BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE ASSOCIATION OF MENTAL HEALTH SPECIALISTS, HUMAN SERVICE PROFESSIONALS

and

ROCK COUNTY

Case 325
No. 58532
MA-10980

Appearances:

Mr. John S. Williamson, Jr., 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, on behalf of the Association.

Mr. Eugene R. Dumas, Deputy Corporation Counsel, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Janesville, Wisconsin, on May 17, 2000. The hearing was transcribed and both parties filed briefs and reply briefs that were received by August 3, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Did the County violate Sections 12.03 and 20.02 of the contract when it refused to grant grievant Tami Robertson-Hoblit her accrued vacation credits and accrued holiday time on the ground she did not give two weeks' notice of her intent to resign her position under Sections 12.03 and 20.01 of the contract and, if so, what is the appropriate remedy?

2. Are the following questions arbitrable and, if so:

   a. What remedy, if any, is needed to address the County's cancellation of grievant Tami Robertson-Hoblit's interview for another position on June 30, 1999?

   b. What remedy, if any, is needed to address the County's removal of grievant Tami Robertson-Hoblit from the nursing pool?

BACKGROUND

The County operates a Psychiatric Hospital – really only the fifth floor – in its Health Care Center ("Center"). In addition to its regular complement of employes, the Center maintains two pools of nurses to provide it with help on a short-term basis – one for the Psychiatric Hospital and the second for the rest of the Center. The County also operates its Rock County Health Care Center – which is a separate bargaining unit than the one herein and which is not involved in this proceeding.

Grievant Robertson-Hoblit, a Registered Nurse, formerly worked on the third floor of the Center where she was in a different bargaining unit. She then transferred to the Psychiatric Hospital with its different bargaining unit where she was scheduled to work 32 hours a week. In addition, she regularly worked in the Health Care Center 3 pool.

She on June 11, 1999 (unless otherwise stated, all 1999 dates herein refer to 1999), taped a resignation note on Nurse Manager James Wiesner's door that stated: "Please accept my resignation and start this date as my four weeks' notice. Thank you." Pursuant to her resignation, her last day of actual work would have been June 23 because she earlier had requested eight days off for vacation/holiday time, thereby putting her on leave from June 25 to July 13.

She submitted her resignation because she had worked nine nights in a row, which included three 12 hour shifts, and because she had been told she would have to work another mandated shift on June 11. She explained:

> "I could not physically do it and I – my exact words were that if I'm mandated, I'm going to walk. And that was my decision because I couldn't take it anymore, and that's when I, the next day, put this up."

She thus worked about eight hours on June 1; eight hours on June 2; eight hours on June 3; eight hours on June 4; eight hours on June 5; eight hours on June 6; 12 hours on June 7; eight hours on June 8; 16 hours on June 9; eight hours on June 10; and four hours on June 11.

She then missed work on June 12 because she was sick "due to physical exhaustion", bronchitis, and a severe sinus infection. She returned to work on June 15 when she worked both the day and the night shift even though she was still ill. She also worked the night shift on June 16 and a day shift on June 17. She then brought in a doctor's note stating she should stay off work until June 22. When she returned to work on June 22, she learned that her earlier April 6 request for eight vacation and holiday days (County Exhibit 1), had been denied because four of those requested days off were not covered, i.e., filled in by another nurse who was willing to work those days. She said she needed that time off "Because I was physically and mentally exhausted".

She was then experiencing considerable personal problems because her husband had walked out on her, thereby leaving her to take care of three young children for whom she could not arrange daycare. As a result, she only was getting three or four hours of sleep between shifts. She therefore on June 23 provided Nurse Manager Wiesner with a second resignation note:

> "I was told that I only needed to give a two-week notice. I looked it up in the contract under 20.01 and it confirmed the amount of time. Due to recent information, it would be best that I end my employment as of today." (Joint Exhibit 7).

Robertson-Hoblit had a scheduled June 30 interview for a half-time job on the third floor of the Center where she had previously worked, but she was told by Amy Kingsland from the Human Resources Department on June 29 that it had been canceled because she had not given two weeks' notice of her intent to resign. She was told a few days later she no longer could work in the nursing pool because she had not given proper notice. June 23 thus was the last day she worked in the nursing pool.

On cross-examination, she testified that she volunteered to work about 80 percent of her total hours at the Psychiatric Hospital; that she could not recall whether Nurse Manager Wiesner ever told her she was working too many hours; that she discussed her past absences and tardiness with Wiesner during her evaluation; that she initially believed she was required to give four weeks' notice under the contract; and that she was never denied sick leave or family and medical leave.

Former Nurse Manager Wiesner, who is now in the bargaining unit, testified that he filled out the grievant's April 6 request for time off (County Exhibit 1), because she was in military training at that time and that he then explained to her that she did not have enough vacation time. He said that he several times told her she was working too many hours because "I noticed her working an exorbitant amount of hours in my opinion" and that he once spoke to her when she "was very ill" and her voice was almost entirely gone. Asked whether he knew that the grievant's failure to give two weeks' notice would forfeit her accrued vacation benefits, he answered:

> . . .I had no idea that not fulfilling a – written notice of – terminating – or resigning from employment would have any effect, unless a person was on probationary – on their probationary period. I had no idea that it would effect my paid benefits or accrued time. I honestly thought those were given automatically.

He also stated that he denied her requested vacation time off because four out of the eight days were not covered and that she was "very unhappy with her work."

On cross-examination, he testified that Kingsland told him after the grievant's June 23 resignation that she had applied for pool work on the third floor and that the County had a policy of not hiring back any employes who did not give proper notice. He also acknowledged that he did not respond to the grievant's leave time request (County Exhibit 1), within one week as required under the contract and that but for absentee and tardiness problems, she was never disciplined.

He also said that the grievant between May 30-June 12 probably worked more hours than anyone else on his floor; that she was tardy for about 15 minutes on February 26, two hours on March 12, and 1.2 hours on April 7; that he could not recall whether she had been disciplined on those occasions; and that no such discipline is recorded in her evaluations.

Human Resources Manager Kingsland testified that the grievant previously had tried to transfer to the third floor in April, but withdrew her application because the job had fewer hours; that she spoke to the grievant around June 10 about working on the third floor after she had submitted her first resignation; and that said job was then open to outside applicants. Kingsland said she then spoke to Wiesner who told her the grievant's work had "gone downhill" and had "some performance issues"; that after she learned about the grievant's June 23 resignation, she spoke to Associate Administrator Lucy Vickerman who told her "she did not want to interview Tami for the position" and that the June 30 interview should be canceled; that such canceled interviews "had happened before"; and that she never discussed the pool position with Vickerman. She also said that she told the grievant her June 30 interview had been canceled because she had not given two weeks' notice and that she then "did not mention

the reference I had received from the fifth floor" because "we normally don't tell an applicant that we have gotten a bad reference." Kingsland added that "her response to me was kind of shock, like she wasn't aware that she hadn't given a sufficient notice"; that the grievant then wanted to rescind her notice; and that Kingsland replied "she couldn't take it back."

When asked on cross-examination whether the County has a policy of not hiring a person who did not give a two-week notification, she replied, "No."

Manager James Wagman testified that he spoke to Wiesner about the grievant's attendance.

Former Union President Judy Schultz testified that no one in contract negotiations ever stated that employes would not be considered for other County employment for one year and that they would be ineligible for pool work if they did not give two weeks' notice of their intent to quit employment. On cross-examination, she stated that she was unaware of any non-probationary employes ever being denied vacation credits because they did not give two weeks' notice.

POSITIONS OF THE PARTIES

The Association asserts that the grievant "complied with the language of Section 12.03"; that both state law and Article XX of the contract "preclude a construction of Article 12.03 that would deny an employe earned vacation pay"; that the County's interpretation "must also be rejected because it would cause a forfeiture, inflict an impermissible form of discipline, impose penalty damages, and violate due process"; that no contractual language permits the County to deprive the grievant "of participation in the nursing pool or to refuse to consider her for a job in the HCC unit because she allegedly fails to give the two weeks' notice"; and that the County violated the contract when it relied on Wiesner's subjective criticisms of the grievant's work rather than on the contract's objective criteria. As a remedy, the Association asks that the grievant be awarded her accrued vacation and holiday time; that she be made whole for all the monies and benefits she lost as a result of not getting the 0.5 position in the Center and for being removed from the nursing pool after her resignation; and that she be placed in the 0.5 position and/or be reinstated to the nursing pool.

The County, in turn, contends that the grievance must be denied because the grievant failed to give the two weeks' notice required under both Sections 12.03 and 20.01 of the contract. It also argues that part of the Union's claim is not substantively arbitrable because the grievant had no contractual rights under the nursing pool and the third floor 0.5 position and that, as a result, she cannot grieve the County's refusal to award her the 0.5 position and the County's removal of her from the nursing pool. The County's Reply Brief hence claims, at page 3, there is no "legal or sound basis for the arbitrator to assume jurisdiction over Lucy

Vickerman's decisions to not interview the grievant for a position in Health Care Center – 3, and to drop the grievant from the list of persons constituting the Health Care Centers' supplemental nurse staffing coverage pool."

DISCUSSION

This case brings to mind Shakespeare's words in *The Merchant of Venice*:

. . .

"The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice bless'd;
It blesseth him that gives and him that takes:"

IV, i, 184

. . .

For, if any employe deserved some measure of mercy and consideration because of an impossible situation, it was Robertson-Hoblit.

In June, she had to take care of her three young children alone after she and her husband separated and after he moved out of their residence. Left alone to care for them, she could not put her children in needed daycare because they were not examined by a doctor in time to warrant such placement under state law. Yet despite those great difficulties, she somehow managed to work about 92 hours in 10 days. She did that by volunteering to work extra shifts and by accepting mandatory overtime that caused her to work several 16 hour shifts. Indeed, Weisner said that the grievant between May 31-June 10 probably worked more hours than anyone else on the fifth floor. The City's Brief at page 3 also acknowledges: "she was regularly working more extra hours on a voluntary basis than she was being required to work by her supervisors. . ."

This, then, is not a case of where an employe failed to work his/her regular work schedule because of great personal difficulties and where an employer was legitimately concerned over her absence. This, instead, is a case of where an employe worked many more extra hours in spite of great personal difficulties, so much so that Weisner asked her to cut down her overtime. When asked why she needed to work such a grueling schedule, she replied: "Financial. My husband had left and I was basically drowning financially."

Given all of the above, she certainly was entitled to some slack when she told management on June 11 that she would quit if she were assigned an extra shift that day. Since she already had worked about 92 hours in 10 days by then, and since she already had volunteered to work many extra hours during that time period, it is surprising that the County on June 11 threatened her with mandatory overtime which, if accepted, would have made her work about 100 hours in an 11 day period.

Robertson-Hoblit on June 11 then gave four weeks' notice that she would be quitting her job because she thought that such notice was mandatory under the contract. (Joint Exhibit 6). She did so at that time because her notice was predicated on receiving about 8 days off as vacation and holiday time that she had earlier requested (County Exhibit 1). If granted that leave, June 23 would have been her last day of actual work, thereby enabling her to spend her vacation and holiday time taking care of herself and her children. After the County refused to grant her request for vacation and holiday time off on the ground that four of her requested days off were not covered by other nurses, she submitted her June 23 resignation because she was physically exhausted, because she needed time to take care of her children, and because the County refused to grant her needed time off for the four vacation days she had requested and which were covered.

Given the great personal problems that she was then facing, and her own serious physical condition which demanded her immediate attention, I find that it was impossible for her to give 14 calendar days' notice under Sections 12.03 and 20.01 of the contract which state:

> 12.03 Any employee entitled to a vacation at the time of terminating his/her services with the County, shall be paid for his/her cumulative vacation credits at the time of severing his/her status. The employe must give two weeks notice of termination unless notice is impossible. A fraction month of employment shall be counted as a whole month when the fraction is one-half or more and dropped when less than one-half. In the event of the death of an employee, all accrued vacation benefits shall be paid to the deceased employee's estate.
>
> . . .
>
> 20.01 An Association member shall give the Rock County Human Services Department or the Psychiatric Hospital at least two (2) weeks written notice of intent to resign. (Emphasis added)

Moreover, even if one were to assume *arguendo* that two weeks' notice was possible, there is no merit to the County's claim that the grievant was not entitled to her accrued vacation under this language because she failed to provide such notice. The County contends that Sections 12.03 and 20.01 must in effect be read as follows:

> Any employee entitled to a vacation at the time of terminating his/her services with the County, shall be paid for his/her cumulative vacation credits at the time of severing his/her status. The employe must give two weeks notice of termination unless notice is impossible. If the employe fails to provide such notice, he/she shall forfeit all of his/her accrued vacation credits. A fraction month of employment shall be counted as a whole month when the fraction is one-half or more and dropped when less than one-half. In the event of the death of an employee, all accrued vacation benefits shall be paid to the deceased employee's estate.
>
> . . .
>
> 20.01 An Association member shall give the Rock County Human Services Department or the Psychiatric Hospital at least two (2) weeks written notice of intent to resign. If the employe fails to provide such notice, he/she shall forfeit all of his/her accrued vacation credits.

The problem with this claim is that the contract does not contain these underlined sentences.

There is a good reason for that: former Union President Schultz testified without contradiction that the parties never discussed such a forfeiture in past contract negotiations, let alone agreed to it. Hence, the County seeks to strip away an accrued benefit even though the parties in the past never even negotiated over such a forfeiture and even though arbitral law holds that forfeitures should be avoided whenever another reasonable contract interpretation is possible, which is exactly the case here under the Association's interpretation. For as stated in *How Arbitration Works*, Elkouri and Elkouri, p. 500, (BNA, 5th Edition, 1997):

> . . .
>
> "A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible. Since forfeitures are not favored either in law or in equity, courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation it can be avoided." MODE O'DAY CORP., 1 LA 490, 494 (1946).

. . .

Moreover, Section 20.02 of the contract supports the Association's interpretation because it states:

> 20.02 Upon termination of employment, the employee shall be paid for all accrued holidays, overtime, and earned vacation time. Pension refunds shall be paid in full accordance with the provisions defined in the rules governing the Wisconsin Retirement System.

There is nothing in this language that conditions payment for "all accrued holidays, overtime, and earned vacation time" upon giving two weeks' notice. Here, this language must be applied as written which means that all such payments are automatic irregardless of how much notice is given.

Furthermore, there is no evidence that the County ever told the grievant before she resigned that she could lose her vacation credits and holiday time if she did not give sufficient notice. That is why Kingsland testified that the grievant was in "kind of shock" when she learned about it. Indeed, even Wiesner, her immediate supervisor, stated that he had never heard of the County's policy. And then, to top matters off, Kingsland herself acknowledged on cross-examination that no such policy exists.

Given all this, it is flapdoddle to hold the grievant to a supposed policy that was never negotiated with the Association; never codified in the contract; never reduced in writing and communicated to the grievant before she quit; never made known to Weisner; and whose very existence is disputed by Kingsland.

The grievant therefore shall be immediately paid for all the vacation and holiday time that was improperly withheld from her.

The County cites several arbitration cases in support of its contrary claim that accrued vacation credits need not be paid out when two weeks notice is not given: See OUTAGAMIE COUNTY PROFESSIONAL POLICE ASSOCIATION AND OUTAGAMIE COUNTY, Case 190, No. 44602, MA-6357 (Honeyman, 3/91); CALUMET COUNTY COURTHOUSE EMPLOYEES LOCAL 1362, AFSCME, AFL-CIO, AND CALUMET COUNTY, Case 79, No. 48870, MA-7742 (Burns, 9/93); CEDAR CREST EMPLOYEES UNION, AFSCME, AFL-CIO, AND CEDAR CREST, INC., Case 4, No. 48989, A-5053 (Greco, 8/93).

In CEDAR CREST, I ruled that the employer did not give proper notice to the grievant that he would lose certain benefits if he quit before January 1. While the County argues here that the grievant must have known that her failure to give two weeks' notice doomed her

prospects for other County employment, the record establishes that she, in fact, was never told of that policy. Moreover, and for the reasons stated above, it in any event was impossible for her to give such notice.

In CALUMET COUNTY, Arbitrator Coleen Burns ruled that the County Clerk, who was no longer in the bargaining unit, had no right to certain sick leave benefits that had been given to the prior County Clerk and that she had to pursue her claim elsewhere. Here, by contrast, the grievant does have a right to accrued vacation and holiday time since the contract in Sections 12.03 and 20.02 expressly provides for them. Hence, this is the proper forum for resolving her dispute.

In OUTAGAMIE COUNTY, Arbitrator Chris Honeyman ruled that the grievant was not entitled to accrued vacation time because the contract expressly stated that such accrued vacation would be granted if more than thirty (30) days notice of an intent to resign was given. Here, the contract does not expressly condition such payment to any cutoff date.

The Association also requests that the grievant be made whole for all the monies and benefits she lost because of being removed from the Health Care Center 3 pool and because of not receiving the 0.5 position in the Center. It also asks that she be offered the 0.5 position and that she be reinstated to the nursing pool.

The grievant worked in the nursing pool for some time before her resignation. There is no evidence – nary an iota nor a scintilla – to show that her work there was unsatisfactory. In addition, she was removed from the nursing pool only because she did not give two weeks' notice of her intent to quit, as Robertson-Hoblit testified without contradiction that that was the only reason given to her at that time.

However, there is no evidence showing that this policy – which created a nexus between her work in the bargaining unit and her non-bargaining unit work - was ever negotiated with the Association. Hence, the County's policy and its attempted nexus between bargaining unit work and non-bargaining unit work constitutes a unilateral term and condition of employment on all of the bargaining unit employes herein because it restricts their employment and job rights to both bargaining unit and non-bargaining unit positions.

The same is true for the 0.5 position that was the subject of her June 30 scheduled interview. The County claim that it canceled the interview because of the grievant's past performance problems in the Psychiatric Hospital. This claim, however, is in direct variance with what Kingsland told the grievant at that time. She then told Robertson-Hoblit that the interview had been canceled only because the grievant had not given proper notice. While Kingsland claimed she made that statement only because she did not want to reveal that

Wiesner had given the grievant a bad reference, I find her explanation unpersuasive. Moreover, Wiesner himself never claimed in his testimony that he ever told Kingsland that. To the contrary, when specifically asked on cross-examination to fully set forth everything he discussed with Kingsland at that time, he replied: "My understanding from that conversation was that employes that did not give the proper notice and follow through with that typically were not hired back by the County." I therefore find that the alleged lack of proper notice was the only reason the grievant was not interviewed for the 0.5 position.

Moreover, even if we were to assume *arguendo* that the County canceled the June 30 interview because of the alleged lack of proper notice and the grievant's alleged faulty work performance, the record shows that the grievant had received average evaluations with no indication that she was a poor employe (Unon Exhibits 3-4). Indeed, she had not been marked below average in any category. Hence, her only problems centered on several tardinesses and absences over which she was never disciplined. By ignoring the grievant's past evaluations and by suddenly claiming that she was unfit to work anyplace else when in fact she had already worked there without incident, the County violated the grievant's right to have her evaluations speak for themselves.

Turning now to the question of remedy, I find that the grievant must be made whole by immediately offering to her the 0.5 position that she applied for in June, 1999; by reinstating her to the nursing pool; and by paying to her all wages and benefits that she would have received had she been retained in the nursing pool and had she received the 0.5 position on the third floor. See COASTAL OIL OF NEW ENGLAND V. TEAMSTERS LOCAL 25, 134 F.3D 466, 157 LRRM 2294 (1st Cir., 1998), wherein the court upheld an arbitration award which ordered the employer to reinstate the grievant to a different bargaining unit. For here, Article VII of the contract, entitled "Grievance Procedure", broadly defines a grievance as: "Any dispute which may arise from an employee or Association complaint with respect to the effect, interpretation or application of the terms and conditions of the Agreement. . .unless expressly excluded from such procedure by the terms of this Agreement."

By violating Sections 12.03 and 20.02 in the manner described above and thereby creating an improper nexus between the grievant's work in the bargaining unit and her non-bargaining unit work, the County has made it necessary to promulgate an effective remedy to rectify all of the adverse actions directed at the grievant because of the County's erroneous claim that she did not give proper notice under the contract and its additional erroneous claim that it could impose a significant penalty against her because of her alleged improper notice. Since the contract does not limit an arbitrator's remedial powers, it is proper to fashion this remedy here because it is directly related to the adverse effects and improper nexus that the County imposed on the grievant when it violated the contract. For, it is well recognized that: "With few exceptions, arbitrators and courts nevertheless agree that an arbitrable appointment

carries with it the inherent power to specify an appropriate remedy." (Footnote citations omitted). Hill and Sinicropi, *Remedies in Arbitration*, pp. 22-23 (BNA, 1981). All this is why there is no merit to the County's claim that I lack jurisdiction over this aspect of the case.

It is true, of course, that we do not know for sure whether the grievant would have been hired for the 0.5 position after her scheduled interview. However, any such uncertainty has been caused entirely by the County itself when it canceled that interview because of its erroneous beliefs that Robertson-Hoblit had not complied with Sections 12.03 and 20.01 and that it could unilaterally impose such a penalty even though it was never bargained with the Association and even though the contract itself does not contain any such penalty. Hence, as the wrongdoer, it is the County -- not Robertson-Hoblit -- who must pay the price for any such uncertainty.

The County therefore shall make the grievant whole by paying to her the average weekly earnings (and benefits) that she would have earned from June 24, 1999, to the time of her reinstatement. Her average weekly earnings are to be computed by what she earned from January 1, 1999 to June 23, 1999, in the Psychiatric Hospital and the Health Care Center 3 nursing pool, as that time frame is long enough to determine what she would have earned in the 0.5 position and the nursing pool after June 24 and up to the present. Any such backpay, if any, is to be offset by any interim earnings that the grievant earned, or could have earned, but for the County's failure to offer her the 0.5 position and its removal of her from the nursing pool.

In order to resolve any questions arising over the application of the remedy, I shall retain my jurisdiction indefinitely. Arbitrators have the authority to retain jurisdiction over remedial questions even when, as here, the County objects to any such retention. See John E. Dunsford, "The Case For Retention Of Remedial Jurisdiction In Labor Arbitration Awards", *Georgia Law Review*, Vol. 31: 201 (1996).

In light of the above, it is my

AWARD

1. That the County violated Sections 12.03 and 20.02 of the contract when it refused to grant Tami Robertson-Hoblit her accrued vacation credits and accrued holiday time. To rectify that contractual violation, the County shall immediately pay her all of her accrued vacation credits and holiday time. In addition, the County is prohibited from refusing to pay out any accrued holiday time or vacation credits to other employes who do not give two weeks' notice of their intent to quit.

2. That the following questions are arbitrable:

   a. What remedy, if any, is needed to address the County's cancellation of Tami Robertson-Hoblit's interview for another position on June 30, 1999?

   b. What remedy, if any, is needed to address the County's removal of Tami Robertson-Hoblit from the nursing pool?

3. That the County shall make Tami Robertson-Hoblit whole by immediately offering to her the 0.5 position that was the subject of the June, 1999 interview; by immediately reinstating her to the Health Care Center 3 nursing pool; and by paying to her the backpay and benefits ordered above.

4. That I shall retain jurisdiction indefinitely to resolve any questions relating to application of the remedy ordered.

Dated at Madison, Wisconsin this 7th day of August, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
6113