

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**FEDERATION OF NURSES AND HEALTH PROFESSIONALS,  
LOCAL 5001, AFT, AFL-CIO**

and

**ST. FRANCIS HOSPITAL**

Case 33  
No. 56410  
A-5675

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Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Jeffrey P. Sweetland**, appearing on behalf of the Union.

Michael, Best & Friedrich, by **Attorney Thomas W. Scrivner**, appearing on behalf of the Hospital.

**ARBITRATION AWARD**

The Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, herein the Union, and St. Francis Hospital, Inc., herein the Hospital, requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was designated as the arbitrator. Hearing was held in Milwaukee, Wisconsin, on April 21, 1999. A copy of a stenographic transcript of the hearing was received on June 1, 1999. Post-hearing briefs were exchanged on July 21, 1999.

**ISSUES**

The parties were not able to stipulate to the issues and agreed that the arbitrator would frame the issues in his award.

The Union stated the issues as follows:

Did the Hospital violate the collective bargaining agreement by requiring Ruth Ventela, a limited part-time employe, to work holidays? If so, what is the appropriate remedy?

The Hospital stated the issues as follows:

Whether the grievance was filed by the Union in a timely manner pursuant to Article 23 of the collective bargaining agreement? Whether Article 10.02 of the collective bargaining agreement was violated when Ruth Ventela, a limited part-time employe, was scheduled to work on December 25, 1997? If so, what remedy, if any, is appropriate?

The undersigned believes the following to be an accurate statement of the issues:

Was the grievance timely filed? If so, did the Hospital violate Section 10.02 of the Support Service collective bargaining agreement when it scheduled Ruth Ventela, a limited part-time employe to work holidays? If so, what is the appropriate remedy?

## **BACKGROUND**

The Hospital employed approximately 1,800 employes in 1998, many of whom were represented by the Union in three separate bargaining units. There were approximately 550 employes in the RN (registered nurses) unit, which unit had existed since 1985. The Technical unit was certified in early 1996 and contained just over 200 employes. The Support Service unit was certified in December 1996 and contained approximately 600 employes.

The Hospital and the Union have had collective bargaining agreements covering the RN unit since 1985. In the RN's 1994-96 agreement, the parties adopted an A/B schedule for assigning RN's to work on the six specified holidays.

A memorandum, dated January 17, 1995, set forth the written agreements reached by the Hospital and the Union on several issues, including, inter alia, the following statement: "Limited part-time employes are not required to work a specific number (or any) holidays."

In 1996, Lori Kellerman-Bush, a RN, went from RFT (regular full-time) status to LPT (limited part-time) status. In the fall of 1996, Kellerman-Bush asked her supervisor about the requirement for LPT employees to work holidays. The supervisor advised her that she was required to work on holidays. Kellerman-Bush worked the Thanksgiving holiday in 1996 and the New Year's Day holiday in 1997 as scheduled. In January of 1997, she contacted Barbara Janusiak, the Union's chief steward for the RN unit. Janusiak discussed the matter with Ed Malindzak, the Hospital's Director of Human Resources. In March of 1997, Kellerman-Bush was told by her supervisor that she would not be required to work on holidays.

The Hospital bargained a separate collective bargaining agreement with each of the three bargaining units in 1996-97. Bargaining with the RN unit began in mid to late 1996 for a successor agreement. During those negotiations, the Hospital proposed to include the LPT employees in the holiday scheduling language. The Union did not agree to said proposal. The parties had agreed on holiday scheduling language for the RN unit prior to December of 1996. Bargaining for the Technical unit began in mid-1996 and the holiday scheduling language had been agreed to prior to the commencement of the negotiations with the Support Service unit. Negotiations with the Support Service unit began in March or April of 1997.

On July 6, 1997, the parties signed separate collective bargaining agreements for each of the three units covering the period of 1997-2000. All three agreements have identical definitions of regular full-time employees (RFT), regular part-time employees (RPT) and limited part-time employees (LPT). All three agreements recognize the same six regular holidays. Each of the agreements includes a provision with respect to the obligation of employees to work on the holidays. The language in the RN agreement refers to full time and regular part-time employees only and requires them to work six and three holidays per year, respectively, on the A/B schedule. The Technical agreement holiday language refers to employees maintaining the "current practices" previously utilized before the agreement. The Service agreement incorporates the language from both the RN and Technical agreements. Both parties agreed that to maintain consistency within the agreements, when possible, the same language would be utilized in each of the agreements.

Prior to the commencement of the 1996 negotiations, the Union requested and was given a set of all relevant written Hospital policies. A manual containing those Hospital policies is kept in each unit of the Hospital. Those policies include policy 8.8, which has existed since 1982 and was last updated on June 15, 1997. Policy 8.8 contains, *inter alia*, the following statement: "LPT (limited part-time) employees are expected to work two of the six major holidays with regular rate of pay."

During the negotiations for the Service agreement, the parties did not discuss the subject of LPT holiday obligations. Neither did the parties discuss either policy 8.8 or the 1995 memorandum during the negotiations.

The grievant, Ruth Ventela, became a limited part-time (LPT) employe at St. Francis Hospital in March of 1994 working in the 3 West unit. In March of 1997, the 3 West and 5 East units were merged into the 6 Center unit. Ventela became part of the 6 Center Oncology unit as a Health Unit Coordinator. From March of 1994 to the present, Sue Milewski was her supervisor. Ventela is a member of the Service unit.

Unit 6 Center utilizes an A/B schedule for all of its RFT and RPT employes. Ventela has been scheduled to work two holidays each year since she began her employment as an LPT employe. Ventela was assigned to work Schedule B in 1995, and worked on Memorial Day and Christmas. Ventela was assigned to Schedule A in 1996. In 1997 she was again assigned to Schedule B, which schedule included Christmas. Ventela has never worked three holidays in any given year during the time she has worked as a LPT employe for the Hospital.

On December 8, 1997, the schedule for the employes in the 6 Center unit was posted for the 28-day period beginning on December 21, 1997, which showed Ventela was scheduled to work on the Christmas holiday, December 25, 1997. On December 18, 1997, Ventela spoke with Milewski, her supervisor, because she had heard that LPT employes did not have to work holidays. Milewski said that the agreement was silent on the issue, so she would continue to rely on policy 8.8 and that Ventela was expected to work the Christmas holiday as scheduled. Milewski also told Ventela that she would not receive holiday pay for working on Christmas Day. Ventela worked the Christmas holiday. Ventela also talked to a Union steward, Gus Holtz, about working on holidays. On or before December 31, 1997, Holtz spoke with Milewski regarding the issue. Milewski reiterated the fact that the contract was silent and thus LPT employes were required to work scheduled holidays. Milewski did provide Holtz with a copy of policy 8.8.

Ventela filed the grievance on January 16, 1998, after receiving her paycheck covering the Christmas holiday. She did not receive holiday pay for working on Christmas. Ventela has continued to be scheduled to work two holidays a year since she filed her grievance.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 3**

#### **Management Rights**

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#### **3.02.**

Without limiting the generality of the foregoing, and except as expressly and specifically limited or restricted by a particular provision of this Agreement, the Hospital's management rights include: the right to manage the Hospital and determine the work to be done; the time and manner in which the work will be

done; the right to schedule working hours; (the right to direct the working forces, including the right to hire, layoff, recall, classify, transfer, promote or demote employees; the right to suspend, to discipline and to discharge for just cause any employee; the right to determine and reasonably redetermine qualifications of employees and, after consultation with the Union, to make reassignments based on such determinations; the determination of services to be rendered or supplied; the determination of and the right to make changes to services to be rendered or supplied; the determination of and the right to make changes in processes, techniques, methods and means of performing the work including the right to subcontract work; the selection or promotion of employees to supervisory or other managerial positions or to positions outside the bargaining unit; the right to have supervisors or others perform any work deemed necessary by the Hospital (but not for the intent and purpose of eroding the bargaining unit); the establishment of uniform performance standards; the scheduling of work and the determination of the number and duration of said shifts and the size of the work force; the combination or splitting of departments or units; the determination of safety, health and property protection measures for the Hospital; the establishment, modification and enforcement of standards of care; the assignment of employees from one task to another, or from one unit department to another, or from one location to another, or from one shift to another, to meet the needs of the Hospital from time to time; and the right to reasonably make, modify, or change and publish or enforce employment rules, policies and practices.

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## **ARTICLE 10** **Holidays**

### **10.01.**

Full-time employees will receive the following paid holidays: January 1 (New Year's Day), Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, December 25 (Christmas Day), and two personal holidays. Regular part-time employees will receive three (3) paid holidays and one (1) personal holiday. Holiday pay is eight (8) hours pay for regular full-time and regular part-time employees.

### **10.02.**

(a) In departments that use the A/B system of scheduling holidays the following rules will apply. Full-time and regular part-time employees will rotate holiday off schedules as follows:

**1997 and 1999**

**Schedule A**

Memorial Day  
Labor Day  
Christmas Day

**Schedule B**

Fourth of July  
Thanksgiving Day  
New Year's Day (1998)(2000)

**1998**

**Schedule A**

Fourth of July  
Thanksgiving Day  
New Year's Day (1999)

**Schedule B**

Memorial Day  
Labor Day  
Christmas Day

...

(b) In departments that do not use A/B holiday scheduling, current practice shall remain in effect unless there is an operational need to change.

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**ARTICLE 23**

**Problem-solving**

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B. The problem solving process shall be subject to the following procedure:

**Step One:** The employee and immediate supervisor are encouraged to meet, discuss and resolve problems that may be covered by this procedure. Regardless of whether such a meeting takes place, the problem shall be reduced to writing and signed by the employee(s) and Union representatives. The problem must be submitted to the supervisor in writing within fourteen (14) calendar days of the date the employee became aware or should have become aware of the event giving rise to the problem. The supervisor shall respond in writing within seven (7) calendar days of receipt of the written presentation of the problem.

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**ARTICLE 28**  
**Rules of Construction**

In construing this Agreement, past practice shall not be considered except to the extent necessary in order to construe a provision of this Agreement that is found to be ambiguous, and past practice shall not be or become part of this Agreement.

Nothing shall be deemed a past practice unless it meets each of the following tests:

- (1) long continued;
- (2) certain and uniform;
- (3) consistently followed;
- (4) generally known by the parties hereto; and
- (5) not in opposition to the terms and conditions in this Agreement.

. . .

**POSITION OF THE UNION**

The grievance was filed on a timely basis because the issue to be resolved is a continuing violation and the grievance, as presented to the arbitrator, does not seek any retroactive remedy. Rather, the grievance simply seeks prospective relief through a ruling that Ventela need not work holidays in the future. Ventela has remained on the holiday schedule and thus the issue is not only the scheduling of the 1997 Christmas holiday, but also of any holiday she is scheduled to work.

Section 11.02 of the RN agreement sets forth the holiday work obligations for RFT and RPT employees. LPT employees are not mentioned in said provision. The parties issued a memorandum in January of 1995 to clarify the obligations of LPT employees to work on holidays. Thus, there is no need for the arbitrator to interpret Section 11.02, since the parties have already done that through their agreement as contained in the 1995 memorandum. Such a conclusion is supported by the bargaining history. In the negotiations for the 1997-2000 RN agreement, the Hospital sought to have the term "limited part-time employees" added to the list of employees subject to the A/B schedule for working holidays. The Union rejected the proposal and the Hospital withdrew the proposal.

Policy 8.8 was in existence prior to the 1995 memorandum. A unilaterally promulgated policy must yield to an agreement when the two are in conflict. Therefore, policy 8.8 does not control in the instant matter.

Past practice shows that when one LPT RN, Lori Kellerman-Bush, complained about being scheduled for holiday work, the Hospital agreed with the Union that she would not be required to work any holidays. Such a decision was consistent with the 1995 memo and the withdrawal of the Hospital's proposal to add LPT employees to Section 11.02 in the 1996 negotiations for the RN agreement. In contrast, the decision was contrary to Hospital policy 8.8.

When the Service agreement was negotiated, the parties wanted to maximize consistency and uniformity between the three contracts. When the same language was used in different contracts, the parties intended it to have the same meaning. Here the parties chose to have the RN agreement 11.02 language apply to certain departments, while other departments would follow the Technical agreement language. Because Unit 6 center uses an A/B schedule, then Section 10.02 (a) of the Service agreement must be given the same meaning as Section 11.02 of the RN agreement. Consequently, LPT's on Unit 6 center who are in the Service unit are exempted from the requirement of working any holidays.

The grievance should be sustained. The arbitrator should declare that, under Section 10.02 (a), Ventela, as an LPT employe, is not required to work any holidays.

### **POSITION OF THE HOSPITAL**

Ventela failed to file the grievance within 14 calendar days following any of several events, each of which should have started the 14-day period. The schedule was posted on December 8, 1997, at which time Ventela should have been aware of the issue. Ventela was informed by Milewski on December 18, 1997, that she was expected to work on December 25, 1997, and that she would not receive holiday pay. Ventela did work on December 25. The Union was advised, on or before December 31, 1997, of the Hospital's position concerning Ventela having to work on holidays. Because the grievance was filed on January 16, 1998, Ventela failed to meet the 14 calendar day time limit based on any of the above dates.

Ventela's grievance does not constitute a continuing grievance, because the Union focused on her specific situation rather than the membership in general. Even if the grievance was to be considered a continuing grievance, it still had to be filed within 14 calendar days of a holiday on which Ventela worked.

The language in Article 3 of the agreement is clear and unambiguous that the Hospital has retained the right to schedule holiday work for LPT employes. Article 10 of the agreement does not refer to LPT employes. Article 28 of the agreement prohibits the parties from looking beyond the language of the agreement when the language in question is clear. Based on the express language of the agreement, the arbitrator must find that management has the right to schedule LPT employes to work holidays and must deny the grievance without resorting to technical rules of interpretation.



The bargaining history demonstrates that the Hospital did not agree to restrict its ability to schedule LPT employees to work on holidays during the 1996-97 negotiations. Although the Union opposed adding LPT employees to the language of the RN agreement under 11.02, the Union never proposed to exclude the LPT employees from working holidays, thereby endorsing the status quo. Both the A/B scheduling language of the RN agreement and the current practice language of the Technical agreement were included in the Service agreement. This was done to ensure that the Service employees would remain on the same holiday schedule they had prior to the bargaining of an agreement. Because 6 Center had been scheduling LPT employees to work two holidays per year prior to the 1996-97 negotiations, it was the intent of the parties to continue with this practice.

The Union's reliance on the RN negotiations as the controlling source of interpretation of the Service agreement is misplaced. The language in the Service agreement was drawn from both the RN and the Technical agreements with the intent to allow holiday scheduling to continue as it had been done. Further, the Union never raised the issues of either extending the 1995 memorandum to the Service employees or modifying policy 8.8

Past practice demonstrates that the Service LPT employees have always had the expectation of holiday work. The holiday language of 10.02 (b) captures this expectation with the "current practice" language. The LPT employees are not part of the A/B system of holiday scheduling. The LPT employees in the 6 Center unit have been consistently required to work only two, rather than three, holidays per year including either Christmas or New Year's Day and a second holiday chosen by the employee. This is unlike the A/B scheduling system which requires employees to work three pre-assigned holidays a year. In addition to Ventela, two RN LPT employees in the 6 Center unit, Grefe and Aussperung, have been scheduled and have worked two holidays per year since at least 1995 without filing any grievances.

The 6 Center unit practice of scheduling of LPT employees to work on holidays is common throughout the Hospital. No LPT employees have ever filed a grievance over the long-standing Hospital practice of scheduling LPT employees to work holidays. It is clear from the testimony, the 1995 memorandum was intended to apply only to RNs.

Based on the foregoing, the grievance should be denied.

### **DISCUSSION**

The first issue that must be addressed is whether the grievance was filed in a timely fashion. The undersigned concludes that the grievance was timely filed. Due to the fact that Ventela has been required to continue working holidays, the grievance is of a continuous nature. Although the grievance originally was filed over the scheduling of Ventela to work the Christmas of 1997 holiday, Ventela has remained on the holiday work schedule and has been

required to work additional holidays since the 1997 Christmas holiday. If the Hospital's argument was accepted and the instant grievance was denied for being untimely filed, then Ventela, or another LPT employe could file a new grievance for the same reason that the instant grievance was filed. Such an action would require the parties to duplicate the procedure followed in the instant matter so as to receive a decision on the same issue as is presented by the merits of the instant matter. For the foregoing reasons, the grievance is found to have been timely filed and to be ripe for decision.

The next issue to be determined is whether the Hospital violated the Service agreement when it scheduled Ventela to work holidays. Section 10.02 of the agreement is silent regarding this issue, since the language only refers to full-time and regular part-time employes and does not mention limited part-time employes. Article 3.02 of the agreement sets forth the Hospital's general right to schedule employes. Because the agreement is silent with respect to requiring LPT employes to work on holidays, the undersigned will consider the Union's argument that the parties have modified the agreement as it applies to LPT employes.

Under Article 28 of the Service agreement, a past practice can only be considered when the agreement is found to be ambiguous. In addition, five requirements must be met in order to find a past practice exists. Those requirements are: (1) long continued; (2) certain and uniform; (3) consistently followed; (4) generally known by the parties hereto; and (5) not in opposition to the terms and conditions of the Agreement.

The threshold requirement to consider a past practice has been met. The agreement is ambiguous with regard to LPT employes working on holidays. The undersigned does not agree with the Union's assertion that the 1995 memorandum precludes the consideration of the alleged past practice when interpreting the language of the agreement. The 1995 memorandum is not referenced in the agreement. Thus, it can only be considered on the same basis as the alleged past practice, i.e., as a means to clarify ambiguous language. The parties did not discuss either the 1995 memorandum or policy 8.8 during the negotiations culminating in the agreement for the Service unit. In the absence of a specific discussion of the 1995 memorandum in those negotiations, the undersigned is not persuaded that the parties mutually intended that the 1995 memorandum would apply to LPT employes in the Service unit. That memorandum was adopted for the RN unit prior to the creation of the Service unit. The Hospital's proposal to add LPT employes to the A/B rotation was made in the negotiations for the RN unit. There was no proposal concerning holiday work for LPT employes in the negotiations for either the Service unit or the Technical unit from either the Union or the Hospital. Kellerman-Bush was a LPT employe in the RN unit. The Hospital's agreement to exclude her from the requirement to work on holidays appears to be consistent with the 1995 memorandum and the negotiations history for the RN unit. Such a background fails to establish that the parties were in agreement to have the 1995 memorandum apply to the Service unit.

The Hospital has demonstrated that a past practice exists with regard to scheduling LPT employes to work on holidays. This past practice is long continued as demonstrated by the fact that LPT employes under the supervision of Milewski have been scheduled to work two holidays per year for a number of years. In addition to Ventela, two RN LPT employes have worked two holidays per year in the 6 Center unit. It was the uncontradicted testimony of Milewski that employes are made aware of the requirement to work on holidays at the start of their employment on the 6 Center unit. The Hospital presented evidence to show that numerous, ranging from 5 to 9, LPT employes in the Service unit worked on each of the six holidays listed on the A/B schedule beginning with Memorial Day in 1997 through New Year's Day in 1998. Thus, the practice is certain and uniform and has been consistently followed over a long period of time. As discussed above, the Union had a copy of the Hospital policies and should have been aware of policy 8.8. Moreover, the extensive and consistent use of LPT Service unit employes to work on holidays also should have made the Union aware of the practice. Furthermore, because the agreement is silent with regard to the scheduling of LPT employes to work on holidays, the past practice is not in opposition to the agreement.

The past practice offered by the Union fails because it does not meet all the requirements as established by Article 28. Although LPT RN Kellerman-Bush was not required to work holidays pursuant to the 1995 memo, this practice was not consistent with the scheduling of other LPT employes to work holidays. Ed Malindzak, the former Director of Human Resources for the Hospital until March of 1999, testified that LPT employes, including RN's, were scheduled to work holidays in both 1997 and 1998, just as they had been scheduled in prior years. No grievances have ever been filed regarding this practice. Thus, the alleged practice of not requiring RN's to work holidays pursuant to the 1995 memo does not meet the requirements to establish the existence of a past practice which would apply to the Service unit.

Although the 6 Center unit utilizes the A/B system, it does not do so for all its employes. LPT employes are not required to work six or three holidays per year nor are they required to work only pre-assigned holidays as are the employes under the A/B schedule. Rather, the LPT employes work a modified A/B schedule. Thus, the current practice is to schedule the LPT employes to work on two holidays per year, one of which must be Christmas or New Year's Day and the other to be of the employe's choice. Such a practice is similar, but not identical, to the A/B schedule for RFT and RPT employes. The agreement confers the right to schedule employes according to the current practices that had been utilized. Because this system has been used consistently for an extended period of time, it constitutes a current practice.

Based on the foregoing and the record as a whole, the undersigned enters the following

**AWARD**

That the grievance filed by Ruth Ventela was filed in a timely manner; that the Hospital did not violate Article 10 of the Service collective bargaining agreement by scheduling Ruth Ventela, a limited part-time employe, to work holidays; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16<sup>th</sup> day of September, 1999.

Douglas V. Knudson /s/

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Douglas V. Knudson, Arbitrator