

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, INC.**

Case 36  
No. 57213  
A-5742

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Appearances:

**Ms. Carol Beckerleg**, Field Representative, Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, representing the Union.

Michael, Best & Friedrich, LLP, by **Attorneys Thomas W. Scrivner and David A. Dixon**, representing 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 June 22, 1999. A copy of a stenographic transcript of the hearing was received on August 9, 1999. Post-hearing briefs were exchanged on October 12, 1999.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

**ISSUES**

The parties stipulated to the following issues:

Was Section 14.03 of the 1997-2000 Registered Nurse collective bargaining agreement violated when the grievant was low censused on July 31, 1998? Specifically, was the grievant low censused out of turn within her department? If so, what is the remedy?

### **BACKGROUND**

The Hospital provides a full range of medical services, including both inpatient and outpatient surgery. The Hospital is organized around a system of separate, but cooperating, sub-units, each of which performs certain functions. Three of those sub-units are involved in this proceeding, Same Day Surgery (SDS), Post-Anesthesia Care Unit (PACU) and Pre-Admission Testing (PAT). Mary Ann Lorence has been the manager of those three sub-units since she was hired by the Hospital in September of 1996. SDS and PACU are located adjacent to each other in the Hospital and share a nurse's station. PACU and SDS both provide immediate post-operative care. PAT is located in a separate building about two blocks from the Hospital.

PAT develops a data base, i.e., histories, on patients having outpatient surgery. In addition, PAT nurses educate patients regarding all aspects of pre- and post-operative care, such as dietary restrictions, rehabilitation planning and additional assistance at home after surgery.

SDS primarily is concerned with surgeries that will occur during the same day as the day on which the patient arrives at the surgery center. SDS nurses complete any missing information in SDS patient databases, complete pre-operative checklists, prepare the patient for surgery, which may include administering medications and starting intravenous solutions, and deliver patients to the pre-operative holding area. SDS and PACU nurses both oversee the post-operative care area.

SDS is open from 5:30 a.m. to 9:30 p.m. and the need for coverage by nurses during these hours results in a variety of start times for the nurses. The number of nurses scheduled for each day is based on a pre-determined grid developed by the nurse manager and the schedulers. Generally, on Tuesdays, Wednesdays and Thursdays, three nurses work from 5:30 a.m. to 2:00 p.m., one nurse works from 6:30 a.m. to 3:00 p.m., one nurse works from 7:00 a.m. to 3:30 p.m., one nurse works from 8:00 a.m. to 4:30 p.m., one nurse from either 8:30 a.m. to 5:00 p.m. or 9:00 a.m. to 5:30 p.m., and, one nurse from 1:00 p.m. to 9:30 p.m. The 8:30/9:00 a.m. shift is referred to as the dotted shift and the nurse working this shift is required to stay beyond eight hours if the late shift nurse needs help because of the number and/or complexity of the patients in post-operative care. Usually on Mondays and Fridays the 6:30 a.m. shift is eliminated due to historically lighter patient loads on those days. The work

schedule is posted for a four-week period. The schedule is reviewed each day and start times for the following day can be adjusted based on the patient load. Nurses affected by such changes are then informed of the changes.

In the instant case, the grievant was scheduled to begin work at 6:00 a.m. on July 31, 1998, but she actually began work at 5:30 a.m. as she had agreed to do when requested, on July 30, to make that change to accommodate the patient census. Three other nurses also began work at 5:30 a.m. in SDS on July 31. A fifth nurse, B Beaumont, began a dotted shift at 8:30 a.m. on July 31. After the anticipated morning rush of patients, the Charge Nurse, Grace Halenka, determined that two nurses needed to be low censused. One of the nurses who started at 5:30 a.m. volunteered to be low censused. After failing to find a second volunteer among the four early nurses, Halenka checked the SDS low census log and learned that the other three early nurses had been low censused more recently than the grievant, who had been low censused last on May 1. The grievant had been low censused more recently than Beaumont. However, Halenka decided not to low census Beaumont, the dotted shift nurse, since that would have reduced the staff to one nurse after 2:00 p.m., unless an early shift nurse was required to remain in overtime status until it was safe to leave the late shift nurse alone with the remaining patients. At approximately 9:30 a.m. the grievant was notified that she was low censused and the grievant left work shortly thereafter.

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*1/ Unless otherwise specified, all other dates herein refer to 1998.*

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The grievant had been oriented in PAT on two dates in 1996. Additionally, PAT charts frequently are brought over to SDS for the nurses to complete and the grievant had worked on those charts. A pool nurse, Terri Lampe, worked in PAT on July 31. Lampe worked in PAT at least once a week in 1997. Prior to July 31, Lampe had worked over 500 hours in PAT in 1998.

### **POSITION OF THE UNION**

Of the individuals working on July 31, the nurse working the 8:30 a.m. dotted shift had the most distant instance of low census and should have been sent home rather than the grievant. Halenka knew on July 30 that it probably would be necessary to send nurses home on the next day. It would have been possible to let the grievant start at 8:30 a.m. and move that nurse to a 5:30 a.m. start.

The department schedule anticipates overtime. The dotted shift can be required to work overtime each and every day, if necessary. Thus the Hospital's alleged fear of incurring overtime if the grievant had been allowed to stay is a faulty argument. It should not matter which shift incurs the overtime.

In addition, the grievant was cross-trained in the PAT area and should have replaced a pool nurse who was working in PAT on July 31, which action would have been consistent with Section 14.03 of the contract. The grievant has been oriented to PAT on two prior occasions. Further, SDS nurses perform many of the duties performed by the PAT nurses. In fact, PAT charts have been given to SDS nurses, including the grievant, for them to complete. A document produced by the Hospital in September of 1997 lists the grievant as being qualified to work in PAT. The cross training committee developed a list of areas with similar duties and the length of time it would take for an employee to learn the new area. That document indicated that employees in SDS could be trained to work in PAT in five, or less, days due to the similar skills and type of patients. Lorence did not know if any total joint patients were scheduled for July 31, but, even if there had been, there were nurses in PAT, other than the pool nurse, who could have handled those patients.

The Union requests the arbitrator to award the grievant four hours of back pay for being sent home early on July 31.

#### **POSITION OF THE HOSPITAL**

The contract does not address low census rotation within individual departments. Therefore, Halenka appropriately exercised the Hospital's management rights when she decided to low census the grievant, rather than Beaumont, to provide quality patient care. The Union failed to establish that the informal low census rotation method used in SDS constituted anything more than an informal guide for determining who should be low censused.

If Halenka had low censused Beaumont rather than the grievant, there would have been a gap in patient care coverage from 2:00 p.m. to 5:00 p.m., which would have compromised patient care. The gap could not have been covered by requiring one of the early shift nurses to remain on duty beyond 2:00 p.m. because both the Union and the employees are generally opposed to mandatory overtime. In fact, Beaumont remained at work until 8:30 p.m. on July 31. If one of the early nurses had been required to remain instead of Beaumont, then said nurse would have worked a fifteen-hour shift. Although most low census situations are resolved voluntarily, there were at least three other occasions in 1998 when the dotted shift nurse was not low censused, even though that nurse was next on the informal low census rotation log.

The grievant admitted that she was not cross-trained in PAT. Although she had some knowledge of PAT functions, she clearly was not cross-trained. She had worked only two days in PAT in the fall of 1996, prior to Lorence's restructuring and broadening of the PAT nursing function. The grievant did not work in PAT between her two occasions in 1996 and July 31. The amount of time required to maintain competencies must be greater than the zero amount worked by the grievant since 1996. Section 14.03 does not limit the skill and ability

standard to voluntary low census cases. The word “grant” connotes the authority of management to apply the skill and ability standard to any low census situation, whether voluntary or mandatory.

Lorence was hired to modernize the PAT program. Most of the changes implemented by Lorence began to take effect during 1997-1998, during which time Hall did not work in PAT. Terri Lampe, a pool nurse who worked in PAT on July 31, did have both the necessary skill and ability and the continuing experience to perform the PAT tasks.

The Hospital argues that it has never contested the fact that some similar database development tasks, including reviewing lab results, etc., are performed in both PAT and SDS. Indeed, it agrees that pre-selected “easy” PAT files are sent to SDS for processing. Such form of SDS assistance to PAT typically occurs only when PAT gets backlogged with relatively easy tasks and SDS has extra resources available. The workload in PAT on July 31 was not backlogged with easy database development.

The Union relies on a document containing a grid illustrating the cross-training recommendations. The document was composed before the changes introduced by Lorence and is outdated. Further, the document contains recommendations which were never incorporated into the contract.

The Hospital contends that it acted within its authority and the grievance should be dismissed.

## **RELEVANT CONTRACTUAL PROVISIONS**

### **ARTICLE 4**

#### **Management Rights**

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#### **4.02.**

. . . 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, . . . 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; . . .

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## **ARTICLE 14**

### **Layoff, Recall, and Low Census**

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#### **14.03**

(a) Low census will be done on a house-wide basis when mandatory and on a by unit basis when voluntary. Ability to grant low census will be based on skill and ability, regardless of whether there is pool in house. Low census will be determined not more than 16 hours prior to the shift. During periods of low census/volume, employees will be requested to voluntarily use vacation time or personal days. Employees will be encouraged to take low census days (unpaid time off) in increments equal to and/or less than 8 hours per shift. During such period, employees who voluntarily participate shall not lose continuity of employee benefits or accrual of benefits. Voluntary low census can be taken even if there is a pool person within the house (after consideration of house-wide continuity of care and workload). With the approval of the Department Manager, an employee may take a voluntary unpaid leave for a period of five working days at a time to be renewed to a maximum of four weeks. It is the responsibility of the employee to remain available for recall within one day of notification and to personally contact the Department Head or designee at the end of each five day period to determine if s/he should return to work or request additional time. The Hospital shall make very (sic) effort to utilize full time (sic) and part-time staff Registered Nurses wherever possible, on a voluntary basis (e.g. surgical nurses/recovery room nurses in areas such as Day Surgery, or any nurse in an area where the nurse meets qualifications of available department work as determined by the Hospital), before releasing such a nurse from work on a low census/volume mode. If further remedy is required, Administration and Department Heads will institute mandatory low census reduce or shorten work weeks wherever feasible. Mandatory low census/activity scheduling will normally be based upon reduction in 8-hour increments.

However, mandatory low census may also be allowed in increments greater than four hours and less than eight hours. Mandatory low census will not occur for only the first four hours of an eight hour shift; however, employees may remain available voluntarily. Cancellation will not occur in four (4) hour increments in the middle of a twelve (12) hour shift. An employee on low census may, as appropriate, be offered call or replace current on call employees. An employee will not receive mandatory low census if pool RN is working in an area where that employee is cross-trained. Employees may take vacation time or personal days when mandatory low census/activity requests are made and will receive credit or rotation if the time is taken paid or unpaid.

(b) Employees who wish to volunteer to take low census time should fill out a low census request form available from their Department Heads. Such forms may be turned in no more than one (1) week prior to the date(s) the employee is volunteering to take low census time. Telephone requests will be honored if received at least four (4) hours prior to the start of the shift. Where more voluntary requests are submitted than can be accommodated, volunteers will be selected in order of seniority on a rotating basis. Rotation shall begin anew each year beginning each January 1<sup>st</sup>.

(c) Whenever possible, the Hospital shall notify nursing units in advance of unit closure or anticipated unit closure.

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### DISCUSSION

Apparently, each department keeps a list to track low census occurrences and, when it is necessary to institute a mandatory low census, the list is used to determine which employee has the most distant instance of low census. Based on that list, the Union believes that the employee working the dotted shift, which started at 8:30 a.m., should have been sent home rather than the grievant. The sole reference to rotation in Section 14.03 (a) is found in the last sentence of that Section. However, that language does not specify how the rotation is to occur. When the contractual language is silent with respect to how a provision is to be administered, then the party alleging the existence of a past practice of administering the provision must be able to substantiate the alleged practice with examples of such administration. The Union failed to provide such substantiation. The record does not contain any prior instances in which the nurse, who was scheduled to work the dotted shift, was moved to an earlier shift, while the nurse scheduled to work that earlier shift then moved to the dotted shift, because it was that turn of the employee originally scheduled to work the dotted shift to be low censused. Neither does the record contain any examples in which the employee working the dotted shift was low censused, rather than a nurse on an earlier shift, because it was the turn of the dotted shift nurse to be low censused. Conversely, the Hospital identified two other occasions in 1998, prior to July 31, on which a mandatory low census of an early nurse occurred, even though said nurse previously had been low censused more recently than the nurse working the dotted shift on that date. Thus, while it appears that the Hospital does follow a method of rotating mandatory low census occasions among the early nurses in SDS, the record does not support a finding that the dotted shift nurse has been included in the rotation with the early nurses.

The record fails to establish that the grievant was sufficiently cross-trained in the PAT so that she should have replaced a pool nurse who was working in PAT, rather than being sent home after four hours on July 31. The grievant had been sent to PAT for orientation on two

occasions in the fall of 1996, but had not worked in PAT since 1996. Even if one assumed that she was cross-trained after two days in 1996, she did not work in PAT after that time so as to maintain her knowledge of, and competency in, the procedures. The need to stay current is especially important in light of the changes in the PAT program which Lorence has been instituting. The grievant had neither performed, nor been trained in, all of the duties which PAT nurses are expected to be able to perform. Although she has worked on PAT charts since 1996, such activity constitutes only a part of the duties performed by PAT nurses. Those duties had changed during the approximately two years since she had actually worked in PAT. On the other hand, Lampe had worked in PAT on a regular basis in 1997 and in 1998, prior to July 31. While the grievant could have performed some of the PAT duties on July 31, she had not been cross-trained in all of the duties. The 1997 document, which listed her as being able to work in PAT, appears to show the grievant has some familiarity with PAT functions and could be used to perform some of the duties of PAT nurses. But, the record does not demonstrate that said document means the Hospital considers the grievant to be fully cross-trained in PAT duties. While the Hospital might choose to use the grievant to perform some PAT duties, it was not obligated to replace Lampe with the grievant and then reassign duties among the other PAT nurses, so that the grievant could be given only those duties she was capable of performing.

The undersigned concurs with the Hospital's position that the skill and ability requirement in Section 14.03 applies to all low census instances, both mandatory and voluntary. The language in 14.03 does not support drawing a distinction between mandatory and voluntary low census situations. The use of the word "grant" clearly reserves to the Hospital the ability to decide both whether to use the low census process and, if used, whether the affected employee meets the skill and ability requirement.

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

### **AWARD**

That the Hospital did not violate Section 14.03 of the 1997-2000 Registered Nurse collective bargaining agreement when the grievant was low censused on July 31, 1998; that the grievant was not low censused out of turn within her department; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 30<sup>th</sup> day of December, 1999.

Douglas V. Knudson /s/

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Douglas V. Knudson, Arbitrator

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