BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN FEDERATION OF NURSES & HEALTH PROFESSIONALS, LOCAL 5001, AFT

and

MILWAUKEE COUNTY

Case 554
No. 63874
MA-12734

(Mary Wilder Grievance)

Appearances:

Jeffrey Sweetland, Attorney, Shneidman, Hawks & Ehlke, 700 West Michigan, Suite 500, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Union.

Timothy Schoewe, Deputy Corporation Counsel, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

ARBITRATION AWARD

Wisconsin Federation of Nurses & Health Professionals, Local 5001, AFT, hereinafter referred to as the Union, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance filed by the Union. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on October 1, 2004. The hearing was not transcribed. Afterwards, the parties filed briefs by October 20, 2004, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s)to be decided in this case. The Union frames the issue as follows:

> Did the County violate Sec. 3.14(2) of the 2001-2004 Memorandum of Agreement by failing to pay the bonus provided therein to Mary Wilder, RN, based on hours she worked as a pool nurse in 2003? If so, what is the appropriate remedy?

The County frames the issues as follows:

1. Does the collective bargaining agreement authorize a party to rescind its previous acquiescence to a grievance disposition?

2. Did the Union refer the grievance to arbitration in a timely fashion?

3. Did Milwaukee County violate Sec. 3.14(2) when it did not pay Mary Wilder the pool nurse bonus for hours paid while she was a pool nurse in 2003? If so, what is the appropriate remedy?

Having reviewed the record and arguments in this case, the undersigned finds that the Union's wording of the issue is appropriate for purposes of deciding the substantive issue. Accordingly, the undersigned adopts the Union's wording for the substantive issue. With regard to the County's two procedural issues, the undersigned lumps them both together into the following issue:

Is the grievance procedurally arbitrable?

PERTINENT CONTRACT PROVISIONS

The parties' 2001-2004 collective bargaining agreement contained the following pertinent provisions:

3.14 REGULAR POOL NURSE

. . .

(2) Regular Pool Nurses shall be compensated at a rate of $25.00 per hour effective pay period 1, 2001. Thereafter, this rate will be adjusted by the general wage increase.

Regular pool nurses shall be granted a bonus based on total pool hours paid at the end of each payroll year. (Pay Period 1-26), based on total pool hours paid, as follows:

201-400 hours	$250
401-800 hours	$600
801 or more hours	$1,000

This bonus shall be paid as soon as administratively possible.

. . .

4.02 GRIEVANCE PROCEDURE

. . .

(5) SETTLEMENT OF GRIEVANCES

Any grievance shall be considered settled at the completion of any step in the procedure if the president of the Federation or designee and the Director of Labor Relations, and the appointing authority or their designee are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

. . .

(7) STEPS IN THE PROCEDURE

. . .

(c) STEP 3

. . .

2. In the event the Director of Labor Relations or designee and the President or designee of the Federation mutually agree to a resolve of the dispute it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal. The President, or his/her designee of the union shall mail, with the appropriate union signature to the Director of Labor Relations' Office, the Director's disposition indicating the union's approval or disapproval of said third step disposition. The union shall return the third step disposition within 45 calendar days of the third step disposition. Failure of the union to respond shall mean the grievance is withdrawn and it is null and void and will not be processed further.

. . .

(d) STEP 4

1. If the grievance is not settled at Step 3, the Federation may refer such grievance to arbitration. Such reference shall be made within 45 days from the date of the conclusion of Step 3.

BACKGROUND

Since at least 1998, the County has employed pool nurses who do not work a regular schedule. The parties' 1998-2000 collective bargaining agreement defined a regular pool nurse as "an employee licensed as a nurse in the State of Wisconsin and employed on an hourly basis." This definition was contained in Sec. 3.14(1) of that agreement. Subsection (2) in that agreement specified the pool nurse's hourly pay rate. For 2000, it was $21.96.

In the last round of bargaining, the parties put new language into Sec. 3.14(2). That new language dealt with the hourly rate for pool nurses. It also established a system whereby regular pool nurses can earn bonus pay. This case involves the bonus pay portion of the new language. There was no bonus for pool nurses prior to the parties' 2001-04 collective bargaining agreement.

The record indicates that the new language came to be incorporated into the 2001-04 collective bargaining agreement as follows. The main dispute between the parties with respect to the pool nurses was their hourly pay rate. The Union proposed that their hourly rate be increased to $27 per hour in 2001, with annual 6% increases thereafter. The County counteroffered the Union's proposal. The County proposed that the pool nurse hourly rate be increased to $25 per hour in 2001, with adjustments "by the general wage increase" thereafter. The County also proposed adding a year-end bonus for pool nurses "based on total pool hours paid." The exact language which the County proposed was as follows:

> RN 1 – MH (Pool) shall be granted a bonus at the end of each payroll year. (Pay Period 1-26), based on total pool hours paid, as follows:
>
> | | |
> |---|---|
> | 201-400 hours | $250 |
> | 401-800 hours | $600 |
> | 801 or more hours | $1,000 |
>
> This bonus shall be paid as soon as administratively possible.

On November 8, 2000, the Union accepted the County's proposal in lieu of the Union's own pool nurse pay proposal. Both sides signed a document that day indicating that the language referenced above was a tentative agreement. Insofar as the record shows, there was no substantive discussion between the parties about this language. Specifically, County

negotiators did not tell Union negotiators that if a pool nurse converts to permanent status, they forfeit the pool nurse bonus.

When the parties' 2001-04 collective bargaining agreement was finalized, it contained language in Sec. 3.14(2) that it slightly different than the tentative agreement just referenced. The language which is contained in Sec. 3.14(2) in the parties' 2001-04 collective bargaining agreement is as follows:

> Regular Pool Nurses shall be granted a bonus based on total pool hours paid at the end of each payroll year. (Pay Period 1-26), based on total pool hours paid, as follows:
>
> | | |
> |---|---|
> | 201-400 hours | $250 |
> | 401-800 hours | $600 |
> | 801 or more hours | $1,000 |
>
> This bonus shall be paid as soon as administratively possible.

FACTS

Mary Wilder worked for the County as a pool nurse for the first five months of 2003. In that time period, she worked 297.1 hours. Effective June 2, 2003, she accepted a full-time permanent staff nurse position in the County's Department of Aging. Thus, after June 2, 2003, Wilder was no longer a pool nurse.

In early 2004, Wilder sought a pool nurse bonus for the hours she had worked as a pool nurse in 2003. Specifically, she sought a $250 bonus. The County refused to pay her a pool nurse bonus. The County averred that Wilder was not a pool nurse when the bonus became payable (i.e. the end of the year), having converted to full-time status in June, so she was not eligible to receive a pool nurse bonus.

In March, 2004, the Union filed a grievance over the fact that Wilder was not paid a pool nurse bonus of $250. On June 9, 2004, the County's Director of Labor Relations, Troy Hamblin, issued his decision on the grievance. He denied the grievance. Under the parties' collective bargaining agreement, the Union then had 45 days to appeal the grievance to arbitration. 45 days after June 9, 2004 would have been July 24, 2004.

On July 7, 2004, Hamblin sent an e-mail to several union officials regarding the deadline for appealing the Wilder grievance to arbitration. In that appeal, Hamblin indicated that the Employer had agreed to extend the timeline to July 30, 2004.

On July 28, 2004, the Union's Chapter Chair, Barbara Kelsey, notified Hamblin in writing that she (Kelsey) "agree[d] with third step disposition." Thus, she approved of Hamblin's denial of the grievance.

On the afternoon of July 30, 2004, a clerical employee in the Union's office faxed two letters from Kelsey to Hamblin. In the first letter, Kelsey wrote:

> On July 28, 2004, I returned a 3rd step decision that I erroneously signed indicating agreement with the decision on grievance #40589 – Mary Wilder. In fact, our arbitration review committee did not agree with the 3rd step decision and voted to take this grievance to arbitration. Therefore, I am rescinding my earlier correspondence.
>
> We will be sending you a copy of the request for arbitration, which we will be filing today. Sorry for the confusion over this matter. . . .

In the other letter, Kelsey notified Hamblin that since the Union disagreed with the County's denial of the grievance, the Union had appealed the grievance to arbitration before the WERC.

The WERC received the aforementioned grievance arbitration request on August 2, 2004.

. . .

There is no past practice applicable to this contract dispute. Wilder is the first person who claimed the pool nurse bonus who converted from a pool nurse to a permanent position after earning the pool nurse bonus.

POSITIONS OF THE PARTIES

Union

The Union contends that the grievance should be upheld. It elaborates on this contention as follows.

First, the Union responds to the fact that it originally acquiesced to the County's denial of the grievance. The Union maintains that was a mistake which it immediately and timely corrected. The Union also submits that the County suffered no prejudice from the Union's rescission of its mistake.

Next, the Union responds to the County's contention that the grievance was not appealed to arbitration in a timely fashion. The Union disputes that assertion. It notes in that regard that Hamblin agreed to extend the arbitration deadline to July 30, 2004. It avers that it met that deadline since Union official Kelsey faxed two letters that day to Hamblin: one letter notified Hamblin that the Union's previous acceptance of the denial of the grievance was a mistake, and the other letter advanced the grievance to arbitration. The Union avers that since the appeal to arbitration was done by the July 30, 2004 deadline, the appeal was timely.

With regard to the merits, the Union argues that Wilder was contractually entitled to a $250 pool nurse bonus because she worked more than 201 hours as a pool nurse in 2003 and was still employed by the County when it came time to pay the bonus. As the Union sees it, those are the only eligibility requirements referenced in the language itself. Building on the premise that those are the only eligibility requirements, the Union contends that there is nothing in the applicable contract language that says that someone forfeits the bonus by converting to permanent status mid-year or not being a pool nurse at the end of the year. The Union therefore maintains that the fact that Wilder was a regular staff nurse at the end of 2003 does not mean she no longer qualified for, or forfeited, the pool nurse bonus she had earned. The Union avers that the year-end payment provision was simply put in to make clear that the bonus would be based on total pool hours worked during the year. This avoided a construction that a nurse would qualify for $250 as soon as she worked 201 hours, another $600 as soon as she worked 401 and another $1,000 as soon as she worked 801 hours.

To buttress the interpretation just referenced, the Union notes that the first paragraph of Sec. 3.14(2) also uses the phrase "regular pool nurse" in the sentence "regular pool nurses shall be compensated at the rate of $25 per hour effective pay period 1, 2001." As the Union sees it, that sentence does not say the employee must be a pool nurse at the time she receives her compensation. Instead, all it says is that she must be a "Regular Pool Nurse" when she performs the work for which she will subsequently get paid. The Union uses Nurse Wilder to make the following point. During the bi-weekly pay period that ended June 7, 2003, she worked 24 hours as a pool nurse. After she worked those hours, but before the end of that pay period, she converted to permanent status. In her next paycheck, she was still compensated at her pool nurse rate for those pool nurse hours, even though by then she was on permanent status. The Union argues rhetorically that if that was the proper application of "Regular Pool Nurses shall be compensated," etc. in the first paragraph, then the second paragraph's command that "Regular Pool Nurses shall be granted a bonus," etc. dictates an identical result. According to the Union, Wilder's mid-term conversion is irrelevant to her eligibility for the bonus, just as it was irrelevant to her eligibility for pool nurse pay based on her pre-June 2 pool hours.

Next, the Union asserts that a number of rules of construction support the Union's proposed interpretation of the contract language. Specifically, the Union cites the rule against forfeitures, the rule that terms used in a contract have the same meaning throughout the contract, the rule that ambiguous or doubtful words should be construed in light of their context, the rule against harsh, absurd or nonsensical results, and the rule that ambiguous language is to be construed against its drafter.

Finally, citing the parties' bargaining history, the Union submits that there is nothing in the record which shows that when the parties agreed on the County's bonus proposal, the parties mutually contemplated and intended that someone who subsequently converted to permanent status would forfeit the pool nurse bonus. The Union argues that if that was the County's intention at the time it proposed this language, it was incumbent on the County, as the proposal's drafter, to disclose that intention to the Union. The Union submits that the County's negotiators never said anything of the sort.

In sum then, the Union's position is that Wilder was contractually entitled to receive a $250 pool nurse bonus. Since the County did not pay her that bonus, the County violated the collective bargaining agreement. As a remedy, the Union asks that the County be directed to pay Wilder the $250 bonus.

County

The County contends that the grievance should be denied. It elaborates on this contention as follows.

First, the County calls attention to the fact that on July 28, 2004, Kelsey notified Hamblin in writing that she (Kelsey) "agreed with" his (Hamblin's) third step disposition (denying this grievance). While Kelsey later rescinded her previous acquiescence to the denial of this grievance, the County submits that it never acceded to, or accepted, that rescission. As the County sees it, the collective bargaining agreement is silent as to authorizing such a rescission, much less a unilateral action as that proffered by Kelsey, and the Union offered no citation as to an enabling contract provision.

Second, the County asserts that the grievance was referred to arbitration in an untimely fashion. This contention is based on the premise that the Union's appeal to arbitration was received 54 days after the County's third step decision – not 45 days as required by the collective bargaining agreement. The County argues in the alternative that even if the Director of Labor Relations is authorized to unilaterally alter that 45 day time limitation, and extend the timeline in this case from July 24 to July 30, even that time limit was exceeded because the WERC did not receive the grievance arbitration appeal paperwork until August 2, 2004.

Third, with regard to the merits, the County notes that the contract language involved in Sec. 3.14(2) is new and has not been previously litigated. The County reads the language at issue to have a threshold eligibility requirement. According to the County, that threshold eligibility requirement is that an employee must be a "regular pool nurse" at the end of the year. The County avers that Wilder did not meet that eligibility requirement because she was not in that classification after June 2, 2003. As the County sees it, the contract language does not provide for individuals who had been pool nurses to receive the bonus if they departed county service or took a position pursuant to a permanent appointment. That being so, the County believes that Wilder's eligibility to receive the pool nurse bonus terminated when she voluntarily changed her status.

In conclusion, the County emphasizes that the Union bears the burden of persuasion in this case. It notes that the Union called no witnesses or provided evidence of a practice inconsistent with the County's interpretation of the applicable contract language. The County avers that the parties' bargaining history does not support the Union's interpretation of the contract language. Building on the foregoing, the County maintains that the Union did not prove that the County's actions violated the collective bargaining agreement. It therefore asks that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Inasmuch as the County has raised two procedural arbitrability contentions, they will be addressed at the outset.

First, the County relies on the fact that union official Kelsey originally notified Hamblin that she agreed with the County's third step disposition. Not surprisingly, the County wants the Union held to Kelsey's acquiescence to Hamblin's denial of the grievance. Were I to do that, obviously it would be the end of this case and there would be no need to discuss anything further. I decline to do that here for one simple reason: Kelsey's original acquiescence to the denial of the grievance was a mistake which was rescinded two days later. Kelsey's two July 30, 2004 letters made the following points clear: 1) that her previous communication (wherein she agreed to the County's denial of the grievance) was an error; 2) that this grievance was not resolved; and 3) that the Union was appealing it to arbitration. While there is no language in this collective bargaining agreement which expressly authorizes a party to change or rescind its position on a grievance, that is not surprising. In my view, it is implicit that a party can change or rescind its position on a grievance. While the timeliness of a party's change in position can certainly become an issue, it is not an issue here because the Union's change in position was made promptly (i.e. in two days). Given the promptness of the Union's rescission of its mistake, the County could not show how it was prejudiced by the Union's change in position.

The County's other procedural contention (i.e. that the Union's appeal to arbitration was untimely) overlooks several key factual details. First, this contention is based on the premise that in this case, the 45 day time limit for appealing a grievance to arbitration expired July 24. The County is mistaken about that date. While July 24 was the original deadline for appealing the grievance to arbitration, that deadline was changed by the mutual agreement of the parties. I am referring, of course, to the fact that Hamblin agreed to extend the timeline from July 24 to July 30 in an e-mail. Such time extensions are common in labor relations, and there is nothing in the record which indicates that the County's Director of Labor Relations was not empowered to extend the timeline as he did in this case. Second, the County argues that the July 30 timeline was exceeded because the WERC received the grievance arbitration appeal paperwork on August 2, 2004. This contention misses the mark because it ignores the fact that the Union faxed the appeal to arbitration paperwork to the County's Director of Labor Relations on July 30, 2004. That fax transmittal was sufficient to meet the agreed-upon time limit which was referenced in Hamblin's e-mail granting the time extension.

In light of the above, it is held that the grievance is procedurally arbitrable.

Merits

Attention is now turned to the substantive merits of the grievance.

My discussion begins with an overview of the contract provision involved here – the second paragraph of Sec. 3.14(2). That provision, of course, establishes a system whereby pool nurses can earn bonus pay. The bonus pay is not automatic, though. In order to qualify for the bonus, a pool nurse has to work a certain number of hours during the year. When they work a certain number of hours, they qualify for a bonus. If they work more hours, they get a higher bonus. Thus, the language establishes that working a certain number of hours during the year as a pool nurse is an eligibility requirement to qualify for the bonus. If the pool nurse does not work at least 201 hours during the year, they do not qualify for any bonus.

In the factual situation involved here, Wilder worked 297.1 hours as a pool nurse in calendar year 2003. On its face, that was more than enough hours to qualify her for the bonus referenced in the first category, namely $250.

The County contends that notwithstanding the fact that Wilder worked 297.1 hours as a pool nurse in 2003, she does not qualify for the $250 bonus because there is a threshold eligibility requirement that she did not meet. According to the County, the threshold eligibility requirement is this: the employee must be a regular pool nurse at the end of the year. The County avers that Wilder did not meet that requirement because she was not a pool nurse after June 2, 2003.

Based on the rationale which follows, I find the County's reading of the language to be mistaken.

First, there is nothing in that provision, or anywhere else in the agreement, that says that in order to get the pool nurse bonus, the employee has to be a pool nurse at the end of the year. While the provision does say that the pool nurse bonus is paid at the end of the year, that is not the same thing as requiring the employee to still be in a pool nurse position at the end of the year. By saying that the pool nurse bonus is paid out at the end of the year, as opposed to say, the middle of the year, this makes it clear that the bonus is paid on total pool hours worked during the year. This avoided the possible interpretation that the bonus contained multipliers (i.e. that a nurse would get $250 as soon as they worked 201 hours, then get another $600 as soon as they worked 401 hours, then get another $1000 as soon as they worked 801 hours, for a total of $1850). By waiting until the end of the year to count the total number of hours the employee had worked, this made it clear that a pool nurse who qualified for a bonus by working a minimum number of hours would earn either $250, or $600, or $1000, but not all. Thus, the phrase "based on total pool hours paid at the end of each payroll year" does not mean that to get the pool nurse bonus, the employee must be a regular pool nurse at the end of the year.

That interpretation is consistent with the way the parties have interpreted the first paragraph of Sec. 3.14(2). Here's why. That sentence says that "regular pool nurses shall be compensated at a rate of $25 per hour. . ." That sentence does not require that the employee must be a pool nurse at the time he/she receives pool nurse pay. Instead, all it says is that the employee must be a "regular pool nurse" when they do the work for which they are subsequently paid. The pay records for Nurse Wilder indicate that during the pay period that

ended June 7, 2003, she worked 24 hours as a pool nurse. After she worked those hours, she converted to permanent status. In her next paycheck, she was paid at the pool nurse rate for her pool nurse hours, even though by then she was in a different job. Since the County paid Wilder at the pool nurse rate for her pool nurse hours after she was no longer a pool nurse, the phrase "regular pool nurses shall be compensated" must mean that an employee is to be paid for their hours as a pool nurse even if they are no longer a pool nurse. The phrase "regular pool nurses shall be compensated", which is found in the first paragraph of Sec. 3.14(2) is very similar to the phrase "regular pool nurses shall be granted a bonus" which is found in the second paragraph of Sec. 3.14(2). In fact, the only difference between the two provisions is the dropping of the word "compensation" and adding the phrase "granted a bonus". Overall, the phrases are close enough in their wording that their interpretation should be similar. It is under the Union's interpretation, while it is not under the County's interpretation.

Second, there is nothing in the second paragraph of Sec. 3.14(2) that says that someone forfeits a bonus which they have already earned if they convert to permanent status. A general rule of contract interpretation is that a forfeiture will not be inferred where none has been specifically provided. In other words, if someone is going to forfeit something, it has to be spelled out explicitly. Here, though, there is no explicit reference to a pool nurse forfeiting a bonus if they convert to permanent status. That being so, the rule against (implicit) forfeitures supports the inference that there is no forfeiture when a pool nurse converts to permanent status. Were I to infer such a forfeiture here, I would be adding something to the contract that presently is not there.

Third, another rule of contract construction applicable here is that a contract ambiguity is construed against the drafting party. In this case, it was the County's representatives that drafted the language that was ultimately incorporated into the parties' collective bargaining agreement as the second paragraph of Sec. 3.14(2). As previously noted, the County believes that that language says that a pool nurse forfeits a bonus if they convert to permanent status. However, the language does not say that, and the responsibility for the absence of such language falls on the County since they drafted the language involved.

Finally, there is nothing in the parties' bargaining history which shows that when the parties agreed on the County's pool nurse bonus language, they mutually intended that a pool nurse who subsequently converted to permanent status would forfeit the pool nurse bonus. If that was the County's intent at the time it proposed its language, it was incumbent on the County, as the drafter of the language, to disclose that intent to the Union. It never did.

In conclusion then, it is held that Wilder was contractually entitled to receive a pool nurse bonus of $250. She earned that bonus by working more than 201 hours as a pool nurse in 2003. The fact that she was not a pool nurse at the end of the year, having converted to a permanent position in the middle of the year, does not change that. Since the County did not pay her that bonus, the County violated the second paragraph of Sec. 3.14(2). In order to remedy that contractual violation, the County shall pay Wilder a $250 pool nurse bonus.

In light of the above, it is my

AWARD

1. That the grievance is procedurally arbitrable; and

2. That the County violated Sec. 3.14(2) of the parties' 2001-04 collective bargaining agreement by failing to pay the bonus provided therein to Nurse Wilder based on the hours she worked as a pool nurse in 2003. In order to remedy that contractual breach, the County is directed to pay Wilder a $250 pool nurse bonus.

Dated at Madison, Wisconsin, this 8th day of March, 2005.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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