

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**BROWN COUNTY MENTAL HEALTH CENTER EMPLOYEES,  
LOCAL 1901, AFSCME, AFL-CIO**

and

**BROWN COUNTY**

Case 650  
No. 59280  
MA-11240

*(Overtime Gender Grievance)*

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Appearances:

**Mr. Michael J. Wilson**, Staff Representative, Wisconsin Council 40, on behalf of the Union.

**Mr. John C. Jacques**, Assistant Corporation Counsel, on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Green Bay, Wisconsin, on January 16, 2001, and December 13, 2001, at which time the parties agreed I should retain jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs that were received by March 7, 2002.

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

**ISSUE**

Since the parties were unable to jointly agree upon the issue, I have framed it as follows:

Did the County violate Article 11 and/or any other part of the contract when it stopped offering extra shifts and/or hours based upon gender and, if so, what is the appropriate remedy?

### **BACKGROUND**

The County operates a mental health facility in Green Bay, Wisconsin, where it employs both trained and untrained Nursing Assistants. For the last 20 years or so, the County has maintained separate seniority rosters for the Nursing Assistants based on gender even though they share the same Nursing Assistant job description (County Exhibit 1). Hence, if a male Nursing Assistant was needed to fill in at straight time for another male Nursing Assistant, the County attempted to contact the male Nursing Assistants on the male seniority list before turning to the female seniority list for such straight time work. If that proved unsuccessful, the County then offered overtime to male Nursing Assistants and then to female Nursing Assistants. Conversely, if a female Nursing Assistant was needed to fill in at straight time for another female Nursing Assistant, the County offered that straight time to the female Nursing Assistants on the female seniority list before turning to the male seniority list. If that was unsuccessful, the County then offered overtime to female Nursing Assistants and then to male Nursing Assistants. As a result, Nursing Assistants were offered overtime even though other Nursing Assistants on the opposite gender's seniority list had more seniority than they did.

This system apparently worked well enough when there were the same number of female and male Nursing Assistants because the overtime hours were distributed fairly evenly between the female and male seniority lists. Now, there are more female Nursing Assistants than male Nursing Assistants. Hence, male Nursing Assistants over the years have received more and more extra hours, thereby resulting in fewer extra hours for those female Nursing Assistants who have more seniority than some of the less junior male Nursing Assistants. This separate seniority system also was time-consuming because office personnel had to work with both seniority lists and it also resulted in extra overtime.

By memorandum dated June 9, 2000 (unless otherwise stated, all dates hereinafter refer to 2000), Nursing Home Administrator Earlene Ronk informed bargaining unit members:

...

The current procedure to call out hours for Nursing Staff at this facility is called out by gender in seniority order. This procedure has proved to be very time consuming and currently requires approximately twenty-five hours per week to call out all hours. This process will be changed in an effort to complete the

staffing process in a more timely manner. Effective Monday, June 26, 2000 all hours will be called in seniority order regardless of gender. For example, all Certified Nursing Assistant hours will be called out males and females simultaneously in seniority order first for straight time and then for overtime. The end result will be awarding of hours in seniority order in a timely manner. This in turn will allow us to safely staff this facility in an effort to provide safe, effectual client care which is our ultimate goal in this organization.

...

The change referenced in Ronk's memo took effect on June 26 after the Union grieved it on June 9 (Joint Exhibit 2), thereby leading to the instant proceeding.

### **POSITIONS OF THE PARTIES**

The Union claims that the County has violated the contract because "gender heretofore was respected as a qualification within the classification of Nursing Assistant" and it argues that there is a well-developed past practice of offering extra hours based upon gender and that the practice is protected under Article 6, the Maintenance of Benefits proviso. The Union therefore requests that the County be ordered to revert back to that prior practice.

The County contends that it has acted properly because its new procedure recognizes seniority; because there has been no violation of Article 2 or Article 6, the Maintenance of Benefits clause; and because the contract does not protect all past practices. The County also asserts that it had legitimate business reasons for making its change, i.e., to cut down on the amount of time it takes to call employees and to also overcome the shortage of male Nursing Assistants.

### **DISCUSSION**

This case largely turns on the interpretation and application of Article 11 of the contract, entitled "Overtime", which provides in pertinent part:

...

Overtime shall be awarded utilizing a system of strict seniority according to qualified individuals within a classification. (Emphasis added).

On-call employees shall not work overtime unless all regular qualified employees within a classification are on overtime or unavailable to work.

On its face, this language does not refer to gender, as it instead only refers to awarding overtime “according to qualified individuals within a classification.” In addition, Article 24 entitled “Seniority”, states that the County must “recognize seniority. . .”

Elsewhere, Appendix A of the contract, entitled “1997-1998 Classification and Compensation Plan”, refers to “Nursing Assistant (Untrained)” and “Nursing Assistant (Trained)”. Hence, there is no classification in the contract that breaks down such work along gender lines. To the contrary, all Nursing Assistants are in the same job classification and have the same job description (County Exhibit 1). Article 11 on its face therefore is clear and unambiguous in mandating that overtime must be awarded on the basis of seniority to “qualified individuals” within the Nursing Assistant classification without regard to gender.

However, the Union correctly points out that a practice has existed over the last 20 or so years under which overtime was offered by gender and that Article 6 of the contract, entitled “Maintenance of Benefits”, states in pertinent part: “The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining and are not specifically referred to in this agreement.” The Union also is correct in stating that the County in the past has posted Nursing Assistant positions according to gender; that it regularly schedules Nursing Assistants according to gender; and that gender also has been used for bumping purposes, for shift preferences, and for changing shifts.

The Maintenance of Benefits proviso, however, expressly excludes from its coverage those benefits that are “specifically referred to in this agreement”, which here means the assignment of overtime provided for in Article 11. Article 6 therefore does not supersede Article 11.

In addition, the underlying reason for assigning overtime by gender is no longer applicable because of the decline in the number of male Nursing Assistants. For as the County states in its brief:

. . .

The Union seeks to “freeze” the call-in procedure when the underlying factual basis for the former practice has dramatically changed due to the shortage of male Nursing Assistants. The underlying factual basis for the practice was that the number of male Nursing Assistants on the seniority list would be adequate to fill-in for absent males. In the recent past, even position postings of openings for those Nursing Assistant positions designated for male (“NAM”), have been filled and posted into by female Nursing Assistants.

. . .

Such a material change in circumstance can render certain past practices inoperable, a point made by Arbitrator Richard Mittenthal in his seminal article on past practice when he wrote:

“One must consider, too, the underlying circumstances which give a practice its true dimensions. A practice is no broader than the circumstances out of which it has arisen, although its scope can always be enlarged in the day-to-day administration of the agreement. No meaningful description of a practice can be made without mention of these circumstances. For instance, a work assignment practice which develops on the afternoon and midnight shifts and which is responsive to the peculiar needs of night work cannot be automatically extended to the day shift. The point is that every practice must be carefully related to its origin and purpose.

...

Consider finally the effect of changing circumstances on the viability of a practice during the contract term. Where the conditions which gave rise to a practice no longer exist, the employer is not obliged to continue to apply the practice. Suppose, for instance, that crane operators who handle extremely hot materials have for years been given a certain amount of relief time during their shift and that after installing an air-conditioning unit in one of the crane cabs the employer refuses to give any more relief time to the operator of that crane. Whether the employer’s action is justifiable depends upon the reason behind the relief time practice.”

See Richard Mittenthal, “Past Practice And The Administration Of Collective Bargaining Agreements” From *Arbitration and Public Policy, Proceedings of the 14<sup>th</sup> Annual Meeting of the National Academy of Arbitrators* (BNA, 1961), pp. 30, 32-33, 56-57.

Here, if the Union’s grievance is sustained, that would create a great disparity by awarding more overtime to male Nursing Assistants at the expense of female Nursing Assistants. Such a result therefore would gut – at least for overtime purposes – the very principle upon which seniority is based, a point well made by the County which notes: “There can be no more equitable procedure than that which is being challenged in this grievance.” I agree.

Based upon the above, it therefore is my

**AWARD**

1. That the County did not violate Article 11 and/or any other part of the contract when it stopped offering extra shifts and/or hours based upon gender.

2. The grievance is therefore denied.

Dated at Madison, Wisconsin, this 5th day of June, 2002.

Amedeo Greco /s/

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Amedeo Greco, Arbitrator

