

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PARK VIEW REHABILITATION PAVILION AND
PLEASANT ACRES EMPLOYEES UNION, LOCAL 1280,
affiliated with the
WISCONSIN COUNCIL OF COUNTY AND
MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO**

and

**PARK VIEW REHABILITATION PAVILION AND
PLEASANT ACRES, WINNEBAGO COUNTY, WISCONSIN**

Case 302
No. 56068
MA-10163

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54913, appearing on behalf of Park View Rehabilitation Pavilion and Pleasant Acres Employees Union, Local 1280, affiliated with the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John R. Bodnar, Winnebago County Corporation Counsel, Winnebago County Courthouse, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing on behalf of Park View Rehabilitation Pavilion and Pleasant Acres, Winnebago County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of seven employees represented by the Union. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 24, 1998, in Oshkosh, Wisconsin. The hearing was not transcribed. The parties entered their positions at the hearing, and chose not to file written briefs.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the contract when it suspended the seven grievants pursuant to the then existent mandatory overtime policy?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

. . .

WHEREAS, in order to provide the best care and humanitarian consideration of the residents, to maintain the existing harmonious relationship between the Employer and its employees, to promote the morale, well-being and the security of said employees . . . We, the contracting parties, set forth the following as our will and agreement:

. . .

ARTICLE V
CONDUCT OF UNION BUSINESS

. . .

ARTICLE VI
DISCIPLINARY PROCEDURES

. . .

Any employee may be suspended, discharged, or otherwise disciplined for just cause. As a general rule, the sequence of disciplinary actions shall be oral reprimands, written reprimands, suspension, and discharge. . . .

ARTICLE XII
OVERTIME

. . .

ARTICLE XXIX
MANAGEMENT RIGHTS

Except as specifically restricted or limited by this Agreement, the management of Park View Rehabilitation Pavilion and Pleasant Acres and the direction of the working forces is vested exclusively in the Employer, which rights will not be used to discriminate against any employee covered by this Agreement. . . .

**LETTER OF UNDERSTANDING BETWEEN
WINNEBAGO COUNTY
AND
PARK VIEW REHABILITATION PAVILION AND PLEASANT ACRES
EMPLOYEES UNION, LOCAL 1280, AFSCME, AFL-CIO**

It is agreed between the parties that in the interest of providing safe patient care, a nursing service employee will not leave his/her work station at the end of the scheduled shift until the person assigned to his/her patients has arrived or permission to leave has been granted. However, it is understood that a replacement will be assigned as quickly as possible in accordance with Article XII of the Agreement.

BACKGROUND

The grievances focus on the events of January 26, 1997. On that day, the Packers defeated the Patriots in Super Bowl XXXI. The grievances involve employe attempts to participate in that event at sites other than the County's health care facilities. The grievants are Certified Nursing Assistants (CNA) employed at the County's Parkview Health Center. The Parkview Health Center houses normative residents at its Pleasant Acres Pavilion and chronically mentally ill residents at its Rehabilitation Pavilion.

Seven employe grievances were filed concerning those events. The parties stipulated that the grievances pose the same issue on the same set of facts. The County docked these employes one day of pay by informing them not to report for work on a scheduled work day. This loss of pay is not discipline in the traditional sense. Rather, the County directed the loss of pay through its CNA Mandatory Overtime Procedure, which is referred to below as the MOT.

The MOT in effect at the time was jointly developed by the Union and the County and first put into effect in April of 1995. The MOT reads thus:

PURPOSE: To meet minimum CNA staffing, to ensure the safety and welfare of both residents and staff. . . .

PROCEDURE:

MOT is only to be used as a final option in meeting staffing needs. When time permits other alternatives are to be attempted prior to initiating MOT. These include maintaining and utilizing a list of overtime volunteers, soliciting full and part time off duty employees, and notifying each nursing unit of the need for overtime. Attempts to find voluntary replacements are to continue after MOT has been appointed.

MOT will be assigned by last acceptable overtime worked (per date). All full and part time CNA's will be included in this process. MOT to cover PMs and NOCs will be done by shift and by building (ie: AM's-PA will stay to cover PMs-PA; PMs-PAV will stay to cover NOCs-PAV). MOT to cover AMs will be chosen from the combined PA and PAV night shift staff.

An updated seniority list, in alphabetical order, with dates of those already having served MOT will be made available and maintained by the RN Shift Coordinators and will be posted outside of the Shift Coordinator's office.

The Personnel Clerk/Nursing Office or RN Shift Coordinator will assess staffing levels prior to each shift change. If staffing levels are found to be at minimums the potential for mandatory overtime will be determined. The next qualifying staff for MOT duty will be notified of the possibility for MOT. Assigned MOT person(s) will remain on duty until directed otherwise. All MOT assignments will be for the shortest period of time possible.

EXCEPTIONS:

New employees: . . .

Substitution: . . .

Medical Reasons: . . .

Personal/Family Hardship: If MOT presents a hardship to an employee or their immediate family unit due to an ongoing extenuating circumstance, documentation may be provided for exemption from MOT. . . .

Personal/Family Emergency: Cases will be dealt with on an individual basis with approval at the discretion of the Personnel Clerk/Nursing Office or the RN Shift Coordinator. Follow-up documentation may be required to confirm the emergency (refer to "Personal/Family Hardship" and "Refusals").

Already Worked Overtime: A person will be exempted from MOT by having already worked overtime within the concurrent calendar week (Sunday thru Saturday) in which the MOT is needed. This exemption does not include any

upcoming overtime which has not already been worked. If all staff scheduled have met MOT requirements for a particular week, the least senior employee who has not worked overtime the previous day, will be required to work. Each employee is responsible to notify the Personnel Clerk/Nursing Office or RN Shift Coordinator if they have already volunteered and worked overtime within that particular week.

Volunteered Overtime: When overtime is needed, a person volunteering for the overtime will have fulfilled their turn for MOT when the overtime meets the need stated by Shift Coordinator, Unit Manager or Personnel Clerk/Nursing Office (i.e. which unit or floor to work and length of time.) A voluntary overtime sign-up sheet will be posted near the daily schedules in the basement of both the PAV and PA, and a call sheet will be kept at the switchboard. This is a chance for staff to sign up in advance for days interested in working overtime when MOT is needed. This does not mean you are committed to working that particular day, but will be used to contact those persons first before going to mandatory overtime.

REFUSALS:

Refusal to Work MOT: Refusals will not be accepted. Any person who refuses to work MOT will automatically be suspended for one day without pay to take effect within five scheduled working days and will remain first on the list for MOT duty.

Leaving Ill: Leaving “ill” after being selected for MOT will be considered as not fulfilling a MOT obligation and this individual will remain first on the MOT list. Leaving ill during MOT a second time may constitute a “Refusal to Work MOT” and be subject to disciplinary action.

ADVERSE WEATHER/OTHER FACILITY EMERGENCIES:

Unanticipated staffing needs which occur as the result of any emergency (such as adverse weather) will be managed as necessary. Actions required to provide adequate staffing during these times may supersede the MOT guidelines.

The grievances posed here are not the first MOT based disputes, but represent facts unique in the parties’ implementation of the MOT. Prior emergencies resulted from adverse weather conditions. It is undisputed that the one day suspensions at issue here implicate the MOT and not the progressive discipline system established by Article VI.

The factual background to the events of January 26 are not disputed, but are best set forth as an overview of witness testimony.

Loreli Spaay

Spaay is no longer employed by the County, but worked for the County as a Registered Nurse on January 26. She served, on Super Bowl Sunday, on the day shift as Scheduling

Coordinator. On January 25, a CNA warned Spaay that a number of employees were planning to call in sick. This posed a potential dilemma, since the County had staffed for the weekend tightly, to accommodate the absence of as many employees as possible.

Spaay worked at the Rehabilitation Pavilion on January 26, and it was apparent that staffing the second shift would be a problem. The first shift runs from 6:30 a.m. until 2:30 p.m. Throughout the morning of January 26, Spaay received call-ins for the second shift. As the morning wore on, Spaay went to all the units to seek volunteers to stay after the first shift. She found none. She then proceeded to repeat the procedure, "begging" for volunteers. She again met with no success. Attempts to pull in employees from the call-in list or from Pleasant Acres afforded no success. She then reverted to the MOT. After isolating the employees who would be required to stay under the MOT, she went to their work station to inform them of their overtime assignment. Eight of the employees she met told her they would refuse to stay and would accept the one day suspension under the MOT.

Spaay did not have the authority to order employees to work and contacted her supervisors, Mary Tack and Judy Pahlow. Tack and Pahlow informed Spaay to announce throughout the facility that no first shift employee would be permitted to leave the facility until a replacement for the employee reported for duty. Spaay estimated that this declaration of an emergency came between Noon and 2:00 p.m. After her announcement, a few employees volunteered to accept overtime.

No CNA refused to stay at the facility at the close of the first shift, although certain employees on one unit threatened not to stay. As second shift employees reported for work, Spaay released their first shift counterparts. Although staffing was "very thin," Spaay was able to staff the second shift within State of Wisconsin mandates.

Spaay did not view her staffing difficulty to be the result of a job action. She wrote an account of the shift for Mark Luebke, the County's Personnel Coordinator for the Health Center. She played no role in the one day suspension meted to the eight employees who refused work under the MOT, but did expressly note the cooperation of those employees who volunteered to stay after the announcement of emergency staffing.

Charlene Lowe

Lowe is the Administrator of Park View Health Center, and served in that capacity on January 26, 1997. She was one of the Employer representatives who negotiated the terms of the MOT. The situation of that day was unprecedented and unanticipated by the employees who drafted the MOT.

Lowe had heard rumors of a concerted refusal to work on January 26, but did not view those rumors to play any role in the declaration of a staffing emergency. Rather, she viewed the emergency to be the result of employees refusing to work overtime voluntarily and after being assigned to do so under the MOT. She noted that the eight disciplined employees reported for

work in the morning of January 26, but then stated their refusal to work overtime under the MOT. No employee from the call-in list was disciplined. None of the employees who ultimately volunteered to work overtime was disciplined. That the County was able to staff the second shift did not, in Lowe's eyes, constitute a defense for the one-day suspensions. None of the suspended employees afforded her an excuse other than the inconvenience the overtime would have imposed on their enjoyment of a then only anticipated Packer victory.

Nancy Rodat

Rodat, now retired, served the County for twenty-eight years as a CNA. She served the Union as its Treasurer, and served as a resource for many unit employees. She was aware of potential staffing problems prior to January 26. She, as many other employees, had put in overtime prior to the commencement of the first shift on January 26 to avoid being compelled to work on January 26 under the MOT. After the County declared an emergency at roughly 1:15 p.m., Rodat advised unit members to stay at their positions or risk losing their jobs.

Rodat affirmed that the County's declaration of emergency did not occur until after unit employees had refused to work overtime under the MOT. In her view, the County's declaration of emergency suspended the operation of the MOT. Once the MOT had been suspended, the County lacked the authority to issue the one-day suspensions authorized by it.

Lynn Monday

Monday is the Union's Vice-President. Rodat phoned her on January 26 to discuss the staffing dilemma caused by employee refusals to work overtime. Monday advised Rodat to inform Spaay to declare an emergency. Rodat again phoned Monday after the County had declared the emergency. She advised Rodat that employees should not leave the facility unless they were willing to put their jobs at risk.

Monday was one of the Union representatives who participated in the creation of the MOT. In her view, the County's declaration of an emergency suspended the operation of the MOT and precluded the application of its suspension provision. Had the County not declared the emergency, the Union would not have filed a grievance.

Further facts will be set forth in the **DISCUSSION** section below.

THE COUNTY'S POSITION

The County contends that the MOT has worked well except in this instance, which was never contemplated by the parties when they created it. The emergency declared by the County was spawned by the refusal of an unexpectedly large number of employees to work overtime. The final paragraph of the MOT then in effect clearly establishes that the County's declaration of an

emergency has no effect on the application of its terms. The use of “may” instead of “shall” before the term “supercede” unambiguously establishes this.

This conclusion is not simply good contract interpretation. It is also good employment policy. If the MOT has no effective sanction, then the policy has no meaningful effect and the behavior at issue here would be encouraged in the future. That the parties voluntarily increased the sanction in a revised MOT underscores this conclusion.

The County concludes that the grievance must be denied.

THE UNION’S POSITION

The Union contends that the facts posed by the grievance are unique and cannot be repeated. This establishes that the grievance does not concern the establishment of precedent. Rather, the grievance questions the equitable implementation of the MOT.

The incident posed here was not contemplated by the parties at the time they created the MOT. Nor does the incident pose egregious County or Union conduct. The absences do not constitute a job action. The County appropriately tried to run a tight schedule on Super Bowl weekend. The crisis anticipated by the County did not materialize, and thus its response is no more than an over-reaction.

That over-reaction should not, however, become a basis for a misapplication of the MOT. The revised MOT contains the “supersede” sentence of the final paragraph of the MOT posed here. To sustain the County’s conduct denies employes the choice to decline overtime which is one of the primary reasons for the policy. In this case, employes who were conscientious enough to put in overtime earlier in the week received an inappropriate “double whammy” by being compelled to work overtime on Super Bowl Sunday.

The final paragraph of the MOT must be read to void the MOT once an emergency is declared. Any other result wrongfully denies employes the choice which makes the MOT work. It follows that the grievance must be sustained.

DISCUSSION

The issue for decision is stipulated and focuses on the MOT. A MOT suspension must be distinguished from an Article VI suspension. MOT based suspensions are designed to encourage employe acceptance of overtime. Article VI based discipline is a just cause based sanction designed to punish inappropriate behavior and set the stage for the dismissal of an employe incapable of modifying that behavior.

Seven of the eight suspended employes grieved their suspension. The parties’ stipulation of the issue focuses the propriety of the suspension primarily on the terms of the

MOT rather than on Article VI. The strength of the Union's case is its assertion that the County's actions effectively superseded the MOT. Once the MOT was superseded, the County's authority to mete a one-day suspension vanished under the terms of the final paragraph of the MOT. On a more policy-based level, the strength of the Union's case is that the suspended employees were given the burden of the MOT policy without having received its benefit. Under this view, an employee can decline MOT knowing a sanction will follow. The employee thus accepts a day off in return for the privilege of avoiding a MOT shift.

While the Union's contention has persuasive force, the County's interpretation is better rooted in the terms of the MOT. The "supersede" reference appears in the final sentence of the MOT. "Supersede" can be read to mean "void" as the Union asserts. The subject of that sentence is not, however, a declaration of emergency but "(a)ctions." Those actions are modified in the final sentence by "required." The distinction should not be overlooked. If the sentence had a general declaration of emergency as its subject, then a general voiding of the MOT guidelines would be an appropriate result. The sentence focuses, however, on "required actions." This greater specificity implies that only those provisions of the MOT conflicting with required, emergency actions are superseded.

The parties' use of the term "may" before "supersede" underscores this conclusion. While "may" can be read as "shall," it is more commonly viewed as a term of limitation and discretion. The term "may" implies that the MOT guidelines are not to be suspended as a matter of course or mandate.

A review of the MOT as a whole further underscores this conclusion. The comprehensive coverage of the policy is apparent on its face. The drafters of this policy took their work seriously and addressed the issues covered by it comprehensively. More significantly, reading a declaration of an emergency to void the entire policy yields unpersuasive results. The final sentence of the first paragraph of the "PROCEDURE" section notes that even when the MOT is employed, "voluntary replacements" should still be sought. Accepting the Union's interpretation would void this sentence for no evident purpose. Presumably, a volunteer for overtime works more productively than a non-volunteer. Similarly, the final sentence of the final paragraph of the "PROCEDURE" section notes that MOT assignments will be for no longer than necessary. It is not apparent why this sentence should be unnecessarily voided. It would seem an odd interpretation of the MOT to conclude that because the County declared an emergency on January 26 it secured the authorization to hold employees longer than necessary.

Beyond this, the Union's interpretation strains the purpose of the "REFUSALS" section of the MOT. Under that section, a refusal is not to be accepted and "automatically" results in a one-day, non progressive-discipline suspension. It is not apparent how the suspensions issued by the County constitute something other than an automatic act. Beyond this, it is not apparent what sanction would result if the MOT is not read in this fashion. The MOT acts to a significant degree as a defense to discipline, potentially for insubordination, under Article VI. If the asserted declaration of emergency voided the MOT, and if the County is convinced conduct in which it has a disciplinary interest occurred, has that discipline thus been

aggravated to the level of Article VI? This has no apparent basis in either the contract or the MOT. Rather, it appears the parties intended the MOT to provide a disincentive to use Article VI discipline to secure employe acceptance of overtime.

In sum, the final paragraph of the MOT authorizes emergency actions by the County to assure staffing levels. Such "required" actions "may supersede the MOT guidelines." This over-riding of the MOT should, however, be limited to the extent necessary to assure staffing. The "actions" thus taken do not amount to a general declaration of emergency which voids the MOT as a whole. Rather, the final sentence affords the County a limited defense against challenge to the actions it is required to take in emergency situations to assure staffing.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. That the parties increased the sanctions applied by the MOT in a revision to the policy governing the incident of January 26, 1997, can play no role in the resolution of this grievance.

The Union's assertion that the suspensions impose an unjust result cannot be lightly dismissed. Employees who called in sick on January 26 received no penalty, while those who came to work did. That some of those employes put in overtime earlier in the week to secure the freedom to back the Pack from sites other than the Health Center aggravates the inequity. This inequity does not, however, afford a persuasive basis to overturn the conclusion stated above. The fundamental purpose of the MOT is to assure staffing for the vulnerable residents of the Health Center. Beyond this, the inequity is not solely the result of County conduct. Those employes who successfully avoided work on January 26, no less than the County, forced the inequity noted above on their fellow employes. The sanction imposed by the County for the staffing dilemma of January 26 presumably promotes employe assumption of overtime. Overturning that sanction does not.

AWARD

The County did not violate the contract when it suspended the seven grievants pursuant to the then existent mandatory overtime policy.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 14^h day of October, 1998.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator