BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LINCOLN COUNTY (PINECREST NURSING HOME)

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 201
No. 58848
MA-11078

(Short-Staffed Grievance)

Appearances:

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin 54452-2535, on behalf of the County.

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 1998-99 collective bargaining agreement between Pinecrest Nursing Home (County) and Labor Association of Wisconsin, Inc., 1/ the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether maintenance employees should receive extra compensation for working short-staffed. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Merrill, Wisconsin, on September 26, 2000. No stenographic transcript of the proceedings was made. At the hearing, the parties agreed that they would postmark their briefs to each other, a copy to the Arbitrator, on October 27, 2000, and that they would waive the right to file reply briefs herein.

1/ After the expiration of the 1998-99 collective bargaining agreement, Wisconsin Council 40, AFSCME, AFL-CIO became the collective bargaining representative of the employees covered by the 1998-99 contract. Council 40 thereby became the administrator of that contract for unit employees and it brought this grievance.

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 that the following issues should be determined in this case:

> Did the Employer violate the collective bargaining agreement by refusing to compensate the Grievant Tracy Brown for two hours' pay for each day he worked a short-staffed schedule? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS OF THE 1996-97 COLLECTIVE BARGAINING AGREEMENT

The parties attached the following "Memorandum of Agreement" to the 1996-97 labor agreement, the predecessor to the effective labor agreement. By its terms, this Memorandum was to expire as of the termination date of the 1996-97 agreement "unless extended by mutual agreement of the parties." The Memorandum read in relevant part as follows:

. . .

> IT IS HEREBY AGREED by and between Pinecrest Nursing Home ("Employer") and the Labor Association of Wisconsin, Inc. for and on behalf of Local No.902 ("Union") that the following shall constitute the agreement between the parties regarding payment of additional compensation to employees who are required to work a regular work shift at less than the established staffing levels as determined by the Employer, as follows:
>
> 1. For the term of the agreement between the Employer and the Union, the Employer agrees to provide additional compensation of one hour of regular pay for each work shift that an employee is scheduled to work and actually works with a staff of employees less than the staff level for the department area and shift as determined by the Employer.
>
> 2. Staff levels as determined by the Employer for the classification of nursing assistant are as follows:
>
> **Day Shift** - 8 or less CNAs on South Wing
> 10 or less CNAs on North Wing and Special care [sic]

NOTE: Central Supply Assistants shall count as .5 CNAs.
NOTE: For every 8 empty beds, the above staffing levels shall be reduced by 1. If the 8 empty beds are distributed between the two units, the unit with the majority of empty beds shall have the staffing level reduced by 1.

P.M. Shift - 5 or less CNAs on South Wing
7 or less CNAs on North Wing and Special care [sic]

NOTE: For every 11 empty beds, the above staffing levels shall be reduced by 1. If the 11 empty beds are distributed between the two units, the unit with the majority of empty beds shall have the staffing level reduced by 1.

Night Shift - 7 or less CNAs for entire shift

NOTE: For every 18 empty beds, the above staffing level shall be reduced by 1.

3. Staffing levels for work shifts for other classifications shall be determined by the Employer.

4. This payment shall not be applicable to those instances where an employee actually works on the work shift with less than the established level as determined by the Employer if the shift schedule provides sufficient numbers of employees scheduled to work but employees fail to report to work for whatever reason, resulting in a lesser number of employees on the work shift.

. . .

RELEVANT PROVISIONS OF THE 1998-99 LABOR AGREEMENT

In the 1998-99 contract, the parties agreed to place the substantive language contained in the 1996-97 "Memorandum of Agreement" into the body of the contract. Article VII – Working Hours and Overtime contains the following language:

. . .

7.7: The Employer agrees to provide additional compensation of two (2) hour [sic] of regular pay for each work shift that an employee is scheduled to work and actually works with a staff of employees less than the staff level for the department area and shift as determined by the Employer.

7.7.1 Staff levels as determined by the Employer for the classification of nursing assistant are as follows:

Day Shift - 8 or less CNAs on South Wing

10 or less CNAs on North Wing and Special Care

Note: *Central Supply Assistants shall count as .5 CNAs.*
Note: *For every 8 empty beds, the above staffing levels shall be reduced by 1. If the 8 empty beds are distributed between the two units, the unit with the majority of the empty beds shall have the staffing level reduced by 1.*

P.M. Shift - 5 or less CNAs on South Wing

7 or less CNAs on North Wing and Special Care

Note: *For every 11 empty beds, the above staffing levels shall be reduced by 1. If the 11 empty beds are distributed between the two units, the unit with the majority of empty beds shall have the staffing level reduced by 1.*

Night Shift - 7 or less CNAs for entire shift

Note: *For every 18 empty beds, the above staffing level shall be reduced by 1.*

7.7.3 [sic] Staffing levels for work shifts for other classifications shall be determined by the Employer.

7.7.4 This payment shall not be applicable to those instances where an employee actually works on the work shift with less than the established staffing level as determined by the Employer if the shift schedule provides sufficient numbers of employees scheduled to work but employees fail to report to work for whatever reason, resulting in a lesser number of employees on the work shift.

. . .

FACTS

The Grievant, Tracy Brown, was employed at Pinecrest in the maintenance department from August, 1999, until he quit on September 8, 2000. At Pinecrest, Brown was a maintenance mechanic who worked a regular shift from 8:00 a.m. to 4:15 p.m., Monday through Friday. At the time of his hire, one other maintenance mechanic and the maintenance supervisor worked in the department.

On or about February 14, 2000, the other maintenance employee terminated his employment with Pinecrest, leaving Brown as the only unit employee in the department. Also at about this time, Brown's supervisor took 7.5 days of vacation. While the supervisor was absent, Brown was responsible to prioritize and schedule all the work of the department and to perform all work. This situation continued through April 10, 2000, when the County hired another maintenance employee into the department. It is also undisputed that whenever the other maintenance employee went on vacation or called in sick, Brown was the only employee working in the maintenance department but Brown was never paid extra therefor under Article VII.

On March 28, 2000, Brown filed the instant grievance listing Article 7.7 as having been violated and seeking "additional compensation for the time during which mechanical maintenance worker staff has been working at 50% level of staffing since 14 February 2000 without added compensation."

Both current Union President D'Amico and former Union President Lohfink, stated that for approximately the past 13 years, no grievances have been filed regarding employees having to work short-staffed in any department. Union President D'Amico also stated that in her department (housekeeping) no employees have ever received compensation for working short-staffed; that she has regularly worked short-staffed when employees in her department were on sick leave or vacation and she was never paid extra therefor. D'Amico also stated it is normal for housekeeping to have nine full-time, one part-time and one occasional employee, but that the occasional position remained unfilled for some time. D'Amico stated that during her tenure as Union President (at least the past three years), the Union has never sought to bargain for increased short-staffed pay for CNAs or for any other Pinecrest employees.

Former Union President Lohfink stated that the 1996-97 Memorandum of Agreement was developed because CNAs were working very long hours and because there were too few CNAs to fill the scheduled work hours. Therefore, the CNAs proposed language stating that they should receive extra pay for working short-staffed. Lohfink stated that she did not recall that any other employees were intended to be included in this provision, although the parties did not specifically discuss excluding other departments. Lohfink stated that the provision has never been applied to any other employees except CNAs. Lohfink stated that after the parties entered into the 1996-97 Memorandum of Agreement, this did not actually solve the problem regarding staffing until the County began using temporary agencies to fill the CNA work schedule.

Nursing Home Administrator Meehean (a member of the County's bargaining team at all times relevant hereto) essentially corroborated Lohfink regarding the bargaining history surrounding the 1996-97 Memorandum. Meehean also stated that at the time the parties entered into the 1996-97 Memorandum, the County was having problems staffing Pinecrest with CNAs and the Union had asked for more money for CNAs in order to compensate them for working short. Also at this time, Meehean stated that no discussions were had regarding including other employees' departments in Article VII pay. Meehean stated that other departments had shortages from time to time, both before and after the Memorandum was entered into. Meehean stated that it was his belief that the Memorandum limited extra pay to CNAs and that it was never the parties' intent at bargaining to give extra money to other employees in other departments if they had to work short under either the Memorandum or the language contained in Article VII. Meehean stated that the County has never paid additional compensation to other employees for working short and that only CNAs have received extra pay under the Memorandum and Article 7.7. Finally, Meehean confirmed that no grievances regarding the proper interpretation of Article VII have been filed by any employees.

POSITIONS OF THE PARTIES

The Union

The Union argued that Article 7.7 is clear and unambiguous. The Union asserted that Article 7.7 states without limitation that "an employee" is entitled to "additional compensation of two (2) hour [sic] of regular pay" when the employee is scheduled and actually works with a staff level that is less than that "set for the department area and shift" as determined by the Employer. Here, the Union noted that prior to February 14, 2000, Brown was working in the maintenance department with one other employee, but thereafter Brown was the only unit employee employed in the maintenance department, yet he received no additional Article 7.7 compensation therefor. The Union admitted that the Employer had set no formal staff level for the maintenance department but it noted that evidence indicated that for the past ten years the maintenance department had a past practice of employing two unit employees.

The Union also argued that the arbitral principle that if certain items are expressly stated others must be excluded if they are not listed, should be applicable in this case. As Article 24.4 indicates that the arbitrator may not modify, add to or delete from the express terms of the agreement and that the arbitrator can only interpret the contract in the area where the breach occurred, the Union urged that Article 7.7 is the only provision open to contract to interpretation in this case.

The County's argument that the bargaining history supports its version of the facts in this case should be rejected, in the Union's view. In this regard, the Union noted that this is its first contract with the County; that it did not participate in bargaining the prior agreement

and that it, therefore, cannot dispute contentions regarding the original intent of the language that was in the agreement prior to its representation of the employees. However, the Union urged that a reasonable person would read Article 7.7 as the Union does and it urged that the County should have amended that language to exclude other employees/departments if the County wished to maintain its alleged past practice of paying only CNAs additional compensation under Article 7.7. Because no limitation is expressed in the clear language of Article 7.7, that clear language should control and bargaining history should not become relevant.

Furthermore, the Union urged that the evidence regarding past practice submitted by the County is not applicable here. Initially, the Union noted that it did not believe that the evidence regarding past practice was clear. However, even if that evidence is found to be clear, the Union contended that as no ambiguity exists in the contract, the contract language must prevail over any evidence of an alleged past practice. Finally, the Union urged that Articles 31 and 32 essentially limit the use of past practice and bargaining history and further support the Union's arguments in this case. Therefore, the Union urged that grievance be sustained and that Brown be given full back pay for the period of time that he worked in a short-staffed environment at Pinecrest.

The County

The County argued that Article II reserves to it the right to determine the kind and quality of service, to determine what constitutes good and efficient County service and that all other management functions not specifically limited by the contract are reserved to the County through this Article. It is in this context that the County argues that Article 7.7 and its subparagraphs must be interpreted.

The County argued that if Article 7.7 ended with the first general paragraph, the Union might have a claim. However, as the contract contains the various paragraphs following Article 7.7 which modify Article 7.7, the Union's claims must fail. In this regard, the County noted that it has never set staffing levels for the maintenance department, which is a condition precedent to entitlement under Article 7.7. In addition, the contract sets specific criteria for the payment of additional compensation which only CNAs can meet. Thus, as Article 7.7 contains specific as well as general language, the County argued that the general language of Article 7.7 must be restricted or controlled by the specific language which follows. As no reference is made in Article 7.7.1 to any employees other than CNAs, and because Article 7.7.3 [sic] repeats that the County must first set staffing levels, the County urged maintenance department employees are not entitled to additional compensation under Article VII.

The County noted that the arbitral principle that expressing one item will exclude other items not listed should apply in this case. As staffing levels for the CNAs are expressed in the contract and no other department staffing levels are expressed, the County argued that if other

departments had been intended to be included, the parties would have done this in the contract language. The County noted that past Union President Lohfink confirmed that the parties intended only to cover CNAs under Article 7.7.

The County noted that both the current and past Union Presidents as well as the nursing home administrator confirmed that only CNAs had ever received extra compensation under Article 7.7, although employees of other departments have worked short at various times when staffing levels were low or other employees were on sick leave and vacation. The County urged that the language of the contract was added thereto in the 1996-97 agreement by means of incorporation of a Memo of Agreement which dated back to 1995. In the County's view, the language of the Memo/contract is clear and specific that only CNAs can receive additional compensation under Article 7.7 and it urged that the Arbitrator deny and dismiss the grievance in its entirety.

DISCUSSION

The Union has argued that Article 7.7 should essentially be read alone without reference to the various paragraphs which follow it. I disagree. This approach would contravene a general arbitral principle that language of an agreement must be read as a whole in order to determine the true intent of the parties. Therefore, although the language of Article 7.7 would appear at least in part, to support the Union's claims in this case, the remaining language of that Article indicates that the Union's claims are not persuasive.

Article 7.7 makes clear that a set staffing level is a condition precedent to short pay entitlement. In this regard, I note that Article 7.7.1 specifically states the staffing levels for CNAs on the various shifts at the Pinecrest Home. It is significant that staffing levels for other classifications are not listed in Article 7.7. Indeed, Article 7.7.3 [sic] specifically states that staffing levels for work shifts for other classifications shall be determined by the Employer. The Union conceded herein that the County has never designated staffing levels for the maintenance department. As a general provision of a collective bargaining agreement must be restricted or controlled by a specific provision, Article 7.7 must be controlled and restricted by the provisions which follow it in Articles 7.7.1 through 7.7.4.

It is axiomatic in labor relations that if the parties had intended to include other classifications in its delineation of staffing levels under Article 7.7, the parties could have done so. The parties chose not to do this. The Union has argued that both past practice and bargaining history are irrelevant in this case because the language of Article 7.7 is clear and unambiguous. I disagree. In my view, Article 7.7 is ambiguous as it fails to specify staffing levels to trigger the short staffed pay entitlement and Article 7.7.1 fills in that ambiguity. The use of past practice and bargaining history is also appropriate where, as here, there is a question regarding the proper interpretation of a provision and its various attendant parts. Thus, the fact that the former Union President confirmed that the parties only intended to cover

CNAs by negotiating Article 7.7, and the fact that the County has never paid any other employees other than CNAs extra compensation under Article 7.7 are relevant to inquiries in this case.

The Union's proposed interpretation of the language of Article 7.7 is not reasonable as it fails to reconcile the remaining portions of Article 7.7. Whether this is the Union's first contract with the County or not, the Union is responsible to police the collective bargaining agreement it inherits from a prior union representative and it cannot essentially duck the bargaining history of the prior representative when it assumes its role as the current collective bargaining representative of those employees.

The Union has argued that the provisions of Article 31 and 32 of the collective bargaining agreement (the zipper clause and "no other agreement" language) essentially support its arguments herein. The Union cannot prevail on this argument as Article VII contains specific language regarding short pay which would not be covered by Article 32 of the contract, a standard zipper clause which governs unexpressed past practices. As Article 31 essentially prohibits the County from making separate contracts with individual employees, it has no applicability to this case.

As both the relevant bargaining history and past practice in this case support the County's arguments regarding the proper interpretation of Article 7.7 and its attendant paragraphs and as that interpretation is the only reasonable one, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement by refusing to compensate Grievant Tracy Brown for two hours pay for each day he worked a short-staffed scheduled. The grievance, therefore, is denied and dismissed in its entirety.

Dated in Oshkosh, this 4th day of December, 2000.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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