BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ST. FRANCIS HOME EMPLOYEES, LOCAL UNION #1760-A, AFSCME, AFL-CIO**

and

**ST. FRANCIS HOME SOUTH**

Case 16
No. 56604
A-5694

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Appearances:

**Mr. James Mattson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. William R. Sample**, Labor Relations Consultants, Inc., appearing on behalf of the Employer.

## ARBITRATION AWARD

St. Francis Home Employees, Local Union #1760-A, AFSCME, AFL-CIO, hereinafter referred to as the Union, and St. Francis Home South, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, 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 Superior, Wisconsin, on August 27, 1998. The hearing was not transcribed and the parties made oral arguments at the conclusion of the hearing.

## BACKGROUND

The grievant has been employed by the Employer as a certified nursing assistant (CNA) since August 23, 1986. The grievant holds a 1.0 days posting which means that her minimum schedule is 10 days per pay period (Exs. 4, 6 and 7). The grievant had been assigned to Bay

Waters cottage in the Spring of 1998, and generally worked days from 6:45 a.m. to 3:15 p.m. on a schedule where she usually got every other weekend off (Ex. 10). The grievant's schedule was that she worked Monday through Thursday, had Friday off, worked Saturday and Sunday, had Monday off, worked Tuesday through Friday and then had the weekend off each pay period (Ex. 10). The work schedule for the time frame May 18 through May 31, 1998, was posted late although the contract requires that work schedules be posted at least fourteen (14) days prior to the commencement of the work schedule.

Due to a reduction in Bay Waters cottage, the grievant was assigned a different cottage during the May 18 through May 31, 1998 time frame. The grievant was scheduled to work on Monday and Tuesday, May 18 and 19; she was scheduled off on Wednesday and Thursday, May 20 and 21; she was scheduled to work Friday, Saturday and Sunday, May 22, 23 and 24; she was scheduled off on Monday, May 25, which was Memorial Day; she took vacation on May 26 and 27; she was scheduled to work Thursday and Friday, May 28 and 29, and was off on Saturday and Sunday (Ex. 9). On May 6, 1998, the grievant immediately objected to the schedule because she was scheduled to work only nine (9) days rather than the ten (10) pursuant to her posting. The Employer did not change the schedule insisting that the grievant was scheduled for 9 days plus the holiday so she received 80 hours of pay in the pay period which was all she was entitled to. The Union does not dispute that the Employer can change the cottage assignments and is not required to schedule the same days off each pay period but it took the position that the Employer could not change the number of days to be worked pursuant to the posting without proper notice and following strict seniority. A grievance was filed on May 22, 1998, which was denied by the Employer on the grounds that the grievant did not have to be scheduled to work on a holiday (Exs. 2, 3 and 4). The grievance was appealed to the instant arbitration.

## ISSUE

The Union frames the issue as follows:

> Did the Employer violate the terms of the collective bargaining agreement and past practice when the Employer scheduled the grievant for less than the ten shifts (scheduling under 1.0 status) during the two (2) week pay period contrary to the grievant's posted guarantee?
>
> If so, the appropriate remedy is for the Employer to make the grievant whole for any and all lost wages and benefits due to this action and to schedule the grievant according to her 1.0 status job posting guarantee.

The Employer states the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement and past practice when the Employer scheduled the grievant for less than the ten shifts (scheduling under 1.0 status) during the two (2) week pay period contrary to the grievant's posting?

If so, what should the appropriate remedy be?

The undersigned adopts the issues as framed by the Employer.

## PERTINENT CONTRACTUAL PROVISIONS

### ARTICLE 10 – WORK DAY – WORK WEEK

Section 1. The employer's day begins with the day shift. The normal work day shall be eight (8) hours and the normal work period shall be eighty (80) hours in a two-week period.

Section 2. Day shift shall normally commence at 7:00 a.m.; afternoon shift shall normally commence at 3:00 p.m.; midnight shift shall normally commence at 11:00 p.m. The Employer may schedule a shift to commence 45 minutes earlier or 45 minutes later than the shifts (sic) normal starting time, provided the employees affected are given at least fourteen (14) days notice of such change. Any other changes in the above schedule shall be made by mutual agreement.

Section 3. Work schedules shall be posted at least fourteen (14) days prior to the commencement of the work schedule. Changes to a posted schedule can only be made with the employer's consent, the employee's request will not be unreasonably denied. No employee shall be laid off under provisions of Article 8 or suffer a reduction in the normal hours worked without at least two (2) weeks notice.

. . .

### ARTICLE 12 – HOLIDAYS

Section 1. The following days shall be recognized as contract holidays: New Year's Day, Good Friday, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, the employee's birthday and one (1) floating holiday.

a). Employees hired after 11 January, 1992 shall not be eligible for the floating holiday or birthday holiday until completion of one (1) year of employment with St. Francis Homes, Inc.

Section 2. Eligible full-time employees who have completed their probationary period and who do not work on the holiday shall receive eight (8) hours straight time holiday pay. Eligible employees who have completed their probationary period and are scheduled to work on a holiday shall be paid at the rate of time and one half (1 1\2) (sic) their regular rate of pay for all hours worked on the holiday plus holiday pay for all hours worked on the holiday, with the exception that employees will be paid straight time for all hours worked on their Birthday, plus holiday pay for all hours worked on their Birthday. Employees who work a holiday during their probationary period shall be paid at the rate of one and one half (1 1\2) (sic) times their regular rate of pay.

## UNION'S POSITION

The Union contends the grievant was entitled to be scheduled for ten days of work. It points out that the grievant is a senior employee who sought to correct the schedule. It claims that the grievant is not out to get extra money from the Employer and the Employer's assertion that this is about extra pay is a red herring. It notes that the grievant brought up the schedule problem early enough so that the Employer could have corrected it and scheduled her before May 25, 1998. The Union admits that the Employer can change the days an employe works, as well as the location, but cannot change the 10 days of scheduled work in accordance with the grievant's posting of 1.0. It insists that the Park is not involved and that at South, there has been rigid adherence to seniority which past practice is noted in the contract. The Union concludes that this is a clear case and the grievant by past practice should have been scheduled in accordance with her 1.0 status and it asks that the grievance be upheld and she be made whole.

## EMPLOYER'S POSITION

The Employer denies any violation of the contract. It points out that the grievant worked nine (9) days plus was paid for the holiday. It notes that the Union claims that the grievant's hours could not be reduced without two weeks notice but that language deals with layoff or reduction of hours where the grievant could bump a junior employe. It argues that Article 2, Section 2 provides for 80 hours per pay period and Article 10 also states 80 hours in a two-week period. The grievant got paid 80 hours, and according to the Employer, her hours were not reduced, and even if they were, the language of the contract refers to "normal" which is not a guarantee but is the usual, regular or average. It cites COCA-COLA FOODS, 88 LA 129 (NAEHRING, 1986) in support of its position and asserts that the 80 hours is not a

maximum. It insists that the agreement does not provide for 80 hours guaranteed plus the holiday. It observes that employes who work Monday through Friday have the holiday off and don't work it.

The Employer maintains that it can limit the schedule in the manner it did in this case and no provision of the contract is violated. The Employer asserts that this practice has been used in the past and has not been grieved. The Employer notes that the holiday provisions in Article 12 merely provide that if an employe works a holiday, the employe gets time and one-half for hours worked plus holiday pay. It claims that the parties spent a lot of time working on the language and there is no guarantee that an employe is entitled to work on a holiday. It surmises that the grievant is looking for extra money and wants 92 hours instead of 80 hours of pay. It maintains that the Scheduler was doing her a favor by giving her the holiday off and the Scheduler properly used the guidelines for scheduling. It submits that the Union's theory is wrong and there is no agreement to provide ten (10) days of work plus the holiday. It concludes for these reasons, the grievance has no merit and should be denied.

## DISCUSSION

The Employer asserts that it can schedule an employe off on a holiday and the employe is not guaranteed to work that day. It claims that "normal" does not equate with a guarantee and all that is required under a posting of 1.0 is that an employe gets 80 hours of pay in the pay period. It cites COCA-COLA FOODS, 88 LA 129 (NAEHRING, 1986) in support of its definition of "normal." The Union argues that the grievant is guaranteed 10 days of work in a pay period and the grievant should have been scheduled to work on May 25, 1998, Memorial Day, and received time and one-half her normal rate of pay.

An argument could be made that the Employer changed the grievant's work schedule which had the effect of canceling holiday pay benefits under the contract and this action discriminated against the grievant. See U.S. BORAX & CHEMICAL CORP., 50 LA 304 (MCNAUGHTON, 1968); however, the arguments and references to the holiday schedule and holiday pay are misplaced. The last sentence of Article 10, Section 3 states: "No employee shall be laid off under provisions of Article 8 or suffer a reduction in the normal hours worked without at least two (2) weeks notice." This sentence refers to "normal hours worked" and does not refer to normal hours in pay status. The grievant was scheduled only to work nine days in the May 18 – 31 pay period. It is undisputed that the schedule was posted late and the grievant was not given 14 days notice of a reduction in the "normal hours worked." A review of the schedules (Exs. 9 and 10) reveals that the days off and days worked in the second week of the pay period are identical. The grievant had been scheduled off on Monday and worked Tuesday through Friday before getting the weekend off (Exs. 8, 10 and 17). It is the first week of the pay period where the schedule is different. The grievant was normally scheduled to work Monday through Thursday, had Friday off and worked Saturday and Sunday (Ex. 10). In the pay period in question, the grievant worked Monday and Tuesday, had Wednesday and Thursday off and worked Friday, Saturday and Sunday (Ex. 9). The difference here is 5 days

of work instead of six. The grievant should have been assigned to work on Wednesday or Thursday of the first week to retain her normal hours worked, i.e. so there would be no reduction in normal hours worked. As the grievant was assigned 9 days of work rather than the normal 10 days, the Employer violated Article 10, Section 3 of the contract by reducing the normal hours worked without the requisite notice and the remedy is to pay the grievant 8 hours of pay for the day she was not scheduled to work.

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

## AWARD

The Employer violated the terms of the collective bargaining agreement when it failed to schedule the grievant her normal hours worked in the first week of the pay period for May 18 through May 31, 1998, and the Employer is directed to make the grievant whole by paying her 8 hours of pay for the day it failed to schedule her for work.

Dated at Madison, Wisconsin, this 18th day of September, 1998.

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

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