BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 342, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO
PINECREST NURSING HOME EMPLOYEES UNION

and

LINCOLN COUNTY (PINECREST NURSING HOME)

Case 237
No. 64954
MA-13066

(Francl Time Off Grievance)

Appearances:

Mr. Phil Salamone, Staff Representative, AFSCME Council 40, joined by **Mr. John Spiegelhoff**, Staff Representative, 1105 East 9th Street, Merrill, WI 54452, appearing on behalf of the Union.

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1110 East Main Street, Merrill, WI 54452-2535, appearing on behalf of the County.

ARBITRATION AWARD

Lincoln County (hereinafter referred to as the County or the Employer) and Local 342, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over a grievance concerning the County's refusal to change the work schedule of Barb Francl, thereby causing her to use vacation for time she wanted in the summer of 2005. The undersigned was so designated. A hearing was held November 2, 2005 in Merrill, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No stenographic record was made of the hearing. The parties submitted post hearing briefs, the last of which was received by the undersigned on December 8, 2005, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the Arbitrator makes the following Award.

ISSUE

The parties stipulated that the arbitrator should frame the issue in his Award. The issue may be fairly stated as:

> Did the Employer violate the collective bargaining agreement when it refused to change the Grievant's work schedule in the summer of 2005, and instead required her to use vacation days for the time off she wished to take?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE II - MANAGEMENT RIGHTS

2.1: The management of Lincoln County and the direction of the work force is vested exclusively in the Employer, to be exercised through the department head, including but not limited to, the right to hire, promote, demote, suspend, discipline and discharge for just cause; the right to decide job qualifications for hiring; the right to transfer or layoff because of lack of work or other legitimate reasons; to subcontract for economic reasons; to determine the type, kind and quality of service to be rendered to patients and citizenry; to determine the location, operation and type of physical structures, facilities or equipment of the departments, to plan and schedule service and work; to plan and schedule any training programs; to create, promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogatives of the Employer to operate and manage its affairs in all respects. These rights shall not be exercised in an unreasonable or arbitrary fashion. Nothing herein contained shall divest the Association or its bargaining unit members of any rights existing under Wisconsin's Municipal Employment Relations Act or other State or Federal law.

. . .

ARTICLE VII – WORKING HOURS AND OVERTIME SCHEDULES

7.1: Normal shifts shall be seven and three fourths (7-3/4) hours per day. The normal shift may not be reduced except with the mutual consent of the

Union. The Employer may establish alternative shifts to meet the operational needs of the Home. Each employee shall receive a one-half (1/2) hour unpaid lunch break except employees on the night shift who shall not receive a lunch break.

. . .

7.3: **Scheduling:** Employer and employee agree that the eight and eighty (8 and 80) principle shall apply to the scheduling of hours at the Home. This principle shall apply to all departments. Under this principle, employees may work more than a forty (40) hour week without the payment of overtime as long as their total hours do not exceed eighty (80) hours within a fourteen (14) day period. All hours worked in a day in excess of eight hours shall be paid at the overtime rate. Schedules shall be posted thirty days in advance for dietary and housekeeping employees, and two weeks in advance for nursing employees.

. . .

ARTICLE XII - VACATIONS

12.9.1:Senior full-time employees shall have the privilege of choosing vacation dates within their classification; this selection must be approved by the department head.

. . .

12.13: Vacations must be requested not less than thirty (30) days nor more than one (1) year in advance, except in emergencies or other circumstances beyond the control of the employee.

. . .

BACKGROUND

There is no dispute over the facts giving rise to this grievance. The County operates the Pinecrest Nursing Home in Merrill. The Union is the exclusive bargaining representative for the Home's non-supervisory employees. The Grievant, Barb Francl, is a nursing employee who works the night shift at Pinecrest.

Nursing employees work 10 days in a fourteen day period. The County seeks to schedule them on a pattern of 3 days on, 2 days off, 3 days on, 2 days off, and 4 days on, with every other weekend off. There are variations in this from time to time, but the County seeks to avoid having employees work long stretches without a scheduled off day. Notwithstanding the schedule prepared by the County, however, employees do have the ability to trade off days

among themselves. By contract, the work schedules for nursing employees must be posted no less than 14 days in advance.

In addition to her work at the Home, the Grievant also farms, and during the summer months she combines her scheduled days off with available leave time to allow her to work the farm. In December of 2004, she submitted requests for time off for the summer of 2005. Her request for the week of July 6 through 10 showed the schedule she desired for the week:

July 6 – Off
July 7 – Vacation
July 8 – Off
July 9 – Off
July 10 – Vacation

In order to accommodate this schedule, the County would have had to change the usual pattern of off days to make July 6th a scheduled day off rather than a work day. The County responded to the Grievant's request in March, by advising her that she could have the time off she requested, but that the schedule she had been working for the prior two years would have her scheduled to work on July 6th, and she would need to use a vacation day to cover that day. Her time off request was amended to show that day as a vacation day.[1] The Grievant filed the instant grievance, asserting that the "Employer unjustly secured vacation days." In the discussions about the grievance, the County offered her the option of making a trade with another employee to secure the additional day off, but the Grievant declined. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration. The summer months passed while the grievance was still pending, and the Grievant took the requested days off, being charged vacation for those days when the County said she was scheduled to work.

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

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the decision to use or not use vacation benefits rests with the employee, and cannot be usurped by the Employer. Here the County forced the Grievant to use earned vacation on days when she did not wish to use earned vacation. The County has no right to schedule her for vacation against her will.

[1] Several other requests submitted at the same time had the same problem, and those too were amended to show vacation days in place of scheduled off days.

The County's attempt to justify its arbitrary actions by pointing to the work schedule is misplaced and must be rejected by the arbitrator. The County claims that the days off requested by the Grievant were scheduled work days for her. However, the request was made nine months in advance. The contract calls for posting work schedules for nursing employees two weeks in advance. Given the very broad latitude the County has in setting and changing schedules, it is not credible for it to claim that the Grievant's request for time off conflicted with the schedule – there is no set schedule until the County announces one. Even if it did conflict with the County's plans, the County could simply have denied her request for time off. The only option it did not have was the option it chose – to deduct a vacation day. Thus the arbitrator should grant the grievance, make the Grievant whole, and direct the County to refrain from such violations in the future.

The Position of the County

The County takes the position that the grievance is without merit and should be denied. While this case is styled as a vacation day grievance, it is in fact about the County's right to schedule. This is not a case where an employee asks for a day off and is denied. Here the County merely advised an employee that if she wanted a particular day off, she would need to use vacation because she was going to be scheduled for work that day. This grievance is an attempt to force the County to designate those days as her days off. That flies in the face of management's right to establish work schedules.

Management concedes that its right to establish work schedules is subject to the requirement that it not act in an unreasonable or arbitrary manner. The schedule set for the Grievant in the summer of 2005 was essentially the same as she has worked for years. The County's reluctance to change the schedule springs from its policy of trying to avoid having employees work 7 or more days in a row, and from the fact that a change in the Grievant's schedule ripples out, and affects the work schedules of other employees. The Grievant has, in the past, been able to get her desired consecutive days off in the summer by combining scheduled off days with vacation time, and there is no good reason to think she needed an extraordinary accommodation in 2005. The Grievant sought particular days off, and the County was willing to give her those days, with the understanding that she needed to use leave time to cover the absences. She insisted on having those days, and also on preserving her leave balances. That was not an available option. The arbitrator should therefore conclude that there is no contract violation, and should deny the grievance.

DISCUSSION

The Union styles this as a case in which the County improperly scheduled the Grievant for vacation against her wishes. That is an ingenious take on what occurred here, but it does not accurately reflect the actual substance of events. It is true that the Grievant did not want to use vacation on July 6th. She also did not want to work that day. Notwithstanding her desire

to have her off days changed, the schedule prepared by the County in March had July 6th as a scheduled day of work for her.

The Union argues that the fact that schedules are not posted until two weeks beforehand, while vacation requests may be submitted from one year to 30 days beforehand means that there is, effectively, no schedule and that this gives lie to the County's claim that the schedule was set by March. The County has retained broad rights in the area of scheduling, and simply because the final schedule is not posted until two weeks prior to the work cycle does not mean that the County has no ability and no authority to establish schedules farther in advance. The County has a pattern of work days and off days that it uses to project the schedule. Even though that general pattern is subject to change to account for turnover and absences, it would be remarkable if each schedule was approached as a new and different exercise. The schedule at issue here was consistent with the pattern of work days and off days used for the prior calendar year.

The essence of the Grievant's position is that the County could have accommodated her desire to change her off days, and that is plainly true as far as it goes. It would have required changing another employee's schedule to avoid overstaffing on one day and understaffing on another, but if the County was willing to disrupt that employee's schedule to satisfy the Grievant, it would have been within its power to do so. The fact that it was possible for the County to construct a schedule to satisfy the Grievant does not prove that it was somehow obligated to do so. The County has the right under Articles II and VII to establish the work schedules. It is constrained by the obligation to avoid unreasonable or arbitrary exercises of management rights. On this record, there is nothing arbitrary or unreasonable in what the County did. It constructed the schedule in exactly the same manner it had for some time. It followed the same general parameters, including the avoidance of too many scheduled consecutive work days, that were used in the past.

The reasonableness of the County's position is evident if one looks beyond the facts of this case to the implications of the grievance for the Nursing Home as a whole. As noted above, if the question is confined to whether the County could have made the schedule work for the Grievant without serious disruption, the answer is probably "yes." The question then becomes, why would the right to pick new off days be limited to the Grievant? If she has the right to insist on changes in the work schedule to meet her convenience, other employees would surely have the same right. The logical end result would be that no employee could know with any degree of certainty what the pattern of work days and off days would be until management finished the process of sorting out who should and should not be accommodated on their specialized schedule requests. There is nothing in the contract that would require such a chaotic system.

The grievance does not pose any question of the employee's right to use vacation as she chooses, other than by implication. That is, if the employee wants a scheduled work day off, she must have some sort of leave time to account for the time. The Union is technically

correct that the County could have simply denied her time off request, rather than assessing her for vacation time for July 6th. On the other hand, she was informed, four months beforehand, that she could have the day off, but only if she used vacation to cover the absence. She refused to use vacation. She was also offered the chance to arrange a trade with a co-worker. She declined that as well. At the same time, she did not withdraw her request for time off. When the dates at issue came, the County did not force her to take the time off. She took July 6th off because she had always planned to do so. The County merely forced her to account for the time away from work.

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

AWARD

The Employer did not violate the collective bargaining agreement when it refused to change the Grievant's work schedule in the summer of 2005, and instead required her to use vacation days for the time off she wished to take. The grievance is denied.

Dated at Racine, Wisconsin, this 29th day of December, 2005.

Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator

DJN/dag
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