BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RIDGEWOOD LOCAL 310, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

RACINE COUNTY (RIDGEWOOD HEALTH CARE CENTER)

Case 200
No. 63280
MA-12535

(Reduction of Shift Hours – Denial of Benefits)

Appearances:

Mr. John Maglio, Staff Representative, AFSCME Council 40, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of Local 310.

Mr. Victor Long, Consultant, Long and Halsey Associates, 8338 Corporate Drive, Suite 500, Racine, WI 53406, appearing on behalf of the County of Racine.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 310 (hereinafter referred to as the Union) and Racine County (hereinafter referred to as either the County or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the County's decision to change the postings for newly hired part-time employees, resulting in a reduction in scheduled hours and the loss of health benefits and time off benefits. The undersigned was so designated. An arbitration hearing was held on the matter on March 24, 2004, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. The parties put the case in on closing arguments at the end of the hearing, whereupon the record was closed.

ISSUE

The issue presented by this grievance is:

Did the County violate the collective bargaining agreement by modifying future postings which reduced the hours of part-time positions, in August of 2003, resulting in a loss of health benefits and time off benefits for certain part-time employees? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III
MANAGEMENT

3.01 Except as otherwise provided herein, the management of the operations and the direction of the working forces, including the right to hire and the right to suspend, discipline or discharge for cause, and the right to transfer, promote or relieve employees from duty because of lack of work or other legitimate reasons, the right to establish and make effective reasonable rules of conduct, and the assignment of employees to a job is vested in the County, together with all other functions of management, with the understanding that such rights of management will not be used for the purpose of discrimination against any employee.

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ARTICLE V
PROBATIONARY EMPLOYEES

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5.04 Employees who are hired into a regular full time position and whose work schedule is forty (40) hours per week shall be entitled to all benefits covered by this Agreement. Probationary employees shall receive paid holidays and coverages of all insurance as provided in other sections of this contract. Part time employees shall not be considered under this provision but shall be considered under provisions of Article XIX.

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ARTICLE IX
HOURS OF WORK

9.01 The work week shall be five (5) consecutive days, commencing with the day following an employee's normal two (2) days off (this provision shall not apply to employees who are on a rotating schedule*). The full time work day shall consist of eight (8) hours per day and the full time work week shall consist of forty (40) hours per week.

*LPN's, Nurse Aides, Cooks, Food Service Workers, Building Maintenance Helpers, Laundry Workers, Unit Secretaries/Ward Clerks.

9.02 The normal work day shall begin at the employee's assigned shift starting time and extend for a period of twenty-four (24) hours. Employees will be allowed a five (5) minute wash-up period at the end of their shift.

9.03 Present shift schedules shall be maintained. Any changes in shift schedules shall be taken up with the Union prior to making any change. Any full time employee called into work will be provided with a minimum of two and two-thirds (2-2/3) hours of work or two and two-thirds (2-2/3) hours of pay at a time and one half (1-1/2) their regular hourly rate of pay.

9.04 In computing benefits earned under other provisions of this Agreement, only hours in the assigned position shall be counted, except as provided for in Article 18.02. Employees may not earn additional benefits by working additional hours (i.e., a 2/5 position would receive 40% of available benefits).

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ARTICLE XI
HOLIDAY PAY

11.01 For those holidays listed below on which a full-time employee does not work, eight (8) hours at the employee's straight time rate will be paid.

11.02 A regular part-time employee who has met the requirement of Article XIX shall be paid for those holidays listed below according to actual hours worked, based on number of normal work days in the calendar month preceding the occurrence of the holiday.

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ARTICLE XVIII
INSURANCE

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18.02 Part time employees eligible for insurance benefits under the provisions of Article XIX who select family coverage shall pay forty (40%) percent of the premium, the County's portion to be sixty (60%) percent of the total premium, but in no event less than ninety (90%) percent of the single premium. Part time employees who are in at least a two (2) day per week position will be eligible for the following pro-rated benefits: prorated holiday pay; prorated vacation pay; prorated sick pay; wages lost due to jury duty; military duty, and funeral leave (subject to the limits in the respective articles). Such employees will also be eligible for single health insurance coverage by paying ten (10%) of the premium, prorated dental insurance, prorated life insurance, shift premium and overtime pay.

18.03 At no cost to the employee, the County will provide a group life insurance policy in the sum of $15,000 life and $15,000 accidental death and dismemberment (AD&D) for each full time employee. Part time employees will be eligible to receive life insurance upon payment of the prorated premium.

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ARTICLE XIX
BENEFITS FOR PART-TIME AND CASUAL EMPLOYEES

19.01 Part time employees who are in at least a two (2) day per week position will be eligible for the following pro-rated benefits: prorated holiday pay; prorated vacation pay; prorated sick pay; wages lost due to jury duty; and military duty (subject to the limits in the respective articles). Such employees will also be eligible for single health insurance coverage by paying ten (10%) of the premium, prorated dental insurance, prorated life insurance, shift premium and overtime pay.

19.02 A part time employee who is in a one (1) day per week position will not be eligible for benefits except for shift premium and overtime pay.

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BACKGROUND

There is no dispute about the facts giving rise to this grievance. Among the services provided by the County is the operation of the Ridgewood Health Care Center. The non-professional employees of the Center are represented by the Union. The Center employs regular full-time and regular part-time employees, and both groups are included in the bargaining unit. Full-time employees work an eight hour day, five days per week. Any regular employee scheduled for fewer hours than that is treated as part-time.

The collective bargaining agreement provides various benefits to employees. In the case of part-time employees, many of the benefits are available on prorated basis, with a threshold for eligibility based on the scheduled time for their positions. According to the contract, prorated health insurance, dental insurance, life insurance, holiday, vacation, sick pay, jury duty pay and military pay are available to part-time employees who work in positions scheduled for at least two days per week. Family health insurance is available with a 60% County contribution, and single health is available at a 90% County contribution. Part-time employees scheduled for one day per week are not eligible for any of these prorated benefits. Eligibility for benefits is based on the posted schedule for a position, rather than actual hours worked. Most part-time employees can and do pick up additional shifts, and work more than the nominal hours for their positions.

The County's budgeting practices require departments, including Ridgewood, to treat all employees who are eligible for insurance as if they took the insurance, and charges the department's budgets a melded rate for such employees. In the case of Ridgewood, this meant that the facility's budget was charged insurance costs of approximately $11,200 per year for each of the 49 eligible part-time employees, even though only 15 of them actually took insurance.

In 2003, Frances Petrick, the Administrator of Ridgewood, was directed to submit a budget that reduced the facility's reliance on the tax rate by 10%. In order to avoid additional layoffs and attendant reductions in patient care, she decided to reduce the amount charged to her budget for health insurance costs. She accomplished this by changing the postings for part-time positions from two eight-hour days per week to one eight-hour day and one seven-hour day for certified nursing assistants and one eight-hour day and one seven and a half hour day for licensed practical nurses. She grandfathered all current employees who were taking insurance into 16-hour schedules. 1/

1/ Although Petrick initially announced that current employees posting into new positions would lose their grandfathered status, during the processing of this grievance she agreed that it would be better to allow those employees to keep their benefits in the event of a posting. While that did not lead to a resolution of the grievance, the County's Human Resources and Finance Committee agreed and the policy was adjusted to reflect that change.

The instant grievance was filed challenging Petrick's action. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the arbitration hearing, Union President Jewel Hendrickson testified that her understanding of the contract language requiring the Center to maintain present shift schedules was that it prevented any change for current employees, and also for any vacancies, unless the County first discussed the changes with the Union. She said she was not aware of any instance in which the County had changed the schedule of a vacant job when it was posted. Referring to the seven and seven and a half hour schedules now being posted for vacancies, Hendrickson said she had never before seen such a schedule, and that it was designed solely to deny benefits to employees. She reviewed a summary of actual hours worked by people in the new 15-hour postings, and noted that the majority worked more than 16 hours per week. Hendrickson acknowledged that there had been employees who worked more than 8 hours per week but less than 16 who had not received benefits in the past.

Fran Petrick pointed to other positions with schedules that required more than a single day of work, but less than 16 hours per week, and which did not pay benefits. She stated that there had never been any grievances over these jobs, and used this as evidence that the two days per week standard in the contract had actually been understood to mean working 1/5th of the hours in a normal work week. Petrick cited several instances in which two positions provided coverage from 4 p.m. to 8 p.m. on units, with each employee alternating, working four shifts in one week and three in another. While each of these positions worked seven days in a two week period, the cumulative hours were 28, or an average of 14 hours per week. Petrick said this type of schedule had been used for several years. She pointed to another with an employee scheduled for two seven hour shifts each pay period. Finally, she cited several floater positions, which had a set schedule of hours but no regularly assigned unit. Those positions existed in 2002 and 2003, but were eliminated in the 2004 budget. Some of them were 16-hour, two day per week positions, and others were 12-hour, two day per week positions. Those which were 12-hour positions did not receive benefits. Petrick had no idea whether anyone had ever told the Union about the benefit status of these floater positions.

Petrick testified that the contract language requiring the Center to maintain present shift schedules had always been understood to refer to the schedules of current employees. The County had often changed the schedules for vacant positions as they were posted, including splitting positions into two positions with fewer hours per week. There had never been any protest over this practice.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that the Care Center administrator was forced into the action she took by the County's practice of charging phantom costs to her budget. Notwithstanding her good faith, that action violates the collective bargaining agreement. The

employees whose schedules have been "changed" are actually working the same hours they have always worked. The County's actions are purely fictions, designed to take advantage of what they see as a loophole in the contract.

The loopholes the County grasps at are not reflected at all in the contract. Article 9.03 requires that present shift schedules be maintained, unless the County consults with the Union. While the County asserts that this only applies to current employees, that is not what it says, and there is no evidence anywhere of a seven or seven and a half hour shift schedule in the history of the facility. The standard under the contract is an eight hour shift, and the County's unilateral decision to go to a seven hour or seven and a half hour shift cannot be reconciled with their obligations to maintain the "present schedules" as they existed prior to August of 2003.

Further, the Union points to the clear language of the eligibility provisions for part-time employees. The contract states that employees scheduled for two or more days per week are eligible for benefits. It also states that employees scheduled for one day are not eligible for benefits. These employees are scheduled for two days per week. The County may wish that trimming a half hour from one of those days would deprive employees of benefits, but that concept does not appear anywhere in the contract.

The County's central claim is that it has used floater positions with fewer than 16 hours per week and no benefits since 2002, and that this somehow proves that the Union agrees to its hours calculation in place of the clear two-day standard in the contract. That cannot be accepted. It runs counter to the clear language of Article XIX, and there is no evidence that the Union was informed that these jobs did not carry benefits with them. Moreover, a unilateral management decision taken in 2002 is hardly a longstanding practice as regards a grievance filed a year later.

Inasmuch as the County has failed to maintain the current shift schedules, and since the affected positions are all scheduled for at least two days per week, the Arbitrator should grant the grievance and order the restoration of fringe benefits to two-day per week positions, as well as other relief as may be appropriate.

The County

The County takes the position that, while the Union may have a legitimate concern, it does not have a legitimate grievance. The Union bears the burden of proving that there has been a contract violation, and it has failed to carry that burden. What the Union has proved is that part-time employees commonly work more than their scheduled hours. That is irrelevant. The standard in the contract is that benefits are payable to those who are normally scheduled to work 2/5^{ths} time or more. This has always meant 16 hours or more per week. The County has offered 14-hour per week floater positions for several years, without fringe benefits to those employees and without protest by the Union. It strains credibility to suggest that the Union simply did not notice these jobs, which were openly posted.

The suggestion that the County cannot change the hours of vacant jobs runs counter to the evidence that the County has routinely done so, without any grievances being filed. The promise in the contract to maintain present schedules refers to the schedules of current employees, not those of vacant positions. The County has the basic management right to change those work schedules and has always exercised that right when a change was warranted.

The County understands that the Union does not like the way in which health care costs are accounted in the County's budgeting process, but that is completely unrelated to the contractual rights of the employees. The fact is that the Health Care Center has taken the most reasonable route to save costs, protect the benefits of current employees, and avoid layoffs in the bargaining unit. It has done so in a manner that is consistent with the contract, and the grievance should therefore be denied.

DISCUSSION

There are two issues in this grievance. The first is whether the pledge in the contract to maintain "present shift schedules" prevents the County from posting vacant positions with schedules that are different than those worked by the former occupant of the positions. The second issue is whether the payment of benefits to part-time employees is triggered by working on two calendar days per week, or depends instead on working 2/5th of the hours in a normal work week — 16 hours — no matter how many days those hours are spread across.

Maintenance of Present Shift Schedules

The relevant portion of Article IX, Sec. 9.03 states: "Present shift schedules shall be maintained. Any changes in shift schedules shall be taken up with the Union prior to making any change." The County claims that this relates only to the schedules of current employees, and does not restrict its right to post vacancies with different hours. The Union claims that this applies to both current employee schedules and schedules for vacancies. At a minimum, the Union argues, this prevents the County from introducing completely new shift configurations without first consulting the Union.

As a general proposition, the requirement that present shift schedules be maintained can more easily be read as safeguarding the schedule of current employees than it can as a bar to posting different hours for vacancies. Reading the language as a prohibition on changed hours for vacant positions means that the Center cannot reallocate hours across different shifts and, practically speaking, transforms the provision into what amounts to a minimum staffing requirement. That is inconsistent with Petrick's testimony that vacant positions are routinely posted with different hours than those worked by the employee who left, including splitting hours of vacancies to create two positions. On balance, I cannot conclude that this language is a general prohibition on altering the hours of vacant jobs.

The more persuasive argument is that the language regarding maintenance of present shift schedules acts as a check on the creation of entirely new shift configurations. There is a difference between saying that a job may be posted with a different shift schedule than the job it replaces, and saying that the posting process may be used to unilaterally create an entirely different shift structure. In the past, there has not been a seven or seven and a half hour shift at the Health Care Center. Balanced against that is the fact that the positions at issue in this case are, by definition, part-time positions and are designed to work less than the normal work day/work week for full-time positions. The record shows that the Center has, in the past, posted part-time positions which work only a portion of the normal shift. There are, for example, four-hour positions on each unit providing extra coverage during a portion of the second shift. Those jobs start an hour after the normal shift begins. These jobs exist within the normal shift, but do not parallel the hours of the normal shift. Likewise, the floater positions used in 2002 and 2003 worked portions of shifts.

If the County was attempting to use the posting process to redefine the general shift structure for full-time positions to create a less than eight-hour daily shift, the language concerning the maintenance of present shifts, as well as the definition of the normal work day, would come into play. However, given the nature of part-time positions, and the fact that there has been a history of using part-time positions that do not match up with the normal starting and ending times of the present shifts, I conclude that Article IX does not preclude the posting of part-time jobs having less than eight hours per day.

The Threshold for Benefits

The conclusion that the contract allows the County to post part-time positions having fewer than 8 hours per day does not answer the central question in this grievance. That is, what is the threshold for benefits? The County asserts that the threshold for claiming benefits is averaging 16 hours or more per week, across a two week pay period. The Union argues that it is working on two or more days per week.

Neither party's interpretation is implausible, given the somewhat unusual language of the collective bargaining agreement. The contract defines eligibility in terms of number of days per week ("Part time employees who are in at least a two day per week position will be eligible for the following pro-rated benefits"), and this supports the Union's argument. However, the contract also defines a "day" as eight hours, and illustrates the pro-ration of benefits by using a ratio ("a 2/5 position would receive 40% of available benefits"), both of which support the County's argument. Either interpretation could lead to arguably unfair, or at least odd, results. The Union's interpretation could lead to four-hour per day, two day per week position receiving benefits, while a twelve-hour per day, one day per week position would not. The County's would allow the present situation, where a difference of 30 minutes a week in scheduled hours separates the workers who receive benefits from those who do not. However, the possibility of unfairness is inherent in the setting of any threshold for benefits, as

some people will fall just over the threshold and others will fall just under it. The results are unfair in individual cases, but it is an unfairness the parties have, of necessity, built into the system.

The greatest support for the County's argument, and the greatest weakness in the Union's position, lies in the fact that over time there have been employees at the Center who have worked two or more days per week without receiving benefits. I agree with the Union that the floater positions used in 2002 and 2003 are not particularly persuasive evidence of a past practice, both because they existed only a relatively short time before this grievance was filed and because there is no evidence that the Union knew they did not carry benefits. Since the floater positions were a mix of 16 hours per week and 12 hours per week schedules, some did carry benefits, which could reasonably have led to a belief that benefits were being paid to all floaters. However, there are other positions with schedules that average out to two or more days, but less than 16 hours per week, such as the four hour per day positions providing extra coverage around meal times. According to Petrick, those schedules have been used for some time, and those positions have never received benefits. For her part, Local 310 President Jewel Hendrickson candidly acknowledged that she knew there had been jobs scheduled for less than 16 hours over two or more days that did not receive benefits. Even without that acknowledgement, it is considerably more difficult to believe that the Union would not be aware of the schedules and benefits status of these jobs. The jobs are posted, they have existed for a greater period of time than the floater positions, and they do not represent a mix of benefit and non-benefit positions. On the whole, it appears that the administration of the contract over time has been consistent with the County's reading of the language as limiting pro-rata benefits to persons working 16 hours or more per week.

The language of the collective bargaining agreement allows either party's interpretation, and neither interpretation leads to results that are so harsh as to rule that interpretation out. Any unfairness in individual cases is attributable to the very nature of setting eligibility criteria. The practice over time has been to deny benefits to those who are scheduled for an average of less than 16 hours per week. There are few enough positions in that category that it cannot be definitively said that the parties mutually understand the language to mean 16 hours per week is the threshold. It is possible to say with certainty, however, that the preponderance of the evidence in this case provides greater support for the County's view of the language than it does for the Union's. Given that, I cannot find that the County violated the contract in refusing to offer pro-rata benefits to the positions posted at 15 and 15-1/2 hours after August of 2003.

On the basis of the foregoing and the record as a whole, I have made the following

AWARD

The County did not violate the collective bargaining agreement by modifying future postings which reduced the hours of part-time positions, in August of 2003, resulting in a loss of health benefits and time off benefits for certain part-time employees. The grievance is denied.

Dated at Racine, Wisconsin, this 3rd day of June, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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