BEFORE THE ARBITRATOR

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 32
No. 56352
A-5671

(Ann Strelow On-Call Grievance)

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Mr. Jeffrey P. Sweetland**, PO Box 442, Milwaukee, WI 53201, appearing on behalf of the Union.

Michael Best & Friedrich, LLP, by **Mr. Thomas W. Scrivner**, with **Mr. Jesús J. Villa** on the brief, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, appearing on behalf of the Hospital.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 1997-2000 collective bargaining agreement (Agreement).

Pursuant to notice, the grievance dispute was heard at the Hospital in Milwaukee, Wisconsin, on September 25, November 17 and November 19, 1998, and a transcript was produced. The record was held open pending the parties' stipulations regarding certain Hospital records. Upon submission of those stipulations, the Arbitrator closed the evidentiary record on August 23, 1999. The parties thereafter submitted briefs and reply briefs, the last of which was received and exchanged by the Arbitrator on November 15, 1999, marking the close of the hearing.

ISSUES

At the hearing, the parties authorized the Arbitrator to frame a statement of the issues in dispute. The Union proposed framing the issues as follows:

> Did the Hospital violate the Agreement by failing to call Ann Strelow in on January 2, 1998, P.M. shift, when an external pool nurse was being utilized? If so, what is the appropriate remedy?

The Hospital proposed framing the issues as follows:

> Was Section 15.11 of the 1997-2000 Agreement violated when an agency RN pool employe worked a full eight-hour P.M. shift on January 2, 1998, instead of splitting that shift with the Grievant working as an on-call employe from 1900 to 2300 hours? If so, what remedy, if any, is appropriate?

For reasons noted at the outset of the DISCUSSION, below, the Arbitrator finds it appropriate to frame the issues for determination as proposed by the Union.

PORTIONS OF THE AGREEMENT

ARTICLE 4
Management Rights

4.01
The Union recognizes that the Hospital has an obligation of serving the public by providing high quality, efficient and economical care, and in meeting medical emergencies. The Union further recognizes that, in fulfilling its obligation, the Hospital must act in conformity with Sections 50.32 et. seq. Wis. Stats., HSS 124 Wis. Adm. Code, and related regulations and statutes. Accordingly, it is agreed that the Hospital has the unilateral and exclusive right to operate and manage the Hospital so as to be in conformity with the provisions of those statutes and the rules and regulations promulgated under those statutes.

4.02
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 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 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 scheduling of work and the determination of the number and duration of said shifts and the size of the work force; . . . 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.

In the event of subcontracting, or the combination or splitting of departments or units, the Hospital will notify the Union in advance to explain the rationale of the change and method of implementation, and upon request of the Union shall meet to discuss the bargaining unit implications.

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4.04
It is agreed that the list of management rights as noted above shall not be deemed to exclude other management rights and prerogatives not specifically listed above.

4.05
The Hospital's not exercising any function hereby reserved for it or its exercising any function in a particular way shall not be deemed a waiver of its right to exercise such function or preclude the Hospital from exercising the same in some other manner not in conflict with the express provisions of this Agreement.

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ARTICLE 7
Hours of Work and Overtime

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7.03
Shifts. At the present time the work shifts are:

First Shift/Days:
7 a.m.-3:30 p.m. (or 7 a.m.-7:30 p.m.)

Second Shift/P.M.'s:
3 p.m.-11:30 p.m.
Third Shift/Nights:
11 p.m.-7:30 a.m. (or 7:00 p.m.-7:30 a.m.)

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7.07
Weekend Work. The Hospital will make reasonable efforts to schedule employees for at least every other weekend off. "Weekend" is defined as a forty-eight (48) hour consecutive period away from work from the first shift on Saturday to the first shift on Monday. Employees may designate an alternate weekend, with the approval of their supervisor.

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7.10
Scheduling Guidelines. Work Schedules will be based on patient care and related needs and operational considerations and will promote quality services and continuity of care. Individual work schedules will usually take into consideration the employee's FTE status and the employee's indicated shift availability at the time of hiring, with adjustments for subsequent changes. Scheduling should not normally result in overtime.

7.11
Work Schedules. The Hospital will post a schedule of each employee's work assignment for not less than a 28-day period and posted not less than two (2) weeks preceding the period of time for which the schedule applies and will maintain the schedule unless changed by agreement with the employee(s) concerned. Employees may exchange assignments among themselves, with the approval of the supervisor, by use of the schedule change form. Changes to the posted schedule can be made by mutual agreement. After the work schedules have been posted, employees may contact the department scheduler to see if there is an opportunity to trade with a non-Pool person. Pool Members may accept scheduling trades with regular staff if the Nursing Director/Manager approves the trade and no other options exist for trading with regular staff.

Employees shall submit scheduling requests for a particular schedule four (4) weeks before the first day of that schedule. Such requests shall be honored as submitted unless discussed with the employee and reasonable attempts at alternate arrangements are made. A uniform request form shall be used with a copy to the employee. This paragraph shall not apply to low census requests. The Hospital shall make every reasonable effort to utilize qualified employees covered by this Agreement before resorting to an outside pool.

Employees who rotate will not be scheduled to work more than two different shifts per monthly schedule except on a voluntary basis The previous schedule will be referenced in an effort to minimize back to back shift rotation. Rotation schedules will be finalized prior to making hours available to Pool staff.

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7.14
Nothing in this article shall be construed as a guarantee by the Hospital of any amount of hours, work or pay, or as a limitation on the hours of work that may be assigned to employes on a daily or weekly basis, subject to the scheduling procedures outlined in other sections of this article.

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ARTICLE 8
On-Call, Call-In, Call-Back, Report Pay

8.01
Employees required to be "on-call" shall be paid at the rate of $2.00 per hour while they are on such status.

8.02
In addition to the on-call pay above, on-call employees shall be paid at one and one-half times their straight time rate (with a minimum of two (2) hour's pay) when required to report to a call. Employees who are called in and work more than two (2) hours within each eight (8) hour period shall receive a $40.00 bonus for each eight (8) hour period. The Hospital shall make beepers available to all on-call employees.

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ARTICLE 15
Assignments, Transfers, and Reassignments

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15.11
Staffing. The Hospital will determine and attempt to provide adequate numbers of Registered Nurses and auxiliary nursing personnel on all shifts as necessary, consistent with, statewide and national professional standard of care and professional guidelines and will fill approved vacancies promptly as needed, in order to provide safe and adequate nursing care or services and to make maximum utilization of the training and competencies of all nursing personnel.

Changes in staffing ratios will be reviewed at Labor/Management meetings.

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ARTICLE 24
Problem Solving

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C. The decision of the arbitrator, if within the arbitrator's authority shall be final and binding upon the employee, the Hospital and the Union. The arbitrator shall have no authority to add to, take from, nullify, modify or alter any of the terms or provisions of this Agreement; or to impair any of the rights reserved to management, directly or indirectly, under the terms of this Agreement, including substituting his or her judgment for that of management; and the sole authority of the arbitrator is to render a decision as to the meaning and interpretation of this Agreement with respect to issue(s) presented to the Arbitrator by the parties. If a matter is beyond the scope of the arbitrator's authority, s/he shall return the submission to the parties without action.

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ARTICLE 29
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 a 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.

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BACKGROUND

The Hospital is engaged in the business of providing acute medical care at a 260-bed facility located in Milwaukee, Wisconsin. The Union represents the Hospital's non-supervisory registered nurses (RNs). The Hospital and Union have been parties to a series of collective bargaining agreements the first of, which was effective April 10, 1985-April 1, 1986. At all material times, the Grievant, Ann Strelow, was employed by the Hospital as a regular part-time RN working seven days over a two-week period, assigned on the night shift to the 6 Center unit consisting of two wings, 6 East and 6 North.

On January 2, 1998, Grievant was scheduled to work the night shift beginning at 2300 (11:00 p.m.). She had also volunteered to be on-call for the four hours preceding the beginning of that shift, i.e., 1900-2300, which were among the 6 Center hours made available by the Hospital for RNs to volunteer for on-call status. By volunteering, Grievant committed herself to work those hours if called (unless withdraws from on-call status on 24 or more hours notice or calls in sick), and she became entitled to be compensated under Sec. 8.01 and, if required to report to a call, under Agreement Sec. 8.02, as well.

Grievant was not called to work on January 2 in advance of the start of her scheduled night shift. Grievant noticed outside pool RNs (also referred to as "external agency" personnel) leaving her work area when she arrived for the start of her scheduled shift. After conferring with Union representatives and supervision, Grievant filed the grievance giving rise to this arbitration. It set forth the grievance, Agreement provisions involved, and requested correction as follows:

> Ann was on-call on 1-2-98 from 1900-2300, prior to her regularly scheduled night shift. There were outside pool nurses working and Ann should have been called in and one of those nurses cancelled.
>
> Including but not limited to article 7.11 of the contract.
>
> Ann will be paid for the time lost as a result of the outside pool working and she will be made whole.

Management responded as follows:

> [at step 1:] Ann was available for on-call for 4 hours on the pm (sic) shift of 1/2/98. to maintain continuity of care and order on the unit, supervisor made decision to keep some nurses on the unit for the entire shift. it (sic) was determined to be unreasonable to split RN assignments for that shift. Grievance denied.

> [at steps 2 and 3:] Grievance denied. The supervisor made a staffing decision which better facilitated continuity of patient care and served to not only decrease the chaos on the unit but to eliminate an unnecessary hand off in patient care.
>
> [at step 4:] Grievance denied. The Nursing supervisor was aware of Ann's request but elected to keep 3 pairs of nurses on the entire 8 hr shift previous to Ann's for continuity of patient care. Ann only requested 4 hours which would not have allowed in the circumstances, continuity of care. Sec. 7.11 and followed along with Section 4.02.

The dispute was subsequently submitted for arbitration as noted above.

At the hearing, the Union presented testimony from bargaining unit RNs Larene Gagliano, Grievant and Barbara Janusiak who is also the Union's Chief Steward. The Hospital presented testimony from Nursing Supervisor Roberta Johnson and Nursing Manager Susan Milewski. As noted, various stipulations were thereafter awaited and submitted, prior to the close of the evidentiary record.

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

The Hospital violated Sec. 7.11 by failing to call Grievant in on January 2, 1998, P.M. shift, when outside pool nurses were being utilized.

To secure the services of the RN personnel needed on 6 Center on January 2, 1998, Nurse Supervisor Johnson had to put together a "patchwork quilt" of people from all over. Only five of the nine RNs needed were scheduled, so she called in an on-call internal float pool nurse, Joyce Nitka, and assigned three outside agency nurses, Tom Madole, Jan Golembiewski and Craig MacWilliams to work on 6 Center. MacWilliams was assigned to 6 North, the other agency nurses to 6 East.

Although Johnson knew both that Strelow was on-call to work 1900 to 2300 and that Strelow was scheduled to work the night shift beginning at 2300, Johnson did not call Strelow in for any part of the P.M. shift, either to take over from an agency nurse or to provide an extra helping hand as a functional nurse.

MacWilliams was assigned to the patients in three rooms on 6 North during the P.M. Shift - 6100, 6103 and 6105. When Strelow came in for the night shift, she was assigned to patients in rooms 6100, 6101, 6102, 6103, 6104 and 6115. Thus, at 2300 she took the

assignment of two of MacWilliams' three patients. She could have taken the assignment of those patients at 1900. She could also have taken the assignment of the patient in room 6105 from MacWilliams, as well, in which case she most likely would have kept that patient as her assignment on the night shift. While the "hand-off" from MacWilliams to Strelow might have taken some amount of time, Johnson could have smoothed the transition by having MacWilliams notified at the beginning of the shift that Strelow would be coming in at 1900.

Even if Strelow was not called in to relieve MacWilliams or any of the other outside pool nurses, Strelow could have performed valuable service to the unit during those four hours as a functional nurse, lending her skills, knowledge and mere presence to the others on the floor wherever they might be needed. She could have assisted the other nurses, including the outside pool nurses, with assessments, changing dressings or other patient care activities. She could have covered for them while they took breaks. She could have performed any number of tasks to help reduce the chaos, but Johnson chose not to use her for any of it.

In the circumstances, the Hospital failed to make any effort to utilize Strelow before resorting to an outside pool, and it thereby failed to make the "every reasonable effort" required of them by Agreement Sec. 7.11. By using at least one on-call RN, Nitka on 6 Center during the P.M. shift, the Hospital arguably made a reasonable effort to utilize its own RNs. However, Sec. 7.11 requires the Hospital to use all reasonable efforts, not merely "some" or "any" or "a reasonable effort" or "reasonable efforts"; it requires "every reasonable effort." Significantly, the testimony shows that it was the Hospital that drafted those words when they were negotiated as a part of the parties' initial collective bargaining agreement. Furthermore, the parties must be presumed to have intended to impose a more stringent standard when they used the different term "every reasonable effort" in Sec. 7.11 than when they used the different terminology "reasonable efforts", for example, in Sec. 7.07.

It would have been reasonable to call in Strelow during the hours that she was on call in advance of her shift on January 2, just as the Hospital did on all nine of the other occasions when Grievant was on-call for the four hours preceding her scheduled shift (and on about half of which she relieved an agency nurse upon her arrival, normally keeping the same patients as part of her assignment on her scheduled night shift which followed.) As a regular 6 Center staff nurse, Strelow was familiar with the floor, the procedures, the protocols and the patients. She knew where the carts, equipment and supplies were located. Strelow was unquestionably qualified for the available work. Her presence would surely have helped "make the unit a little less chaotic." Yet, the supervisor, Roberta Johnson, made no efforts to utilize Strelow. She did not call or have someone else call Strelow to determine what her availability was or where she could best be used or even to let her know that she might not be needed.

The Hospital's contention that the "every reasonable effort" requirement applies only to the Hospital's preparation of the posted 28-day work schedule must be rejected as inconsistent with common sense, the language of the Agreement, the parties' bargaining history, and the parties' settlements of prior grievances. Staffing and scheduling involve either the same function or functions that are inextricably interrelated. Various provisions of Article 7 relate

more to last-minute staffing of a particular shift than solely to the component of staffing consisting of the Hospital's posting of the 28-day schedule. Nothing in Sec. 15.11 suggests that the term "staffing" as used in the section title, refers only to last-minute assignments; indeed, the reference in that section to "fill[ing] approved vacancies promptly as needed" clearly extends the scope of "staffing" back in time to the hiring process itself. Nor does anything in Sec. 15.11 suggest the very limited meaning which the parties in the CUYUNA RANGE HOSPITAL award cited by the Hospital gave to the term "staffing" in their contract.

The evidence shows that in the parties' initial round of negotiations, the Union initially proposed "[n]o outside pool shall be utilized by the Hospital as long as employes covered by this Agreement are available and able to perform the work." The Union negotiators told Hospital representatives at the bargaining table that the purpose was to assure that bargaining unit nurses would work before outside pool nurses because they could provide better and safer patient care. None of the discussions had between the parties at that time or in subsequent rounds of bargaining have ever reflected the idea that the "every reasonable effort" was applicable only to the creation of the 28-day schedule. Therefore, the Hospital's effort to limit the applicability of that important contractual protection based on its placement location within the Agreement would be hypertechnical elevation of form over substance. The bargaining history evidence shows that the Hospital did not disagree with the concept advanced by the Union's negotiators, but rather insisted that instead of an absolute prohibition on the use of outside pool when staff nurses were available and qualified, the Hospital would instead be required to "make every reasonable effort to utilize qualified employees covered by this Agreement before resorting to an outside pool." The Union's concept of preferring bargaining-unit employes to outside pool in all staffing decisions, was maintained. The "every reasonable effort" sentence initially appeared as a separate paragraph onto itself, within what was then Section 7.12 Scheduling. The evidence shows that it was later combined with language of a preceding paragraph as a result of an inadvertent printing error regarding the 1989-91 agreement. Nothing that occurred during the initial or subsequent rounds of bargaining has ever suggested that Sec. 7.11 applies only to the creation of the 28-day schedule. The Hospital is raising that argument for the first time in this case.

Significantly, in 1987 and 1994, the Hospital made no such contention when it granted grievances asserting violations of the "every reasonable effort" requirement in situations where the Hospital used outside agency RNs at times when bargaining unit employes were available on-call. Nor did the Hospital assert such a contention when it paid employes to remedy similar claims in response to employe complaints, making the filing of grievances unnecessary.

The fact that there have been other occasions when a staff RN was on call, an agency nurse was utilized and no grievance was filed does not prove that Sec. 7.11 did not apply to them. Nothing is known about those incidents except that they happened and they were not grieved. Thus it is impossible now to determine whether in those cases the Hospital did "make every reasonable effort." The reasonableness of effort must be decided on a particularized case-by-case basis. The most that can be gleaned from the lack of grievances in those cases is that there was no dispute as to the reasonableness of the Hospital's use of the agency nurses.

The Hospital now claims that it would be "impossible to meet patient care needs" if it had to make every reasonable effort to utilize qualified employes covered by the Agreement before resorting to an outside pool in last-minute assignments to meet staffing needs. If that were true, the Hospital's negotiators would surely have insisted on language that read, for example, "in preparing the 28-day schedule, the Hospital shall make every reasonable effort . . .", but they did not do so. Furthermore, "every reasonable effort" does not mean "every conceivable effort," and the reasonableness of any such effort is to be determined in light of all of the facts and circumstances, including the Hospital's need to provide adequate staffing. If in a particular situation, any effort to call in an employe would be unreasonable, then the Hospital need not go through the motions.

However, the reasonableness of any effort must also take into consideration the parties' agreement that regular staff are to be preferred over outside pool, to which the Hospital has contractually committed itself beginning with the initial round of bargaining. Ironically, in this case, the Hospital claims that conditions on January 2 were so chaotic that they practically compelled the use of outside pool because of the shortage of available regular staff. Where, as here, the problem is a staffing shortage resulting in general chaos, then calling in an employe who is available and on call, if only to relieve the shortage as a functional nurse on her own unit, appears to be a most reasonable, sensible and prudent option. Thus, calling Strelow in for that purpose would have been reasonable, even if the situation did militate against her taking the outside pool nurse's patient assignment immediately. Indeed, Johnson testified that there are many reasons why using outside agency RNs to meet staffing needs is the exception, rather than the rule: regular staff know the unit; they are there on a regular basis over a long period of time; they know how the unit functions; they know the procedures that are to be followed; they know where charts, supplies and equipment are located; they are most likely to know the patients; they are the ones whom the Hospital has trained; and the Hospital has a chance to observe them on a regular basis. Indeed, Johnson testified that she uses on-call personnel to alleviate or eliminate the need to utilize agency nurses.

Any Hospital contention that the Arbitrator would inappropriately be substituting his judgment for that of management if he were to determine whether the Hospital made "every reasonable effort" required by Sec. 7.11 in this case must also be rejected as inconsistent with the language of the Agreement. This is a question of contract interpretation that Article 24.C. vests squarely in the Arbitrator. Section 4.02 limits Management's rights under Article 4 rights by making them "except as expressly and specifically limited or restricted by a particular provision of this Agreement." The Sec. 7.11 requirement that the Hospital make every reasonable effort to utilize qualified employes before resorting to outside pool is an express and specific limitation or restriction on management's rights. The Hospital has a positive obligation under the Agreement to make those efforts and the Union is entitled to enforce that obligation.

For the foregoing reasons, the grievance should be sustained and Strelow should be awarded four hours pay at time-and-one-half based on her regular pay rate in effect on January 2, 1998, plus $40.00.

The Hospital

The "every reasonable effort" language of Sec. 7.11 applies only to the "scheduling" process outlined in that section and not to the separate "staffing" process governed by Sec. 15.11.

The Hospital's actions at issue met the requirements of Sec. 15.11 and hence did not violate the Agreement. Specifically, on January 2, the Nurse Supervisor determined the number of nurses needed to adequately staff the P.M. shift on 6 Center; evaluated the available staff and conditions of the unit at that time; and decided that in order to make maximum utilization of the available staff and provide safe and adequate nursing care, it was not optimal to interrupt the shift with a staffing change mid-shift and instead chose to provide continuity of care with the qualified staff already present.

The Union's interpretation of Sec. 7.11 as applying to the Hospital's staffing takes the "every reasonable effort" sentence out of the context in which Sec. 7.11 is presented in the Agreement. The plain language of the Agreement as a whole articulates a distinction between scheduling and staffing decisions. Section 7.11 clearly applies only to scheduling decisions, and Sec. 15.11 clearly applies to staffing decisions. Moreover, the Union's interpretation would lead to unduly burdensome results for both the Hospital and its patients.

Section 7.11 is entitled "Work Schedules," and every part of Sec. 711 addresses the parties' responsibilities with regard to the 28-day work schedule prepared and posted by the Hospital. Clearly, Sec. 7.11 applies solely to scheduling procedures. Article 7, as a whole, deals with scheduling issues and procedures, not staffing matters. Viewing Sec. 7.11 in its proper context, then, it is clear that the parties intended the "every reasonable effort" sentence to apply specifically to the formulation of the 28-day schedule, and, more specifically, to the accommodation of employes' scheduling requests for a particular 28-day schedule.

Although staffing decisions rely in part on previously-made scheduling decisions, staffing decisions are clearly distinguishable from scheduling decisions. Citing, CUYUNA RANGE DISTRICT HOSPITAL, 96 LA 659, 662 (VER PLOEG, 1991)(interpreting "staffing requirements" as "any situation where there is a mismatch between the Hospital's staffing needs for a particular shift and the complement of staff who have been scheduled for that shift.") In their initial bargain and even in recent negotiations, the parties have bargained about "scheduling" and "staffing" proposals separately and placed changes in the respective provisions in different parts of the Agreement. Indeed, contrary to the Union's contentions, Union witness Janusiak's testimony on direct was that it was the Union and not the Hospital that proposed the "every reasonable effort" language as part of the Agreement Section now numbered 7.11. Therefore, it is the Union that should have any uncertainty about the meaning of that language construed against it. While scheduling decisions are made from the day an employe is hired, staffing decisions are generally made during the shift immediately preceding the shift to be staffed. Scheduling is a type of planning activity with advance notice; in contrast, staffing decisions are made in response to events that often cannot be foreseen and

that frequently force unplanned changes in the work schedule. Staffing decisions respond to changes in patient numbers, patient acuity and other patient needs Staffing decisions also respond to short-term changes in the work schedule, such as absences due to illness and accidents. Because of the short-term nature of staffing decisions, it would be inappropriate to treat staffing decisions under the same principles as scheduling decisions. Indeed, if Sec. 7.11 were to apply to short-term staffing decisions, the Hospital would be unable to operate. There would not be time for a Nurse Supervisor to go through the steps necessary to make sure that no regular nurse is qualified and available to fill in for a particular shift before resorting to external pool nurses. It defies common sense to read the Agreement as prohibiting the Hospital from making staffing decisions based upon such basic factors as continuity of care and other patient care concerns. Further, scheduling and staffing at St. Francis involve different decision-makers, evaluating different circumstances.

From the testimony of its Chief Steward, it appears that the Union asserts that there are no circumstances when agency pool workers should be permitted to work when regular employes are qualified or available. The Union's interpretation would therefore require that the Hospital, upon learning of a staffing need, to contact every qualified regular nurse and verify that they are not available to work the shift. Given the limited time in which the nurse Supervisor must meet staffing needs on a shift, the Union's interpretation would lead to unworkable results and hence be a harsh and inequitable interpretation of the Agreement that the Arbitrator must avoid.

The Union's interpretation of Sec. 7.11 would also make it impossible for St. Francis to use agency nurses to supplement staff on shifts. The evidence shows that if the Hospital does not use agency nurses for full eight-hour shifts, the agency nurses in fairly short order would not accept St. Francis work because of the inconvenience and pay loss associated with working in four-hour blocks. Using agency nurses in shifts of less than eight hours would damage the Hospital's relationship with its staffing agency and with the agency nurses whose service St. Francis may need.

The Union's interpretation would also compromise patient care. A particular patient's caregiver would be changed more often than is absolutely necessary, whereas the evidence shows that minimizing patient hand-offs is the optimal way to staff. Outside pool nurses are not necessarily less qualified than bargaining unit nurses. Many agency nurses have worked at St. Francis successfully for longer periods than some of the bargaining unit nurses. When an agency nurse who is qualified to work a particular shift in a particular unit is already assigned to the unit and has already been working with particular patients, care would be compromised if the Hospital were to interrupt that agency nurse's shift and the continuity of the patients' care.

Because the meaning of the pertinent Agreement provisions is clear and unambiguous, consideration of past practice is precluded by Article 29. Even if the Agreement were ambiguous, the evidence clearly establishes that the Hospital has no past practice of always using on-call nurses in place of outside pool nurses. The on-call procedure on 6 Center had

only been in place for about six months before this grievance arose, such that it could not be "long established" within the meaning of Article 29. The treatment of on-call nurses vis-a-vis outside pool nurses during that time has not been certain, uniform or consistent; in some circumstances on-call nurses were used instead of outside pool nurses; on a few occasions, on-call nurses worked splitting a shift with outside pool nurses; there were occasions when a bargaining unit nurse who was not called in when outside pool nurses were used has complained or grieved and the complaint or grievance was resolved in his or her favor; and there have been many occasions where outside pool nurses were used in favor of on-call nurses and no complaint or grievance was filed. The Hospital's reasoning for its decision to settle certain previous grievances involving different employes and different circumstances sheds no light on the propriety of the Hospital's response to the chaotic staffing demands extant on January 2, an extraordinarily difficult day in terms of staffing demands.

The absence of a uniform practice of preferring on-call nurses to agency pool nurses is further evidence of the case-by-case evaluation necessary to determine how to staff a particular shift. In the past, the Nurse Supervisor has determined on a case-by-case basis whether it would be appropriate to use on-call nurses over outside pool nurses by weighing all available factors and considerations, including continuity of care and other patient are issues, qualifications of the available nurses, and the disruption to the administration of treatment caused by interrupting a shift with an unnecessary staffing change.

Even if Sec. 7.11 is somehow deemed applicable to the circumstances that the Nurse Supervisor faced on January 2, 1998, the evidence shows the Hospital made every reasonable effort to use qualified bargaining unit nurses before outside agency pool nurses. Because of holidays and other absences, the Hospital needed to fill nine out of the 16 or 17 RN positions on 6 Center on the second shift. It filled those nine positions primarily using bargaining unit nurses, rather than outside nurses, and it pulled those bargaining unit nurses from a variety of sources including split-shift nurses from previous shifts, on-call nurses and floaters. Even with this effort to patchwork bargaining unit nurses into the staff on the second shift on January 2, the Hospital had to assign an unusually high number of outside pool nurses.

The decision not to include Grievant in this "patchwork staffing" was driven by significant operational and patient care considerations. It is undisputed that the P.M. shift on January 2 was chaotic: the patient census was unusually high and had been all week; the number of visitors was especially high; the P.M. shift is a particularly busy shift in general because of the "conjunction of many different activities" between 5:00 p.m. and 8:00 p.m.; and the staffing of 6 Center on this Friday of a holiday week had already required a "patchwork quilt" of personnel from a variety of staffing sources. Calling in Grievant to replace one of the three outside pool nurses working on 6 Center would have required a mid-shift transfer of patients in the middle of such activities as the dinner service and visiting hours. The hand-off of patients would take the nurses away for an hour or more from their patients and visitors during the most challenging time on an already-chaotic shift.

To have Grievant replace Craig MacWilliams and take over the three patients assigned to him at mid-shift would have interrupted continuity of care by making Grievant the fourth nurse in a 24 hour period to care for a high acuity patient whom Grievant had not previously cared for, and by jumbling Grievant's patient assignments and the patient assignments of other outside pool and bargaining unit nurses in such a way as to undercut the Hospital's operational interest in assigning nurses to the same patients across shifts whenever possible. The Union does not dispute that MacWilliams was well-qualified to care for the patients in question; indeed, the evidence shows that he had worked "pretty much full time" with the Hospital for a long period of time. The Union only repeats the overly-broad proposition that bargaining unit nurses are generally to be preferred over outside pool nurses because the former are more familiar with the employer's policies and procedures. While this may be true as a general proposition, the evidence establishes that MacWilliams was familiar with the Hospital's policies and procedures and qualified to provide the needed care on the P.M. shift involved.

The Union's alternative suggestion that the Hospital should have called in Grievant as a Functional Nurse not assigned to particular patients to provide extra assistance and cover for the other nurses on duty is similarly flawed. The notion that the Agreement requires the Hospital to call in a regular nurse as an extra nurse when patients have been assigned and a shift is already adequately staffed with nurses is unsupported by any argument, evidence, practice, patient care considerations or common sense. In no event should "every reasonable effort" be found to require the employer to provide staffing for a shift beyond the staff actually needed for that shift; especially so on a shift where finding enough staff coverage to care for the patients was the problem that had to be solved. Furthermore, it is undisputed that the Hospital has the exclusive right to determine how many nurses will be assigned to a shift and how those nurses will be used.

Reasonable effort should not be found to require the Hospital to sacrifice such important considerations for the sake of calling in a bargaining unit nurse in circumstances such as those the Hospital was experiencing on January 2. Especially so in the health care industry, where, as the parties have expressly recognized in Article 4 and elsewhere in the Agreement, the primary concern has to be providing "high quality, efficient and economical care, and in meeting medical emergencies." Thus, "every reasonable effort" could not have required the Hospital to call the Grievant in because no effort to call the Grievant would have changed the operational consequences that were avoided by allowing the outside pool nurse to complete the full shift. The Hospital's decision not to call Grievant in was therefore consistent with the language of Sec. 7.11.

For the foregoing reasons the Arbitrator should find Sec. 7.11 inapplicable to this case and deny the grievance in all respects.

DISCUSSION

Framing of the Issues

The grievance giving rise to this case identifies the contract provisions involved as "[I]ncluding but not limited to article 7.11 of the contract." For that reason it is inappropriate to limit the focus of this arbitration solely to Sec. 15.11 as the Hospital proposes. While the grievance describes the alleged violation as failures of the Hospital both to call Grievant in and to cancel one of the outside agency nurses, the issues as framed by the Union permit consideration of the Union's alternative contention in this case that the Hospital could also have complied with the Agreement by calling Grievant in without canceling one of the outside agency nurses. The Arbitrator finds it appropriate to permit consideration of that alternative contention as a part of the resolution of this grievance.

Applicability of the "Every Reasonable Effort" Standard

The only Agreement provision that the Union claims was violated in this case is the sentence of Sec. 7.11 which reads, "[t]he Hospital shall make every reasonable effort to utilize qualified employes covered by this Agreement before resorting to an outside pool." If, as the Hospital argues, Sec. 7.11 applies only to the Hospital's creation of the 28-day schedule, then the entire basis of the Union's claim would be eliminated.

While it is a close question, the Arbitrator is persuaded that the sentence at issue is applicable to all Hospital decisions regarding utilization of bargaining unit vs. outside pool RNs, and not just those involved in the creation of the 28-day schedule.

The Arbitrator does not view the Hospital's reliance on the contract placement of that sentence as hypertechnical. The particular context in which a sentence appears can provide important guidance regarding the parties' intentions as to the scope of its applicability. Here the sentence at issue appears in a Section entitled "Scheduling," which defines and makes various other provisions concerning the posted 28-day schedule. While the focus of some of the other sections of Article 7 would variously impact Hospital decisions regarding the utilization of bargaining unit personnel in addition to those involved in the creation of the 28-day schedule, the placement of the sentence at issue in a section dealing exclusively with the 28-day schedule is an interpretive guide of substantial significance.

However, the language of the sentence itself strongly suggests that it was intended to have a broader application than just to the creation of the 28-day schedule. It addresses decisions about whether the Hospital will "utilize qualified bargaining unit personnel before resorting to an outside pool," not merely decisions about whom the Hospital will preliminarily schedule for utilization subject to wholesale additions of outside pool personnel later. The use of the term "utilize" rather than "schedule" suggests that the parties may have intended the sentence to affect all Hospital decisions relating to the personnel that it will actually "utilize" rather than only the partial set of decisions in that regard involved in the creation of the 28-day schedule.

The language of Sec. 15.11 also makes it clear that the parties' consider the "staffing" which that section addresses to include not only day-of-the-shift decisions about which personnel will be assigned to a particular shift, but to a broader range of decisions affecting staffing which extend back in time to decisions about initial hiring. Specifically, Sec. 15.11 includes a provision that the Hospital "will fill approved vacancies promptly as needed." The parties' inclusion of so broad a time-spectrum of decisions under the heading of "staffing," distinguishes this case from the situation in the CUYUNA RANGE DISTRICT HOSPITAL award and raises doubts whether the parties intended as strict a dichotomy between scheduling and staffing as the Employer contends.

The Arbitrator finds unpersuasive the Hospital's contention that application of the sentence at issue to decisions beyond those involved in creating the 28-day schedule would necessarily result in such harsh or inequitable outcomes that the parties could not have mutually intended them. Rather, as the Union has appropriately acknowledged in its reply brief (at 6), the Agreement calls only for every "reasonable" effort, not for every conceivable effort. The reasonableness of any particular effort claimed due under the provision would appropriately take into account all of the surrounding circumstances, including all operational considerations bearing on the decision. Thus, application of the sentence in question to cases of this kind does not require Hospital efforts that would prevent the Hospital from operating its business, nor does it prohibit consideration of such basic factors as continuity of care and other patient care concerns when day-of-the-shift staffing decisions are made and when and if they become the subject of the Art. 24 Problem Solving procedure.

For those reasons, the Arbitrator finds that the Agreement is ambiguous regarding the scope of applicability of the "every reasonable effort" sentence in Sec. 7.11. Accordingly, evidence beyond the language of the Agreement itself is appropriately reviewed for interpretational guidance.

While both parties, based on Janusiak's testimony, charge the other's negotiators with having drafted the "every reasonable effort" language now in Sec. 7.11, reading that testimony as a whole does not reliably establish which party drafted that language. It is clear that the Union first proposed "[n]o outside pool shall be utilized by the Hospital as long as employees covered by this Agreement are available and able to perform the work;" that the Employer rejected that language; and that the parties ultimately agreed to the "every reasonable effort" sentence which now appears in Sec. 7.11. However, with regard to who drafted the "every reasonable effort" language, Janusiak stated that the Union "probably" had not authored the "every reasonable effort" language because "[w]e would never have been so generous." (tr.183). While she later confirmed on redirect (in response to a leading question) that the Hospital had drafted it (tr.240), her testimony overall on that point appears based not on an actual recollection about which party proposed the language but only at most on an educated guess about which of the parties "probably" had done so. Such testimony is not a sufficient basis on which to charge either party with having drafted the sentence in question.

The record does, however, contain other evidence strongly suggesting that the parties have mutually understood that the "every reasonable effort" language applies to situations such as those at issue in this case.

In that regard, it is significant that, so far as the record in this case would indicate, the instant arbitration is the first time the Hospital has ever asserted that the "every reasonable effort" language applies only to the creation of the 28-day schedule and not to day-of-the-shift staffing decisions (tr.255-57). Indeed, in 1987 and again in 1994, grievances regarding use of outside pool personnel instead of available bargaining unit employes were filed expressly based on the Article 7 "Scheduling" section of the Agreement, and those grievances were granted without any assertion from the Hospital's representatives that they did not consider that language applicable to the claims presented in those grievances. In other such cases, the Hospital granted such relief in response to employe complaints, making the filing of a grievance unnecessary. Even the grievance answers in the instant case essentially assert only that the Hospital complied with Sec. 7.11; they do not assert that Sec. 7.11 is inapplicable to the case.

In addition, the Hospital's decision-making process in making day-of-the-shift decisions as described by Johnson at the conclusion of her testimony on direct further supports the notion that the Hospital understood that such decisions were subject to the "every reasonable effort" standard in Sec. 7.11:

> Q: The situations that you've described over the years which you are knowledgeable about as a nursing supervisor where on-call hours were not used and agency pool worked, are those the rule or the exception?
>
> A: Those are special cause times. Those are the exception.
>
> Q: Special cause meaning what?
>
> A: Meaning it kind of like drops off the line. Those are things that you need to make a decision at that point in time that's best for patient care, and that sometimes is a decision that's made and it doesn't happen — I mean it doesn't happen on a regular basis.
>
> Q: Such as.
>
> A: We use our on-call first on a regular basis.
>
> Q: And special cause circumstances.
>
> A: Um-hum.

> Q: Were they or were they not present on the p.m. shift for the Ann Strelow decision on January 2, 1998.
>
> A: Yes.

(tr.401-402).

The record also contains substantial evidence showing that, looking beyond the Grievant's personal on-call experiences, there have been numerous ungrieved and unchallenged instances in which the Hospital has chosen to use outside pool RNs rather than bargaining unit employes who were available on-call. That evidence firmly supports the Hospital's contention that "St. Francis has no past practice of always using on call nurses in place of agency pool nurses." However, that evidence also supports the notion that the parties have, by their conduct over time, manifested a mutual understanding that the "every reasonable effort" language now in Sec. 7.11 is applicable to staffing decisions beyond those involved in the creation of the 28-day schedule. For, as noted above, "every reasonable effort" does not mean every conceivable effort. Thus, in the exceptional "special cause" situations as Johnson described them, the Hospital has used outside pool RNs despite the availability of on-call bargaining unit personnel, without (in most instances) generating a complaint or grievance.

The Arbitrator recognizes that, in construing an Agreement provision that is found to be ambiguous, Article 29 provides that "[n]othing shall be deemed a past practice unless it meets each of the following tests: (1) long continued; (2) certain and uniform; (3) consistently followed; generally known by the parties hereto; and (5) not in opposition to the terms and conditions in this Agreement." The Arbitrator is satisfied that the evidence described above meets each of those tests. Accordingly, the Arbitrator finds it appropriate to give significant weight to the past practice evidence above in resolving uncertainty as to whether the "every reasonable effort" sentence in Sec. 7.11 applies to decisions beyond those involved in the creation of the 28-day schedule.

The Arbitrator also finds that, in light of the past practice evidence, above, the Union would, over the years, have had a reasonable basis on which to conclude that the parties mutually understood that "every reasonable effort" language applies to cases like this one. In that context, the parties' continued separate negotiation and contract placement of "scheduling" and "staffing" provisions is not a reliable indication that the parties mutually intended the "every reasonable effort" sentence now in Sec. 7.11 to apply only to decisions involving the creation of the 28-day schedule.

For those reasons, the Arbitrator concludes that, notwithstanding the implications of its placement in the Agreement, the generally-phrased "every reasonable effort" sentence of the Sec. 7.11 is applicable to all Hospital decisions regarding utilization of bargaining unit vs. outside pool RNs, and not just those involved in the creation of the 28-day schedule.

Application of the "Every Reasonable Effort" Standard

It is therefore appropriate to determine whether, in all of the circumstances of this case, the record evidence establishes that the Hospital failed to make "every reasonable effort" to utilize qualified bargaining unit employes before resorting to an outside pool.

The Union asserts that the Arbitrator should conclude that the Hospital failed to do so in either of two respects — by failing either to call Grievant in as a functional nurse in addition to the personnel on duty and/or by failing to call Grievant in to replace outside pool RN Craig MacWilliams.

In the Arbitrator's opinion, neither of those failures on the Hospital's part violated Sec. 7.11.

It would be beyond "reasonable" to require the employer to call in the Grievant to work as an addition to the full complement of RNs determined by the Hospital to be needed to perform the work available on 6 Center during the hours at issue. Interpreting "every reasonable effort" to require assignment of more employes than necessary would inappropriately conflict not only with the Hospital's Sec. 15.11 responsibility to "determine . . . numbers of Registered Nurses," but also with the Hospital's Sec. 4.02 right to determine "the size of the work force" and the Hospital's obligation of serving the public by providing . . . efficient and economical care . . . " which the Union expressly recognizes in Sec. 4.01.

Calling Grievant in to relieve MacWilliams for the four hours in question would also have been beyond reasonable in light of all of the circumstances. Grievant had made herself available for four hours, and not for the full P.M. shift. It is undisputed that the staffing situation on 6 Center on the P.M. shift was exceptionally chaotic. The P.M. shift is a particularly busy shift generally because of the conjunction of many different activities including dinner service and visiting hours after normal working hours in many visitors' workplaces. The patient census was unusually and unexpectedly high and had been all week. The number of visitors was also especially high.

Because of holidays and other absences, the Hospital needed to fill an unusually large number of positions, nine out of the 16 or 17 RN positions on 6 Center on that shift. It filled those nine positions primarily using bargaining unit nurses, rather than outside pool nurses, pulling them from a variety of sources including an on-call bargaining unit RN. Grievant's relieving MacWilliams — a qualified RN with considerable experience at St. Francis — for the last four hours of the P.M. shift would have necessitated both a time-consuming handoff of patients to Grievant at mid-shift and a jumbling of patient assignments at mid-shift or shift change, causing otherwise unnecessary interference with continuity of patient care. The evidence also shows that the Hospital had reason to be concerned about sending home outside pool personnel after only four hours of work too often because of the impact doing so might have on the continued availability of qualified outside agency personnel generally.

Upon consideration of the exceptional operational circumstances on the shift in question — Johnson described it as one of the most challenging days she had ever experienced in terms of the number of additional staff positions to cover (tr.321) — the Arbitrator concludes that it would be beyond "reasonable" as that term is used in Sec. 7.11 to require the Hospital to call Grievant in to relieve MacWilliams for the four hours in question.

The Arbitrator finds no other basis on which to conclude that the Hospital failed to make every reasonable effort to utilize bargaining unit RNs before outside pool personnel as regards the four-hour period at issue in this case.

Accordingly, the grievance has been denied.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the issue submitted that:

1. The "every reasonable effort" provision of Agreement Sec. 7.11 applies to this case. However, in the circumstances of this case, the Hospital did not violate Sec. 7.11 or any other provision of the Agreement by failing to call Ann Strelow in on January 2, 1998, P.M. shift, when an external pool nurse was being utilized.

2. Accordingly, the subject grievance is denied and no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin this 11th day of February, 2000.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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