

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 3377, AFSCME, AFL-CIO

and

GRANT COUNTY

Case 91
No. 63713
MA-12687

Appearances:

Jennifer McCulley, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Jon Anderson, Attorney at Law, LaFollete Godfrey & Kahn, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2003-2004 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance about a weekend call-in absentee policy. The undersigned was appointed and held a hearing on September 20, 2004, in Lancaster, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 6, 2004.

ISSUE

The parties ask:

Did the County violate the collective bargaining agreement when it implemented the weekend call-in absences policy? If so, what is the appropriate remedy?

BACKGROUND

The County operates a nursing care facility called Orchard Manor. The Union represents employees in six departments at the home. This grievance involves the certified nursing assistants (CNA's), about 114 of them, and employees in activities. In March of 2004, the County implemented a sick leave policy that is being grieved here. The housekeeping and dietary departments have had similar sick leave policies since 2000 and 1997 respectively, but the new policy being grieved now applies to CNA's and activities. Employees who call in sick on a weekend are now required to make it up by working the following weekend. If employees miss only one weekend in a year, they are not required to make it up. Employees may exchange shifts as long as it does not result in overtime.

A similar policy was implemented for the dietary department in June of 1997 and for housekeeping in September of 2000. The Employer gave a 60-day notice before implementing the policies. No grievances were filed over either the dietary or housekeeping policies. Donna Haines, the Administrator of Orchard Manor, found the policies in dietary and housekeeping to be very effective. There are only 19 employees in the dietary department, and the Union president in 1997 was involved in the policy discussions but did not take the policy back to the membership for a ratification vote.

The policy for CNA's and activities came about because in the fall of 2003, there was an increase in the number of calls for sick leave on the weekends. Louise Gotzinger is the payroll and scheduling clerk. She schedules the CNA's, most of whom are part-time. Gotzinger complained to Haines about the problems with the weekends and the number of calls for sick leave. It is time consuming to find replacements, and on the weekends, a nurse or LPN gets pulled from the floor to find a replacement. Nurses complained to Gotzinger about the time it took to do this. Haines started to address the problem through labor-management meetings. The parties met on January 11, 2004, and Haines gave out the housekeeping and dietary policies to the Union and asked for suggestions on how to handle the problem. Haines asked the Union whether they needed a 60-day notice or whether it could be implemented sooner, and the Union replied that it did not need a 60-day notice. Haines posted the policy on January 19, 2004, hoping to implement it on February 1, 2004.

The policy did not get implemented on February 1, 2004. The Union notified Haines that it wanted to take it to the members for a vote. Haines said she would wait for the vote or use a 60-day notice. The labor-management committee met on February 10, 2004, and the Union offered some suggestions to change the above policy. One of the changes made was to give employees one weekend of calling in sick without having to make up the next weekend. Another change encouraged voluntary exchanges and the policy would not apply in those instances. The policy was also changed to allow full-time employees to have a supplemental day off so they would not have to work 11 straight days. The Union voted on February 20, 2004, and voted against it. Haines had decided to implement the policy on March 22, 2004 because that date would have given employees at least 60-days notice. The policy as revised and implemented stated:

In our endeavor to provide optimal care to our residents, every effort will be made to see that employees are treated fairly and consistently. Therefore, the following guidelines will apply:

An absence occurring on a weekend will be handled in the following manner:

- If an employee calls in absent, two (2) or more weekend shifts (two or more individual shifts on weekends) per calendar year, they shall be required to make up said number of shifts with weekend shifts.
- When a weekend absence occurs, the employee's name and date of absences will be placed on the Weekend Absence Make-up List.
- An employee who is absent on the weekend will be required to work a scheduling need of the facility with the first priority being any needs for the following weekend. Exceptions to this priority can only be made by the Department Head for extenuating circumstances.
- The employee must contact the scheduler on the Monday following the absence and the scheduler will let the employee know if he/she is to be scheduled for the next weekend. (Factors such as full staffing, overtime, etc. will be considered.) If the employee is not to be scheduled for the next weekend arrangements will be made for the employee to "make-up" the weekend absence. For full time employees, a supplemental day off shall be scheduled during the make-up week to avoid overtime.
- The date of the scheduled make-up shift and completion of it will be recorded on the Weekend Makeup List. Names will remain on the list until the make-up is completed.
- Voluntary exchanges are encouraged and this policy does not apply to them.
- If the absent employee fails to meet the commitment of the make-up shifts, corrective counseling will result.

See Absenteeism policy and Discipline policy for definitions and additional information.

Linda Klar has been a CNA for five years and is president of the Union. She was aware of the problems that led to the policy through labor-management meetings. Klar admitted that there are some "bad apples" who call in too often, and she thought they should have been disciplined. The County's policies provide for progressive discipline for absenteeism after six occurrences. Until the labor-management group met in January of 2004, Klar was not aware of other departments having a similar policy regarding sick leave. Under both the old and new system, an absence was counted as an occurrence and was covered by sick leave. Under the new system, the change is that after the first absence, it has to be made up. The dietary and housekeeping policies require employees to make up the weekend with the first absence.

Union members have some concerns that employees will come to work while sick on the weekends. In fact, that has happened – an employee came in, left sick and went to the emergency room. Members have concerns about illnesses being spread to residents and other employees when people come to work sick. Most employees plan around their work schedules, knowing that they could make plans with families or friends on certain weekends. Some of the members felt they were being punished for being sick. Also, full-time employees would lose overtime opportunities when they call in sick on the weekend. The schedule is changed so that the employee making up a weekend would not get overtime, as he or she did in the past.

As positions become available, the County posts them with the days of work, showing the hours and days. According to the postings, CNA's would be working every other weekend, which is also in line with the labor contract.

Haines considers the policy to be fair to employees and finds it works to deter weekend call-in's. After the policy went into effect, the number of call-in's for sick leave dropped, from about 37 to 10 for the same period of time in 2003 and 2004. The County continues to schedule employees with every other weekend off.

THE PARTIES' POSITIONS

The Union

The Union raises several objections to the policy. It objects that the employee who calls in on their scheduled weekend to work is required to call Gotzinger every Monday morning to see if he or she is needed the following weekend until he or she works the missed weekend. This could go on indefinitely. Also, there are few overtime opportunities because a CNA that misses a scheduled weekend has days taken away during the week to prevent overtime status. The policy provides for a department head to have the discretion to make exceptions on the mandatory weekend make-up, which is in complete contradiction to the bargaining agreement. The Union finds that the policy is unreasonable which violates Section 2.01, wherein the County may make and enforce reasonable rules.

The Union contends that the policy conflicts with Section 9.01, which provides that a job posting must state the shifts. An employee posting for a slot knows which days during the week he or she will work and which set of weekends to work. The CNA's work either the payroll weekend or the opposite weekend. The policy violates the contract and past practice and requires employees to work a weekend that they did not sign to work.

Further, the Union asserts that the County has violated Section 11.04 of the bargaining agreement. The contract provides for the Employer to make every effort to schedule full-time employees off every other weekend, and the policy clearly violates that provision with the

requirement to make up the missed weekend with the next weekend. Employees would then be working two weekends in a row. The Union believes the policy also violates Section 6.01 on discipline, because forcing employees to make up the next weekend is discipline. Employees are being disciplined for using an earned benefit. The County already has progressive discipline in place for too many occurrences of sick leave. This policy penalizes all employees, not just the ones who are the chronic call-in's.

The County

The County notes that Section 2.02 of the bargaining agreement gives it the right to make and enforce reasonable rules. The parties have agreed in that agreement that the County will make every effort to schedule its CNA's off every other weekend, but that's hard to do when employees call in unable to work a weekend shift assignment. In 2003, there were 116 total weekend call-in's over the 52 weekends. Only six weekends were free of call-in's on either the Saturday or Sunday. Management spent considerable time replacing those who called in, and it determined that it needed to address the situation and create a disincentive for employees to call in on a weekend.

The County asserts that the bargaining agreement is silent with respect to weekend call-in's, and it adopted a rule similar to the rules previously adopted for dietary and housekeeping. The rule was adopted following notice and consultation with the Union, and the County made changes suggested by the Union. The rule does not violate any term of the bargaining agreement. The County still makes every effort to schedule employees off every other weekend. Section 11.04 contains this "every effort" commitment, and it is simply a commitment to schedule. It does not require employees to have every other weekend off. Regular work cycles and schedules are premised on all employees working when they are assigned, but variations will and do occur based on staffing needs and absences. Employees are not precluded from using sick leave. The policy prescribes consequences if an employee calls in sick on a weekend. Each employee has one free call-in per calendar year, and the rule does not apply to voluntary exchanges. The rule is narrowly tailored to its object and is a reasonable exercise of management rights.

The County states that it has a history of developing rules relating to weekend call-in's. The new rule is an extension of the rules already adopted in the housekeeping and dietary departments. There is a valid basis to extend the rule to the CNA's. Management has not bargained away its right to adopt this type of rule, and there is no evidence that the County implemented the rule in an arbitrary or capricious manner.

DISCUSSION

The bargaining agreement provides in the management rights section that the County may make and enforce reasonable rules, among other things. Section 11.04 states: "The

County will make every effort to schedule full-time, and a reasonable effort to schedule part-time employees with slots, off every other weekend. Weekends for night people will be defined as the Saturday and Sunday night shift.”

The policy or rule itself is reasonable in light of the problem it seeks to address – the sick leave usage on weekends. It gives some room to employees who do not abuse sick leave to keep their regular schedules. It was intended to catch those employees who abuse sick leave by calling in on weekends, and it seems to have obtained its goal, due to the drop in call-in’s on the weekends. It is narrowly tailored to meet the need, and there is nothing unreasonable about the policy or rule.

The question is whether the policy runs afoul of some other provision of the collective bargaining agreement. While the Union points to the posting procedure, Section 9.01 says nothing about the weekend scheduling. Section 9.01 requires that the shift be posted, and whether the position is full or part-time. Job postings do not lock in parties forever – shifts and jobs may change over time. The policy does not conflict with Section 9.01.

Nor does the policy conflict with the contract’s disciplinary language. To require an employee to make up weekend work after calling in sick is not disciplinary. If it were, the Union could grieve every single instance when someone makes up a weekend. There is no punitive nature to the policy as discipline for absences does not take place until someone has more than six occurrences. It is the abuse of sick leave itself that may result in discipline, but the requirement to have employees make up a weekend is not disciplinary in and of itself.

However, it is a closer call as to whether the policy conflicts with Section 11.04 of the bargaining agreement, which calls for the County to make every effort to schedule full-time employees, and a reasonable effort to schedule part-time employees with slots, off every other weekend. The County correctly points out that it does this – it schedules them off every other weekend. And the contract does not guarantee every other weekend off, but only the effort to accommodate that goal. It is only when someone calls in sick that the schedule of working every other weekend fails. But it’s the policy that causes it to fail, and the policy negates the language of making every effort as well as a reasonable effort under Section 11.04 to schedule people off every other weekend. The policy dictates that people will work a couple of weekends in a row when they call in sick. The County is then relieved of making every effort or making the reasonable effort to see that people get every other weekend off, at least under this circumstance. The County would be relieved of its commitment under Section 11.04 frequently.

The policy adds to Section 11.04 by carving out a regular and recurring exception to the commitment to schedule people off every other weekend. The language would have to be changed to say that the County will do that except when an employee calls in sick on more than one weekend, or something to that effect. This is not a *de minimus* exception. The Arbitrator

should not add to or modify the language, and the policy, if allowed to stand, essentially does just that. Therefore, the policy is in direct conflict with the contract language and the grievance is sustained.

This is a bit of an unfortunate result, because the policy is reasonable and works well to deter unnecessary call-in's on weekends. Those call-in's hurt all employees. The ones who come to work are working short-handed, or someone else has to give up their time off on a weekend to come to work. Nurses are pulled from residents' care to rectify the situation and get help in the door. Therefore, the parties need to revisit this issue and bargain something satisfactory to resolve the problem at some point anyway. However, the Arbitrator is only serving to enforce the contract as it is written, not to solve all the problems left in its wake.

The appropriate remedy is to order the County to rescind the policy at this time. There is no evidence that employees have been adversely affected and there is no remedy that should go to specific employees.

AWARD

The grievance is sustained. The County violated Section 11.04 of the collective bargaining agreement when it implemented the weekend call-in absences policy. The County is ordered to rescind the policy implemented on March 24, 2004 regarding employees who call in sick on scheduled weekends.

Dated at Elkhorn, Wisconsin this 10th day of February, 2005.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator