

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY**

and

**SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES,  
LOCAL 2427, AFSCME, AFL-CIO**

Case 372

No. 64922

MA-13056

(LPN Vacation/Holiday Grievances)

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**Appearances:**

**Ms. Helen Isferding**, Staff Representative, Wisconsin Council 40, AFSCME, AFL CIO, 1207 Main Avenue, Sheboygan, WI 53083, on behalf of Local 2427.

**Mr. Michael Collard**, Personnel Director, Sheboygan County, 508 New York Avenue, Sheboygan, WI 53081-4692, on behalf of the County.

**ARBITRATION AWARD**

According to the terms of the 2004-06 labor agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator from its staff to hear and resolve two grievances regarding LPN vacation and holiday selection at Sunny Ridge Nursing Home (hereafter Home). On October 14, 2005, WERC Arbitrator Sharon A. Gallagher who had been designated to handle these grievances, attempted to mediate them at the request of the parties. Mediation was held at Sheboygan, Wisconsin but it did not result in settlement.

Hearing was scheduled for October 18, 2005 and rescheduled for December 14, 2005. Hearing was then canceled, rescheduled and held on January 13, 2006 at Sheboygan, Wisconsin. No stenographic transcript of the proceedings was made.

The parties agreed to submit their initial briefs directly to each other with a copy to the Arbitrator, postmarked on January 27, 2006. The parties also agreed to submit any reply briefs postmarked February 7, 2006. The Arbitrator received the last document herein on February 8, 2006, whereupon the record was closed.

**ISSUES:**

The parties were unable to stipulate to the issues for determination herein. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues:

- 1) Did the County violate the past practice and/or the contract when it changed LPN's holidays/vacations by seniority?
- 2) If so, what is the appropriate remedy?

The County suggested the following issues for decision:

- 3) Does the collective bargaining agreement require the County to grant at least one vacation request by an LPN at Sunny Ridge Health Care Facility on each holiday that falls on a weekend?
- 4) Does the collective bargaining agreement require the County to grant at least three vacation requests by RN's or LPN's at Sunny Ridge Health Care Facility on each holiday that falls on a weekday, those three consisting of one RN, one LPN, and the next highest senior licensed staff member requesting vacation?
- 5) If so, what is the appropriate remedy in each case?

Neither party's issues appropriately state the controversy herein as both sets of issues are argumentative. Therefore, the following issues shall be determined herein:

- 6) Did the County violate the labor agreement and/or past practice by the manner in which it denied LPN vacations and holidays in 2005?
- 7) If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE 8**

**WORK DAY/WEEK, SCHEDULES, SHIFT DIFFERENTIAL**

**I. WORK DAY/WORK WEEK**

The work week for full time employees shall be guaranteed forty (40) hours per week, eight (8) hours per day, Sunday thru Saturday, ten (10) work days within a period of fourteen (14) days with every other weekend off.

Part time employees with benefits shall work a regular schedule of hours so far as possible. Part time with benefit employees shall receive every other weekend off.

There will be no split shifting except in emergency situations.

Shift changes or changes of days off for the convenience of the employee will be accomplished by the employee seeking such change. Notification to the employee's immediate supervisor and/or Staffing Coordinator must be made and approval received prior to the change.

**II. SCHEDULES**

Each Health Care Center shall post shift schedules at least two (2) weeks in advance of their effective date.

**III. SHIFT DIFFERENTIAL**

An employee who works on the late afternoon shift (that is the shift from 3:00 p.m. to 11:00 p.m.) shall be entitled to an additional twenty-five cents (\$.25) per hour as shift differential pay. An employee who works on a night shift (that is those shifts which end between 11:01 p.m. through 7:00 a.m.) shall be entitled to an additional thirty-five cents (\$.35) per hour as shift differential pay. Shift differential shall be paid at the rate indicated for the listed hours.

A Licensed Practical Nurse who works on the late afternoon shift (that is the shift from 3:00 p.m. to 11:00 p.m.) shall be entitled to an additional forty center (\$.40) per hour as shift differential pay. An employee who works on a night shift (that is those shifts which end between 11:01 p.m. through 7:00 a.m.) shall be entitled to an additional forty center (\$.40) per hour as shift differential pay. Shift differential shall be paid at the rate indicated for the listed hours.

**Week-end Differential:** LPN's who are scheduled to work on the week-end shall be entitled to an additional seventy-five cents (\$.75) per hour. All other employees who are scheduled to work on the weekend shall be entitled to an additional (\$.50) per hour.

**Extra Week-End Differential:** LPN's who volunteer or are mandated to work extra or non-scheduled weekend hours shall receive an additional seventy-five (\$.75) per hour. All other employees who are scheduled to work on the weekend shall be entitled to an additional fifty cents (\$.50) per hour.

Employees shall not receive any shift differential on vacation pay or holiday pay, or sick leave pay.

## **ARTICLE 20**

### **HOLIDAYS**

All employees, except as herein provided, shall be granted eleven (11) paid holidays each year. They are as follows:

<b>HOLIDAY</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
New Years Day	Thurs., Jan. 1	Sat., Jan. 1	Sun., Jan. 1
Afternoon of Friday Before Easter	Fri., Apr. 9	Fri., Mar. 25	Fri., Apr. 14
Memorial Day	Mon., May 31	Mon., May 30	Mon., May 29
Independence Day	Sun., July 4	Mon., July 4	Tues., July 4
Labor Day	Mon., Sept. 6	Mon., Sept. 5	Mon., Sept. 4
Thanksgiving Day	Thurs., Nov. 25	Thurs., Nov. 24	Thurs., Nov. 23
Day after Thanksgiving	Fri., Nov. 26	Fri., Nov. 25	Fri., Nov. 24
Christmas Eve Day	Fri., Dec. 24	Sat., Dec. 24	Sun., Dec. 24
Christmas Day	Sat., Dec. 25	Sun., Dec. 25	Mon., Dec. 25
New Years Eve Afternoon	Fri., Dec. 31	Sat., Dec. 31	Sun., Dec. 31
Floating Holiday	As provided in (1)	As provided in (1)	As provided in (1)
Floating Holiday	As provided in (1)	As provided in (1)	As provided in (1)

If the holiday falls on a Saturday, the preceding Friday will be observed as the holiday. If the holiday falls on a Sunday, the following Monday shall be observed as the holiday. This will be applicable to those employees working a Monday through Friday work schedule. Employees who are required to work on the holiday shall be permitted to take the equivalent holiday time at such time as they may select within thirty (30) days before the holiday or sixty (60) days after the holiday subject to the scheduled approval of the administrator or at the employee's election may receive the equivalent pay at the regular rate.

If an employee works over eight (8) hours on a holiday, the employee shall receive double time for any hours worked over eight (8) on that holiday.

If the holiday falls on a scheduled day off, employees who do not work on the Monday through Friday schedule shall have the option of the holiday pay or be permitted to take equivalent time off within thirty (30) days before or sixty (60) days after the holiday. Notice shall be given of the desire to schedule the holiday time off prior to the posting of the schedule of the month in which the holiday occurs.

One (1) "Floating Holiday" may be taken any time after January 1 in any calendar year and the second "Floating Holiday" may be taken after April 1<sup>st</sup> in any calendar year. The actual day of the holiday may be designated by the employee after notifying the department head five (5) days in advance of such election and the department head shall respect the wishes of the employee as to the day off insofar as the needs of the County will reasonably permit.

To be eligible for holiday pay the employee must have worked the scheduled hours of work on the last workday prior to the holiday and the scheduled hours of work on the workday following the holiday.

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## **ARTICLE 21**

### **VACATIONS**

1. Employees Who Earn Vacation. All full and part time employees shall earn vacation, (except those subject to the limitations of Article X).
2. Continuous Service. Continuous service shall include all the time the employee has been in continuous employment status in permanent position. The continuous service of an employee eligible for a vacation shall not be considered interrupted if he/she:
  - (a) Was absent for less than thirty (30) calendar consecutive days.
  - (b) Was on an approved leave of absence.
  - (c) Was absent on military leave.
  - (d) Was absent due to injury or illness.
3. Computing Years of Service. In determining the number of full years of service completed, credit shall be given for all time employed by Sheboygan County in a permanent position. Any absence of more than thirty (30) calendar days except for military leave and absence due to injury or illness arising out of county employment and covered by the Worker's

Compensation Act shall not be counted. Only the most recent period of continuous service may be counted in determining the employee's length of service.

4. Eligibility. After completion of the first twelve (12) months in a permanent position, employees shall be granted non-cumulative vacation based on accumulated continuous service as follows:

<u>YEARS OF SERVICE</u>	<u>NUMBER OF VACATION DAYS</u>	
	<u>EFFECTIVE 1/1/02</u>	<u>EFFECTIVE 1/1/03</u>
1 Year	10 Days	10 Days
7 Years	15 Days	15 Days
13 Years	18 Days	18 Days
15 Years	20 Days	20 Days
20 Years	22 Days	22 Days
25 Years	25 Days	26 Days

5. Computing Vacation.

(a) Vacation credits in any given year shall not be earned for any period of absence without pay except that for administrative purposes any approved leave or leaves of absence totaling thirty (30) calendar days or less in a calendar year may be disregarded.

(b) Upon termination of employment, vacation shall be prorated and paid.

6. When Vacation May Be Taken. In determining vacation schedules, the head of the department shall respect the wishes of the eligible employees as to the time of taking their vacation insofar as the needs of the County will permit. Vacation allowances shall be taken during the vacation year except that employees who are required by their department head to defer all or a part of their vacation for a given vacation period may be permitted to take it within the first six (6) months of the ensuing vacation year, after which it will be lost. An employee whose first (1<sup>st</sup>) Anniversary date is in the last quarter of the year may be taken until March 31<sup>st</sup> of the following year to use that vacation, after which it will be lost. No more than one weekend may be taken as vacation for each 5 total vacation days taken by full or part-time employees.

7. Vacation on Holidays and Days of Work Suspension. In the event that a holiday falls on a regular workday within the week or weeks taken as vacation or sick leave, such holiday shall not be charged as vacation or sick leave. For any day on which work is suspended, such suspension shall not be construed to extend any vacation to an employee in such status at the time. No sick leave shall be granted while an employee is on vacation.

8. Minimum Vacation Time. Vacation must be taken no less than one (1) day at a time.
9. Prorating Benefits. Part-time employees who qualify therefore shall receive vacation benefits on a prorated basis.
10. The vacation year shall be on the calendar year basis.

### **BACKGROUND**

The County has operated the Sunny Ridge Nursing Home (Home) for many years and the Union has represented the LPN's at the Home for many years. The RN's at the Home are represented by a different union and have a separate labor agreement with the County. It is significant that all of the RN's employed at the Home have less seniority than the LPN's at the Home. The most senior day shift LPN's at the Home are Carolyn Miesfeldt, Joan Lawrence and Judy Adomovich. The most senior LPN's on the PM shift are Jean Anderson and Sally Beyersdorf. Prior to 2004, LPN's were always granted vacation on weekend days/holidays based upon their seniority. Due to her high seniority, LPN Miesfeldt was never denied off on a weekend prior to 2004 if she put in her written request before March 1<sup>st</sup> of any year, as Miesfeldt has more seniority than all RN's and all LPN's at the Home.

The County has also employed non-benefit LPN's and RN's at the Home as casual employees, not covered by any labor agreement. These casuals are required to work at least 8 hours per week at the Home to maintain their casual status and they are encouraged to work more hours, filling in for absent/vacationing LPN's and RN's covered by labor agreements. The Home scheduler, Pat Green, posts open shifts and seeks casuals to work in order to assure that the Home is fully staffed at all times with licensed staff.

Green stated that at all times relevant hereto, the Home has assigned 12 LPN/RN's<sup>1</sup> on each day shift, 11 LPN/RN's on each PM shift and 5 LPN/RN's on each night shift in order to cover the care for approximately 265 residents. There has traditionally been a total of 18 LPN's and RN's employed at the Home pursuant to labor agreements on the Day shift. By contract, approximately nine, LPN's and RN's (or 50%) are scheduled to be off work on any weekend. As of January 2, 2004, 50% of the RN's are also off on any holiday according to their 2004-06 labor agreement. As a result, Green must find additional LPN's and RN's to cover each shift. If LPN's and RN's request off on a weekend or a holiday and those requests are approved, Green has an even greater number of open shifts to fill.

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<sup>1</sup> Both LPN's and RN's are considered licensed nursing staff at the Home.

Prior to in 2003, the Home granted vacation requests to licensed staff by seniority, using a seniority pool of all LPN's and all RN's. As a result, the Home regularly granted 1 PN, 1 RN and the next most senior licensed staff who requested off on any holiday /weekend day. The most senior person was invariably an LPN. Although, prior to January 2, 2004, 50% of RNs were to be off on any weekend, holidays and vacations were granted to RN's based upon seniority and requests made by all licensed staff. This meant that RN's were not guaranteed any holidays off work and that they received fewer holidays/vacations off due to their lower seniority as compared to the LPN's.

In April, 2003, Home Administrator Stark issued the following memo regarding "Vacation Requests:

This is to clarify vacation requests for RN's and LPN's effective June 1, 2003. (Note: This affects vacation requests that are submitted prior to May 8, 2003 but **not** those that have been granted prior to that date.) For day shift, 3 nurses may be off. This will be 1 RN and 2 LPN's or it may be 2 RN's and 1 LPN depending on requests and staffing needs. Granting will be done by seniority based on both Union contracts. On PM's 1 RN and 1 LPN will be granted if requested again based on seniority per each Union contract. Based on staffing needs for nights, one professional nurse will be granted vacation time. Prior to this professional nurses for all shifts were lumped into one pool. This did not provide equity.

Next year when vacation requests are submitted for the year by March 1, the same system will be utilized. **If** there is a need to change there will be a meeting scheduled to discuss and inform you.

I apologize for the frustration that many of you experienced regarding granting of vacations this year. As we proceed, Pat Green will make every effort to grant requests that were previously denied. If staffing allows, we will grant additional people off. Your support and dedication are appreciated.

. . .

Stark stated herein that she issued this memo concerning weekday vacations only; that before this memo issued LPN's and RN's were listed on one seniority list and that this meant that RN's were being denied weekday vacations due to their lower seniority than LPN's; that the needs of the facility were always the standard used in approving/denying vacation requests. Stark stated that this memo was not designed to address the number of employees to be allowed off and that it did not concern weekend vacation/holidays.



During bargaining for the 2004-06 labor agreements with both the LPN's and the RNs the County proposed to change the way in which weekend vacations and holidays were given off, proposing that 50% of RNs and 50% of LPN's would have off on (listed) "A" holidays and the other 50% would have off on (listed) "B" holidays. The County's proposal to both unions was identical and it read as follows:

8. Article 20 – Holidays.

- 8.1 Revise to reflect appropriate dates for holidays. Further revise to provide for "A" and "B" holiday shifts that will be scheduled to work on certain holidays, alternating years.
- 8.2 Eliminate the two floating holidays and language pertaining to floating holidays.

9. Article 21 – Vacations.

- 9.1 Revise to provide that no more than one weekend may be taken as vacation for each 10 total vacation days taken by full-time employees, or for each 7 total vacation days taken by part-time employees.
- 9.2 Revise the vacation schedule so that it reads as follows:

<u>Years of Service</u>	<u>No. Days Vacation</u>
1	5
2	10
6	12
10	15
15	20
20	22

The RN union agreed to this scheme but the Union representing the LPN's rejected the proposal in its entirety. The Home studied and prepared a list of 2003-2005 "Licensed Staff Requests and Approved/Denied Holidays" which was submitted by the Union herein and was not disputed by the County, as follows:

**2003 Day Shift**

Licensed staff

- 3 FT RN's
- 7 PT RN's
- 5 FT LPN's
- 6 PT LPN's
- 4 Casual RN's
- 1 Casual LPN

<u>Holiday</u>	<u>Granted</u>	<u>Denied</u>
January 1	4 LPN's 2 RN's	1 RN 3LPN's
Good Friday	3 LPN's	2 LPN's
Memorial Day	1 RN 3 LPN's	1 LPN
July 4	4 LPNs 2 RN's	
Labor Day	3 LPN's	1 RN 1 LPN
Thanksgiving	2 LPN's 1 RN	3 LPN's 2 RN's
Day after Thanksgiving	2 LPN's 1 RN	3 LPN's 1 RN
Christmas Eve	2 LPN's 1 RN	1 LPN
Christmas	2 LPN's 1 RN	3 LPN's 1 RN
New Year's Eve	3 LPN's	

**2003 PM's**

Licensed Staff

- 3 FT RN's
- 3 PT RN's
- 7 FT LPN's
- 1 PT LPN with set schedule
- 1 Casual LPN

<u>Holiday</u>	<u>Granted</u>	<u>Denied</u>
New Year's Day	1 LPN	
Good Friday		
Memorial Day	1 LPN	1 RN
July 4	1 LPN 1 RN	
Labor Day	1 RN 1 LPN	
Thanksgiving	1 LPN 1 RN	1 LPN
Day after Thanksgiving	1 LPN	1 LPN

Christmas Eve	1 RN 1 LPN	1 RN
Christmas	1 LPN	
New Years Eve	1 RN 1 LPN	

**2004 Day Shift**

Licensed Staff

- 3 FT RN's
- 6 PT RN's
- 5 FT LPN's
- 5 PT LPN's
- 4 Casual RN's
- 2 Casual LPN's (sic)

<b><u>Holiday</u></b>	<b><u>Granted</u></b>	<b><u>Denied</u></b>
January 1	1 LPN	1 Denied
Good Friday	1 LPN	
Memorial Day	1 LPN	1 LPN
July 4 (Sunday)	1 LPN	
Labor Day	1 LPN	
Thanksgiving	1 LPN	2 Denied
Day after Thanksgiving	1 LPN	4 Denied
Christmas Eve	1 LPN	2 Denied
Christmas	1 LPN	1 Denied
New Year's Eve	1 LPN	1 Denied

**2004 PM Shift**

Licensed Staff

- 3 FT RN's
- 2 PT RN's
- 7 FT LPN's
- 1 PT LPN's
- 1 Casual RN
- 1 Casual LPN

<b><u>Holiday</u></b>	<b><u>Granted</u></b>	<b><u>Denied</u></b>
New Year's		
Good Friday		
Memorial Day	1 LPN	
July 4	1 LPN	

Labor Day	1 LPN	1 LPN
Thanksgiving	1 LPN	
Day after Thanksgiving	1 LPN	
Christmas Eve	1 LPN	1 LPN
Christmas	1 LPN	
New Year's Eve	1 LPN	

**2005 Day Shift**

Licensed Staff

- 3 FT RN's
- 7 PT RN's
- 5 FT LPN's
- 3 PT LPN's
- 2 Casual LPN's
- 3 Casual RN's

<u>Holiday</u>	<u>Granted</u>	<u>Denied</u>
New Year's Day	1 LPN	
Good Friday		
Memorial Day	1 LPN	1 LPN
July 4	1 LPN	1 LPN
Labor Day	1 LPN	2 LPN's
Thanksgiving	1 LPN	4 LPN's
Day after Thanksgiving	1 LPN	4 LPN's
Christmas Eve		
Christmas		1 LPN
New Year's Eve		2 LPN's

**2005 PM Shift**

Licensed Staff

- 2 FT RN's
- 5 PT RN's
- 5 FT LPN's
- 2 PT LPN
- 1 Casual LPN

<u>Holiday</u>	<u>Granted</u>	<u>Denied</u>
New Year's		
Good Friday	1 LPN	
Memorial Day	1 LPN	1 LPN
July 4	1 LPN	

Labor Day	1 LPN
Thanksgiving	1 LPN
Day After Thanksgiving	
Christmas Eve	1 LPN
Christmas	1 LPN
New Year's Eve	1 LPN

If column is blank, either there were no requests and/or denials.

Home scheduler Green stated that she does not schedule more licensed staff on holiday weekends but she admitted that it is harder to get casuals and unit volunteers to fill shifts on weekend and especially on holiday weekends. Home Administrator Stark stated that the County has plans to down-size the facility from 265 residents to from 125 to 150 residents at some time in the future and that this will make it more difficult to cover shifts with the licensed staff remaining. The County submitted no evidence herein regarding its down-sizing plans.

### FACTS

Grievant Miesfeldt requested to have off on Easter weekend, March 26 and 27, 2005. RN Theresa Mueller put in her written request for vacation on those days on October 13, 2004, pursuant to the RN contract<sup>2</sup> while Miesfeldt put in her written request on December 9, 2004 as allowed by the LPN contract. Mueller's request was granted and Mieseldt's was denied, although Miesfeldt is more senior than Mueller. LPN Joan Lawrence, the second most senior LPN at the Home, was denied vacation on Thanksgiving and the day after that holiday in 2004 and 2005 while less senior employees were off. Miesfeldt was also denied off on December 31, 2004 but she admitted herein that no one less senior than she was given off on December 31<sup>st</sup> that year. Miesfeldt then filed one of the instant grievance on February 16, 2005.

The County denied Miesfeldt's grievance by letter dated March 7, 2005, as follows:

...

The only relevant language from the collective bargaining agreement is in Article 21, section 6, which states in part that the department head "shall respect the wishes of the eligible employee as to the time of taking their vacation

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<sup>2</sup> Since this case arose, the parties have agreed that both the RN's and the LPN's should be allowed to put in their written requests for vacation at the same time and covering the same time frame, from April through the following March 31<sup>st</sup>. This agreement means that RN's will not be allowed to put in their vacation requests before the LPN's, so that seniority will prevail and the problem that arose in Miesfeldt and Mueller's situation will not occur again.

insofar as the needs of the County will permit.” The needs of the County are for 12 licensed staff members, which includes RNs as well as LPNs, to work each day shift at Sunny Ridge, in addition to a charge nurse. The days in question consist of Easter weekend. There was not sufficient staff available to work those days to permit any additional vacation to be granted.

It is true that an RN was granted vacation on those two days. The collective bargaining agreement covering the RNs calls for vacation requests for January through March to be submitted by the previous October 15 and approved by November 15. This procedure is in contrast to the procedure used for many years for Local 2427 members, which does not allow requests for March vacations to be considered until February 8. In this instance, the RN’s vacation request for March 26 and 27 had been acted on long before February 8, through no fault of the grievant, but in accordance with normal procedures of long standing. The County therefore could not consider both vacation requests together and grant one based on the greater County seniority, as the union contends it should have.

There has been no violation of the collective bargaining agreement, and the grievance is denied.

The Union filed the second grievance on April 8, 2005, on behalf of the entire Union membership, alleging that the County “has violated the past practice of granting vacations and holidays for RN’s and denied LPN’s.” The Home denied the Union’s grievance by letter dated April 13, 2005, as follows:

. . .

This is in response to your grievance alleging that the employer has violated the past practice of granting vacations and holidays for LPN’s by seniority and is now granting them for RN’s. The employer is obligated to comply with provisions of all Unions that have employees working within Sheboygan County Health Care Centers.

Per Article 27 of the AFSCME contract the first sentence states “It shall be the policy of the Health Care centers to recognize seniority.” This has and continues to be the primary practice of department directors and the scheduling office. It has also been the practice of the HCC’s for at least the past 5 years to let no more than one licensed staff member off on a weekend shift. Based on the RN contract, they may submit vacation requests for January–March by October 15. Therefore if a RN is approved vacation for this period it **may** result in a LPN with more seniority being denied a weekend off based on facility need if a RN has been approved under their contract. (Note: There has been discussion at both the AFSCME and RN labor management meetings that this issue may be resolved in a Memorandum of Understanding.)

In Article 21, section 6 it states:

6. When Vacation May Be Taken. In determining vacation schedules, the head of the department shall respect the wishes of the eligible employees as to the time of taking their vacation insofar as the needs of the County will permit

Whenever vacations and/or holiday requests are granted, the needs of the facility must be the priority. If we do not have adequate staff to meet the needs of the residents we are here to serve, we compromise the quality of care we are here to provide. There are a certain number of licensed staff that are required to provide care to a projected number of residents. Granting requests for vacations and/or holidays is based on this.

Scheduled weekends off in addition to provisions of the RN contract must also be taken into consideration if a holiday falls on a weekend day.

On May 5, 2005, the County denied the grievance as follows:

. . .

In this grievance the union complains that for 2005 the county granted no vacation to Sunny Ridge LPN's on any holiday. The two most senior LPN's, Carolyn Miesfeldt and Joan Lawrence, attended the meeting and stated that they had been granted none of their requested vacation on holidays in 2005.

Article 21 provides that department heads shall respect the wishes of employees regarding their vacation requests "insofar as the needs of the County will permit." This language does not require the county to grant any particular vacation requests, or any vacation requests for particular days such as holidays, if the needs of the county will not be served by granting such requests.

Furthermore, the grievant's factual premise is false. It is simply not true that no LPN vacation requests for 2005 have been granted. A review of the day shift LPN vacation requests for all holidays during 2004 reveals the following:

1/1	1 granted (Miesfeldt), 0 denied
1/2	1 granted (Miesfeldt), 0 denied
1/3	1 granted (Miesfeldt), 0 denied
3/25	no requests
5/30	1 granted (Beaudry), 1 denied (Oberreich)
7/4	1 granted (Lawrence), 1 denied (Beaudry)
9/5	1 granted (Miesfeldt), 3 denied (Lawrence, Adamovich, Oberreich)
11/24	1 granted (Miesfeldt), 4 denied (Lawrence, Adamovich, Beaudry, Oberreich)
11/25	1 granted (Miesfeldt), 4 denied (Lawrence, Adamovich, Beaudry, Guillette)
12/23	1 granted (Oberreich), 0 denied
12/24	no requests
12/25	1 denied (Oberreich)
12/26	2 granted (Miesfeldt, Lawrence), 3 denied

. . .

The grievances were then brought on for arbitration together before the undersigned.

### POSITIONS OF THE PARTIES

#### The Union

The Union asserted that the County has consistently recognized seniority in granting vacation/holidays to LPNs and that this past practice was confirmed by Administrator Stark in her April 23, 2003 memo to Sunny Ridge staff. In this regard, the Union noted that Stark's memo indicated that 3 licensed nurses would be off on Day shift – one RN and one LPN each by seniority in their units and one other nurse by overall seniority; that on PM shift, one RN and one LPN could be off based upon their unit seniority; that on Night shift, only one nurse could be off based upon their unit seniority. Stark also stated in the memo that if there was any need to change this approach, a meeting would be called on the subject. The Union therefore asked the Arbitrator to reinstate the past practice described in the Stark memo in this case.

The Union pointed out that Union Exhibit 6 showed that LPNs have lost vacation/holidays that they would have ordinarily been granted off due to the County's having changed its method of granting RN vacation/holidays. In this regard, the Union noted that the total number of RNs on Day shift and PM shift at all times relevant has been 20 and that the total number of LPNs on Day and PM shifts has been 18. After the RNs agreed to contract language guaranteeing them A and B holidays effective January 1, 2004, nine RNs were guaranteed off while nine RNs were required to work on any weekend/holiday. This meant that after January 1, 2004, only one LPN on Day shift and one LPN on PM shift could get off on a holiday/weekend. Clearly, the County violated the past practice described in the Stark memo by making these changes.

Specifically, Grievant Miesfeldt had greater seniority than RN Mueller yet Mueller was given off on Good Friday weekend in 2005. In addition, the evidence showed that during 2005, only one LPN was given off on Thanksgiving, the day after Thanksgiving, Christmas Eve, Christmas Day, New Year's Eve and New Year's Day while nine RNs were off on each of these holidays/weekends. The Union urged that the reason that the County could not give LPNs off on these holidays/weekends was because the County had agreed to guarantee RNs A/B holidays and because the Home overstaffed on holiday weekends in fear that employees might call in sick. Thus, the Union argued that the record evidence clearly demonstrated that the County has violated the LPN contract and past practice.



The Union asserted that in fairness, the County should not be granted through arbitration what it failed to gain through negotiations. In this regard, the Union observed that the County tried to convince the Union to agree to do away with seniority and to go with the A/B holiday scheme that the RNs ultimately agreed to in 2004, but this Union rejected both the County's initial and mediation proposals on the subject. The Union contended that its members should not suffer because another union's contract is administered so as to deny LPNs the vacation/holidays they had traditionally received pursuant to past practice and the terms of the LPN contract. Therefore, the Union sought an award sustaining the grievance and an order that the County return to the past practice codified in the Stark memo of April 23, 2003 dealing with vacation/holiday requests.

### **The County**

Initially, the County noted that it believed that a stipulated issue was reached at mediation in this case.<sup>3</sup> The County argued that it has consistently followed the contract standard for granting vacation requests, and granted them "insofar as the needs of the County will permit." The County urged that the evidence herein showed that all vacations that were denied were denied because of the needs of the County in staffing Sunny Ridge for the benefit of the more than 200 residents of the Home.

Due to the language of the LPN and RN labor agreements, scheduling of licensed nurses has been difficult in the past few years; a total of 18 LPNs and RNs regularly work on the Day shift and on any given weekend 9 of these nurses must be off work. In order to fill a schedule of 12 licensed nurses, the Home scheduler must find 3 nurses to cover the Day shift from among casuals and the Home scheduler must find more nurses to fill in shifts if any nurses are off on FMLA leave or sick leave. The County noted that no evidence was presented that the County acted in bad faith in denying LPNs vacation time off as alleged herein.

The County observed that no evidence was presented to show that a less senior LPN was granted time off when a more senior LPN requested vacation; that in every case, when the needs of the County allowed, the County granted the most senior LPN his/her vacation request. The County argued that Stark's April 23, 2003 memo actually announced that separate RN and LPN seniority lists would be used in considering vacation requests by licensed staff on Day shift so that RNs could have a greater chance of getting off, as they all had less seniority than the LPNs.

Furthermore, the County argued that the Union misunderstands how RN A/B holidays work—that the County still follows seniority in granting vacation requests except that 50% of RNs are off and the other 50% of RNs must work on any weekend whether a holiday falls on that weekend or not; that one LPN will then get off on a weekend by seniority if County needs

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<sup>3</sup> There was no evidence submitted herein by the County to support this contention.

allow and no additional RNs have been or will be allowed off on the weekend. In these circumstances, the County asserted that the LPNs have a greater chance of having their requests granted than any RN who asks off.

The County contended that the bargaining proposals regarding the A/B holiday schedule are irrelevant to this case. Although the Union argued that the County has imposed the A/B schedule upon LPNs despite their rejection of proposals thereon, the County noted that there was no evidence presented that the County in fact did this. Union Exhibit 6 showed that at least one LPN who made a request was granted vacation on all holidays on the Day and PM shifts in 2004, and in 2005 this was true except for Christmas Day and New Year's Eve.

The County noted that it has agreed to eliminate the early vacation selection by RNs that caused a problem for Miesfeldt on Good Friday weekend in 2005 so that grievance is now moot. In any event, the County urged the Arbitrator to deny and dismiss the grievance as the Union failed to prove that any contract violation has occurred and the County has continued to grant vacations based upon the same contractual standard, if the needs of the Home allow.

#### **Reply Brief:**

The Union chose not to file a reply brief. The County submitted its reply brief on February 8, 2005.

#### **County in Reply**

The County observed that the Union's main contention in its brief was that the Stark memo established a binding past practice that requires the County to grant vacation requests for at least three licensed nurses on both Day and PM shifts on any day of the year. However, the County pointed out that Stark stated herein that that her April 23, 2003 memo was not designed to and did not address the number of requests that would be granted on any given day and that the needs of the Home were always the standard by which the Home scheduler Green granted/denied vacation requests. The County noted that there was no evidence of record that contradicted Stark in these areas.

Furthermore, the County contended that the Union's assertion that three licensed nurses must be given off based upon Union Exhibit 6 is untenable. In this regard the County pointed out that on Memorial Day, Thanksgiving and Christmas Eve in 2003, the alleged three off rule was not applied, that less were allowed off on those days and yet no grievance was filed. In 2004, only one LPN was allowed off on any holiday and yet no grievance was filed. This evidence weighs against the Union.

Finally, the County urged that the needs of the Home have changed from 2004 through 2005 and the County asked the Arbitrator "to recognize the flexible standard the parties have expressly included in their agreement" to deny the grievance.

## DISCUSSION

The Union has argued that the Stark memo of April 23, 2003, constitutes a codification of the parties' mutually agreed upon, consistent past practice to grant specific numbers of LPNs vacation time off on the Day, PM and Night shifts.<sup>4</sup> In contrast, the County asserted that no such past practice exists as the County has always applied the "needs of the County" contractual standard in denying/granting LPN vacation requests. In any event, the County also argued that the Stark memo did not guarantee any specific number of LPNs per shift who would have their vacation requests granted. Rather, the memo merely announced that separate RN and LPN seniority lists would be used in considering vacation requests on all three shifts in order to allow more RNs to use their time off.

Based upon the record evidence in this case, the Union's arguments on this point must be rejected. The Stark memo clearly indicated that all requests for vacation would be considered and granted or denied in light of "staffing needs" and it did not otherwise contain language which could fairly be construed as a clear guarantee of time off without reference to staffing needs. In these circumstances, the Union was not reasonably entitled to rely upon the contents of the Stark memo to establish a past practice assuring LPNs who requested vacation on holidays a specific number of approved requests.

Union Exhibit 6 strongly supports the above conclusion. That document showed that the number of LPNs and RNs employed by the County has remained about the same for 2003 through 2005. In 2003, on Day shift, 26 licensed nurses were employed (3 full-time RNs, 5 full-time LPNs, 7 part-time RNs, 6 part-time LPNs, 4 casual RNs and 1 casual LPN). On PM shift in 2003, the Home employed 14 licensed nurses (3 full-time RNs, 7 full-time LPNs, 3 part-time RNs, 1 part-time LPN). In 2003 on Day shift, 28 LPNs and 9 RNs were granted vacation time off on holidays, while 7 RNs and 16 LPNs were denied vacation on holidays. In 2003, 14 licensed nurses on PM shift requested and were granted vacation on holidays (9 LPNs, 6 RNs), while 3 were denied same (1RN, 2 LPNs).

In 2004, the Home employed 25 licensed nurses on Day shift, 8 full-time (3 RNs, 5 LPNs), 11 part-time (6 RNs, 5 LPNs) and 6 casuals. On PM shift, 15 licensed nurses were employed in 2004, 10 full-time (3RN, 7 LPNs) 3 part-time (2 RNs, 1 LPN) and 2 casuals. In 2004 on the Day shift, 10 LPNs requested and received holidays off and 11 RNs and 1 LPN were denied their requests for vacation on holidays. Thus, in 2004, the Home changed its approach to granting vacation requests on holidays dramatically. Basically, the Home denied all but one request for vacation time off on each holiday in 2004 on both Days and PMs which meant that 27% fewer LPN requests for vacation on holidays were granted (10 requests) in 2004 on Days and 57% fewer LPN requests for vacation on holidays (8 requests) were granted on PMs in 2004. Yet, no grievances were filed regarding this huge change.

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<sup>4</sup> The parties stipulated herein that there is no issue between them regarding the number of LPN vacation requests granted/denied during the relevant period on the Night shift.

In 2005, with 22 licensed nurses employed on Days and 15 nurses employed on PMs, the Home began denying requests for vacation to all LPNs on certain holidays—Christmas Eve, Christmas and New Year’s Eve. The Home had never taken this position before, and yet, no grievances were filed over these actions until Miesfeldt filed her grievance in February, 2005.

Based upon the above, it is clear that the practice, assuming it existed in 2003, did not continue after 2003. The Union’s refusal to agree to the County’s proposal for the 2004-06 contract to go to an A/B holiday schedule, meant that for the 2004-06 contract term, the only contractual standard for the granting/denial of vacation/holidays continued to be the phrases found in Articles 20 and 21, “insofar as the needs of the County will (reasonably) permit.”

The County submitted evidence through Home Scheduler Green that it has had trouble covering all necessary nursing shifts (12 on Days, 11 on PMs and 5 on Nights) to properly serve the 200 plus residents of the Home in the past two years. Green stated that unit licensed nurses as well as non-unit casuals are not as willing to volunteer to work on weekends and that when a holiday falls on a weekend they are even less likely to agree to work on a holiday weekend; that 50% of RNs and 50% of LPNs are off on any weekend per their labor agreements and that since January, 2004, 50% of RNs are off on holidays whether they fall on a weekend or not, without consideration of the needs of the County. The situation can be compounded by sick leave and other leaves being taken by licensed staff.<sup>5</sup>

In these circumstances and given the fact that I have found no clear past practice existed after 2003, as claimed by the Union and the fact that the County is required to follow the terms of the RN contract or face grievances thereunder, I find that the record facts failed to prove that the County acted in an unreasonable or arbitrary manner in denying Miesfeldt’s request for vacation on Easter weekend, 2005. The Union has argued that were I to rule in favor of the County in this case, the County would essentially gain what it was unable to achieve in negotiations with this Union. I disagree. The facts failed to show that the County has in any way acted in bad faith in granting/denying LPN vacation requests. Rather, it has simply been forced to administer both contracts as well as it could, trying to avoid grievances.<sup>6</sup>

The County argued that the Miesfeldt grievance was essentially mooted out by the parties’ agreement to conform the RN and LPN contracts so that in the future, both LPNs and RNs would have the same date for submission and consideration of their requests for vacation in the early part of any calendar year (January through March). I agree. Miesfeldt admitted as

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<sup>5</sup> Although the County referred to future planned down-sizing of the Home, it failed to place any evidence into this record to show that these plans have had an affect on staffing needs on the Home during the past two years.

<sup>6</sup> There is nothing in the LPN labor agreement that I can find that would force the County to hire more LPNs, that requires the County to call-in LPNs at overtime/premium rates, or to use outside help when licensed staff are needed.

much in her testimony herein. Also, it was undisputed on this record that this tripartite agreement will mean that more senior LPNs will be granted vacation in the early part of the year due to their greater seniority than all RNs.

Based upon the above analysis, I issue the following

**AWARD**

The County did not violate the labor agreement or past practice by the manner in which it denied LPN vacations and holidays in 2005. Both grievances are therefore denied and dismissed in their entirety.

Dated at Oshkosh, Wisconsin, this 28<sup>th</sup> day of March, 2006.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator