that an employe is abusing the system, the Employer certainly has a right to investigate and determine whether that is, in fact, true. However, the system constructed by the Employer is so intrusive and so disruptive of the employes' ability to use the contractually-provided benefit that I believe it violates Article XI, Section J.

AWARD

The grievance is sustained.

REMEDY

The Employer is to directed to rescind the work rule and return to the status quo.

Dated at Madison, Wisconsin this 28th day of April, 1995.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator