BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORWOOD HEALTH CENTER EMPLOYEES
LOCAL 1751, AFSCME, AFL-CIO

and

WOOD COUNTY

Case 168
No. 65302
MA-13186

(Bruce Stargardt Grievance)

Appearances:

Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, for the labor organization.

Dean R. Dietrich, Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, for the municipal employer.

ARBITRATION AWARD

Norwood Health Center Employees, Local 1751, AFSCME, AFL-CIO and Wood County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to scheduling. The Commission appointed Stuart D. Levitan as the impartial arbitrator. A telephonic hearing was held on January 30, 2006; it was not transcribed. The parties filed written arguments and replies, the last of which was received on April 10, 2006. On June 30, the arbitrator wrote the parties seeking to supplement the record, which effort proved unsuccessful.

ISSUE

The Union states the issue as:

"Did the employer violate the collective bargaining agreement by sending Bruce Stargardt home from his scheduled shift on January 28, 2005? Specifically, did the employer violate:

1. Article 7.06 establishing the employer's obligation to post the grievant's schedule, and

2. Article 4.03 establishing the employer's obligation to first send home less senior employees in the event of a reduction in work force?

If so, what is the remedy?"

The County states the issue as:

"Did the County violate the collective bargaining agreement when it established the staffing schedule on January 28, 2005? If so, what is the appropriate remedy?"

I frame the issue as:

"Did the County violate the collective bargaining agreement by adopting a Low Census/Overstaff Policy to send employees home on a temporary basis outside the lay-off procedure? If so, what is the appropriate remedy?"

"Did the County violate the collective bargaining agreement by applying its Low Census/Overstaff policy to Bruce Stargardt from his regularly scheduled shift on January 28, 2005? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to operate the Norwood Health Center and all management rights repose in it. Except as otherwise specifically provided in this Agreement, the Employer retains all rights and functions of management. These rights include, but are not limited to the following:

3.01.01 To direct all operations of the Norwood Health Center;

3.01.02 To establish reasonable work rules and schedules of work;

3.01.03 To hire, promote, transfer, schedule, and assign employees in positions within the Norwood Health Center;

. . .

3.01.05 To relieve employees from their duties for lack of work or any other legitimate reason;

3.01.06 To maintain efficiency of Norwood Health Center operations;

. . .

3.01.08 To introduce new or improved methods or facilities;

3.01.09 To change existing methods or facilities;

3.01.10 To determine the kinds and amounts of services to be performed as pertains to Norwood Health Center operations, and the number and kind of classifications to perform such services;

3.01.11 To determine the methods, means, and personnel by which Norwood Health Center operations are to be conducted;

3.01.12 To take whatever action is necessary to carry out the functions of the Norwood Health Center in situations of emergency.

ARTICLE 4 – SENIORITY

. . .

4.03 In the event of a reduction in the work force only, there shall be two (2) seniority groups – regular full-time employees and regular part-time employees, who shall be retained on the basis of the oldest in point of service in their respective groups if they are qualified to perform the available work. All seasonal employees shall be laid off first. All regular part-time employees shall be laid off next. Employees on layoff shall be returned to work in reverse order of being laid off provided they are qualified to perform the available work and will accept the available work schedules. No new employee shall be hired until all qualified

employees on layoff are returned to work. Regular full-time employees may have to accept part-time employment if that is all that is available. Assignment of jobs remaining after layoff shall be by seniority, provided that each employee has the ability and skills to perform the work, and will accept the available work schedules.

4.04 In the event that a position is eliminated, the laid off employee shall have the right to bump any other employee within the bargaining unit who has less seniority, provided that the originally laid off employee has the ability and skills to perform the work, and will accept the available work schedules. The bumping process shall then continue until the least senior employee is laid off.

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ARTICLE 7 – WORK DAY AND OVERTIME PAYMENT

7.01 Hours, Overtime, and Compensatory Time:

7.01.01 The normal workday for regular full-time employees shall be eight (8) hours. All work in excess of eight (8) hours daily and eighty (80) hours in a fourteen (14) consecutive day period shall be paid at the rate of time and one-half (1-1/2). There shall be no pyramiding of overtime. Sunday at 6:30 a.m. shall be considered the start of the fourteen (14) consecutive day period for computing overtime.

7.01.02 Employees holding positions which do not routinely require replacement who become eligible for, and who work, overtime hours, as described in 7.01.01 shall be allowed to accumulate up to twenty-four (24) hours, as compensatory time in lieu of overtime wages. These positions include Activities Coordinator, Recreation Therapist/C.O.T.A. Business Office positions, Accredited Records Technician, Medical Records Technician, Word Processor, Maintenance, CRP Technician, etc. The decision between compensatory time or wages shall be made by the employee. Compensatory time off shall be scheduled with the approval of the employee's supervisor and shall not normally result in overtime that work day. (This paragraph shall sunset after December 31, 2001.)

7.02 Call-in Scheduling:

7.02.01 If an employee is called in during his/her scheduled time off, the employee will be paid for at least two (2) hours. In addition, employees sent home after reporting to work shall receive a minimum of two (2) hours of pay.

7.02.02 Any individual on the call-in list seeking extra hours must submit to the designated scheduling supervisor a listing of days and shifts when s/he is available to work at least two (2) weeks prior to the posting of the affected Master Schedule. Employees who fail to provide the two (2) week notice will have their names placed on a secondary call-in list for the affected Master Schedule and will be called for extra hours before non-union employees are called.

. . .

7.04 When offers of extra hours are made to bargaining unit employees, they shall be made first to part-time employees by seniority (up to 40 hours per week). Offers of overtime made to bargaining unit employees shall be made in a fair, rotating manner.

7.05 Overtime Sign-up: If an individual signs up for overtime and s/he is contacted, the employee must come in and work unless the employee has informed the Employer of his/her unavailability for the overtime prior to the Employer contacting the employee. If the employee signs up for overtime, is contacted, and declines the overtime assignment, the employee's name will be moved to the end of the overtime rotation list as though the overtime hours were accepted.

7.06 Scheduling: The Employer shall post a Master Schedule of four (4) weeks or eight (8) weeks, no later than the tenth (10^{th}) day prior to the first day of the schedule. The Employer shall post the dates for each scheduling deadline at least six (6) months prior to the deadline.

7.06.01 Employees will be scheduled in the following sequence:

a. Regular Full-time employees according to the employees' posted hours, then

b. Regular Part-time employees according to the employees' posted hours, then

c. Regular Part-time employees and casual employees with benefits up to the employees' submitted availability and greater seniority first, then

d. Casual employees without benefits may be scheduled based upon the employee's option for the remaining hours up to eighty (80) hours per pay period, then

e. If hours remain to be filled, casual employees with benefits will be scheduled up to their benefited level in order of least seniority first. These employees shall be allowed on their availability sheet to exclude scheduling on one (1) of the three (3) shifts.

7.07 Scheduling Changes: Once the Master Schedule has been posted, management will assume the responsibility of finding replacements for illness, funerals or legitimate emergencies. If an employee requires additional time off, the employee must find his/her own replacement, with the following requirements:

7.07.01 It will not entail overtime that work day, unless otherwise approved.

7.07.02 Seniority is followed for the call-in list protocol.

7.07.03 Management is informed, in writing, of the proposed schedule change. Management may void the proposed schedule change if the replacement employee is not qualified.

7.07.04 Employees cannot grieve if the seniority list is not followed properly.

7.07.05 Section 7.07 shall sunset after December 31, 2001.

7.08 Mandated Overtime: When normal scheduling methods described in 7.04, 7.05 and 7.06 fail to staff any department or area to minimum staffing levels, the following procedure shall be utilized to require employees to remain at work:

7.08.01 Qualified employees on duty in the department and job title requiring overtime shall be required to remain up to a full shift. However, no person shall be required to work more than two (2) full consecutive eight (8) hour shifts.

7.08.02 If there is more than one (1) qualified employee on duty in the direct care department and direct care CNA title, mandatory overtime will be assigned in a rotating reverse seniority order.

7.08.03 If an employee has worked or is scheduled to work two (2) overtime shifts during the pay period in which the mandatory overtime is being assigned, that employee shall be placed at the top of the seniority list and not scheduled until all less senior qualified employees on duty who are normally assigned direct care have been scheduled for mandatory overtime.

7.08.04 No employee shall be required to work mandatory overtime for more than two (2) times per work week provided there are qualified employees able to work and are ready to report for work. Employees shall be allowed one (1) refusal of mandated overtime per four (4) week schedule provided there are qualified employees able to work and are ready to report for work.

. . .

ARTICLE 21

ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire Agreement between the parties. Any amendment or agreement supplemental hereto shall not be binding unless mutually agreed to in writing and signed by the County and the Union.

Mandatory subjects may not be deleted from or added to this Labor Agreement except by mutual agreement.

Any actual or alleged “practices” not incorporated into the specific terms of this Agreement are of no binding force or effect whatsoever. For the purpose of this Labor Agreement, the term “past practice” shall mean practices which are not expressed in the Labor Agreement. “Past practice” shall only serve to interpret the meaning of the express terms incorporated in this Labor Agreement.

OTHER RELEVANT PROVISIONS

NORWOOD HEALTH CENTER POLICY AND PROCEDURE
LOW CENSUS/OVERSTAFFING

POLICY: When the need arises to send technicians home due to low census or overstaffing of the units, this will be done in a fair and consistent manner.

PURPOSE: To continue to provide high quality care to the clients residing at Norwood Health Center is the primary focus of sufficient staffing; however there may be times when the number of technicians scheduled is unnecessary. These policy and procedure allows for a systematic approach to relieve these technicians of their duties.

PROCEDURE:

Responsibility	**Action**
Scheduler	All technicians will be scheduled appropriately as indicated by positions (full-time, part-time, and casual) on the 4-week master schedule. The number of technicians working any given shift may exceed minimum staffing numbers. Examples being: floats in the float pool, vocational staff, an extra positioned technician on a given shift, etc. In the event that all of the shifts identified as regular on the master schedule cannot be filled either on the 4-week schedule or the weekly wall schedule without involving overtime, the scheduler shall contact the Program Director of Stepping Stones and/or the Director of Nursing (depending on the unit affected) to determine if filling the shift is necessary.
Scheduler/Nursing staff/DDSS	**ASSIGNING LOW CENSUS/OVERSTAFFING DAYS** Once all technicians scheduled have reported to work, it should be determined if the unit is staffed appropriately. If the unit is overstaffed (due to low census of initial overstaffing of the building), the supervisor on the unit will follow this systematic approach:

1. The supervisor of the unit that is overstaffed will contact the other units in the building to determine if there is a need elsewhere for the extra staff person(s). Only staff members "qualified" to work other units can be moved.

   - "Qualified" refers to staff members who are labeled as being competent to perform regular job duties on another unit, as so indicated on one's job posting/description and/or on the 8-sheet.

2. The supervisor will move any qualified staff to any unit in need of additional staff on the particular shift involved.

3. If there is not a need for the extra staff on an alternate unit or if there are no qualified staff to move to another unit working, staff will be sent home.

   - Any staff member working overtime shall be sent home first. If there are no employees working overtime or if the overstaffing situation cannot be rectified by only sending the technician(s) on overtime home:

   - Any non-benefited casual employee shall be sent home next (in reverse seniority order). If there are no non-benefited casual employees working or if the overstaffing situation cannot be rectified by only sending technicians on overtime or those of casual status home:

   - The float technicians should be adjusted accordingly to accommodate the units when staff members on overtime and/or casuals are sent home. If there are extra float technicians in the building, they should be distributed equally to all units and be considered "regular full-time" employees when determining the order of lay off. Extra floats will be assigned in order of seniority to Stepping Stones first, Admissions second, and Crossroads third.

- The regular full-time or part-time (including casual-benefited and extra floats at this point) employee with the most seniority (based on date of hire) and willingness to use benefit time (excluding sick time) will be given the option to leave next.

- If the regular full-time or part-time employee with the most seniority chooses to work, each regular employee willing to use benefit time (excluding sick time) will be asked if he/she would like to leave in order of seniority.

- If no regular full-time or part-time employee chooses to leave and use benefit time, each regular full-time and part-time employee will have the option to leave using dock time. This will be offered on a rotating basis, beginning with the person with the most seniority.

- If no regular full-time or part-time employees choose to leave, the supervisor is required to send the employee(s) home in the following order (after completing steps indicated in bullet 1 and 2 above): 1) Regular part-time employees in reverse seniority order, 2) Full-time employees in reverse seniority order.

- Regular full-time and part-time employees will be retained at work for 2 hours prior to being sent home or given the option to leave work early and only be paid for time worked when this is mutually agreed upon between the employee and the immediate supervisor.

CALLING STAFF OFF PRIOR TO REPORTING TO WORK

Each supervisor must review the staffing for the shift immediately following the shift worked. The staffing must be reviewed to determine overstaffing issues. If it is deemed that the following shift is overstaffed for the predicted care needed, the supervisor must call off staff in the following manner at least one hour prior to the beginning of the next shift:

- Any staff members scheduled for overtime will be called off first in order of seniority.

- Any casuals (non benefited) will be called off next in order of seniority.

- The regular full or part-time employee with the most seniority will be called and given the option to stay home and use benefit time (excluding sick time).

- If the regular full or part-time employee with the most seniority chooses to work, the other regular full and part-time employees will be called in order of seniority and given the option to stay home and use benefit time.

- If no regular full-time or part-time employee chooses to stay home, each regular full-time and part-time employee will have the option to stay home using dock time. This will be offered on a rotating basis, beginning with the person with the most seniority.

- If all regular employees choose to work and overstaffing is still an issue after overtime and casual employees are called off, the supervisor is required to call regular staff off. This must be done in the following order for the regular employees:

    - Regular part-time employees in reverse seniority order

    - Regular full-time employees in reverse seniority order.

BACKGROUND

The parties executed the following 11-point Stipulation of Facts:

1. There is a labor agreement between the parties.

2. Bruce Stargardt has been an employee of Wood County since September 11, 1989.

3. Mr. Stargardt's supervisor is Heidi Metz or Wanda Blackman.

4. Mr. Stargardt's current position is technician.

5. Mr. Stargardt signed up to work on January 22 and 23 "Overtime/Additional Hours," for the first shift on those respective dates.

6. On January 28, 2005, Mr. Stargardt arrived at work for his regularly scheduled shift. However, because Mr. Stargardt had worked additional hours on January 22-23, his January 28, 2005 shift was overtime.

7. The County has a Low Census/Overstaffing ("Low Census Policy") policy that states "when the need arises to send technicians home due to low census or overstaffing of the units, this will be done in a fair and consistent manner." The Low Census Policy also states: "any staff member working overtime shall be sent home first."

8. On January 28, 2005, it was determined that there was an overstaffing problem.

9. The Low Census Policy also states, "the float technicians should be adjusted accordingly to accommodate the units when staff members on overtime and/or casuals are sent home."

10. Ms. Metz assigned a "float" to replace Mr. Stargardt after he was sent home on January 28, 2005.

11. On February 7, 2005, Mr. Stargardt filed a grievance for being sent home on January 28, 2005.

The grievance form which union official Dan Kroggel filed on February 7, 2005 claimed following violations of the agreement:

* 4.03 Seniority was not followed properly in the reduction of the work force;

* 7.02.01 Call-in Scheduling

* 7.06 Scheduling

* Any other language that may apply.

As remedy, the Union sought, "Make the Employee whole. He would receive 8 hours of O.T. pay on the date of the infraction. Any other union employee Affected by this infraction will be justly paid."

On February 9, 2005, Mary Jo Pawlowicz wrote Stargardt as follows:

Re: Grievance 03-05K

Please consider this my written response to the grievance received on February 9, 2005. Bruce was sent home on 1/28/05 according to the Low Census/Overstaffing policy. On this date, Bruce was the only individual in the building working the am shift that was on overtime pay. When it was discovered that the building was overstaffed and the policy was implemented, Bruce was sent home. According to the policy:

> *Once all technicians scheduled have reported to work, it should be determined if the unit is staffed appropriately. If the unit is overstaffed (due to low census of initial overstaffing of the building), the supervisor on the unit will follow this systematic approach:*
>
> *See #3*
>
> *If there is not a need for the extra staff on an alternate unit or if there are no qualified staff to move to another unit working, staff will be sent home.*
>
> - *Any staff member working overtime shall be sent home first.*

Please review this entire policy, as it is in compliance with section 4.03 of the Union contract. Management reserves the right to send staff members on overtime home prior to implementing the reduction of workforce procedure, as this is a serious budgetary issue. Seniority is followed properly in the reduction of work force when determining all staff members working on the units on any given shift on regular time. This policy was reviewed several times in detail with Union representatives prior to implementation. At those meetings, it was determined that the policy was in compliance with the Contract.

7.06.01 Bruce was paid for 1 hour and 45 minutes of work on 1/28/05. Because he was not paid for a full two hours of pay that day, I will surmise that he was not paid correctly and 15 minutes of pay can be added to his current time card at the time of settlement of this grievance.

7.06 Bruce currently holds a position described as *"100% Full-time DD technician, primarily 6:30-3:00 pm"* according to his personnel file. Bruce was scheduled appropriately for the pay period involved. Just because he was sent home due to low census because the fact that he was on overtime pay at the time does not mean he was scheduled inappropriately.

I am not aware of "Any other language that may apply" to this situation and will only respond to specific Articles or Sections of the Contract allegedly violated as identified on the grievance form.

I am not aware of any other union employee affected by this alleged infraction needing to be justly paid. Again, specific examples need to be provided in writing, not in general terms.

On February 18, 2005, administrator Rhonda Kozik wrote Kroggel as follows:

Re: Grievance 03-05K

Dear Dan,

This letter is my formal response to grievance #03-05K regarding Bruce Stargardt being sent home per the Low Census/Overstaffing policy that has been in place since December 26, 2003 and revised February 6, 2004. As you may know, both Deb Foth and Amy Hills met several times with management and offered input into the development of this policy. They offered valuable insight to ensure the policy did not violate any contract language and we felt it did not at the time it was implemented. This policy was developed to deal with low census and overstaffing issues on a day-to-day basis to prevent permanent lay off or the need to resort to 4.03 that deals with reduction in the workforce. Therefore, I do not believe that article 4.03 applying a permanent reduction is relevant to this issue.

I am unsure, and your grievance does not address how 7.06 is at all relevant in this issue. Mr. Stargardt is a *"100% Full-time DD technician, primarily 6:30-3:00 pm."* Those are the hours he indeed was scheduled for. There has not been a violation to either the number of hours (full time) he works, as he was on overtime, or his shift schedule.

I am also not aware of "Any other language that may apply". I can only address specific perceived infractions.

While the policy was being discussed, it was agreed that for low census/overstaffing issues, those employees incurring overtime would be sent

home first. It is my understanding that section 3 of the policy was indeed followed. Mr. Stargardt was the only employee who would be incurring overtime, therefore he was sent home per policy. It is the right of management (3.01.07) to maintain efficiency of Norwood Health Center operations. Obviously controlling overtime costs is essential in this practice. You can certainly understand why the policy was written to include controlling those additional costs. Any sections regarding Mr. Stargardt being sent home per policy is denied.

I do however agree with Mary Jo Pawlowicz that Mr. Stargardt, according to 7.02.01, should be paid two hours of call in pay for the time he spent at the facility before being sent home. Therefore he should add the additional 15 minutes of time to his next time card for approval.

Rhonda Kozik
Norwood Health Center Administrator

On April 12, 2005, County Human Resources Director Ed Reed wrote Kroggel as follows:

Subject: 3rd step response, 03-05K

Dear Dan:

I have reviewed this grievance and the Norwood Low Census/Overstaffing Policy.

There is no disagreement on the hours worked by Bruce Stargardt nor that he was on overtime on the date he was sent home.

The Union contends that it was Bruce's 'normal shift' and he should have been allowed to work. The County agrees that it was his normal shift. However, it was the normal shift for all the other employees at work at that time and someone needed to be sent home. Bruce was the only person working overtime.

The Union contends that if an employee was to be sent home it should have been the least senior. In a layoff situation where we were making a permanent reduction in staff this would be correct. However, this was an exceptional situation and to implement a layoff only to reshuffle and then recall the individual the next day would be impractical. To cover situations such as this the County established the Norwood Low Census/Overstaffing Policy. The notification to Mr. Stargardt was proper according to the policy.

The Union contends that a "float" employee was assigned to Mr. Stargardt's duties in violation of the policy. The Union's understanding of the policy is wrong. The policy states that a "float" may have been assigned to those duties "when staff members on overtime and/or casuals are sent home."

The Union contends that the policy is not consistently applied. Without knowing the unique facts of each alleged case I cannot comment. However anytime a policy is not enforced consistently is raises the question of fairness. I am not addressing that issue because it is not pertained (sic) to this grievance.

The decision to send Mr. Stargardt home was not a violation of the contract, it was according to the established policy and it made good business sense. Therefore the grievance is denied.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

Article 7.06, which mandates that the employer post a master schedule at least ten days prior to its start, would be rendered meaningless if the employer can change the schedule without notice. There is little point in posting a schedule if the employer may change it. It would be patently unfair for the employees to bargain for mandatory scheduling only to have that protection eviscerated by not being able to rely upon the posted schedule. If the employer schedules too many employees, then the employer, not the employee, must bear the ramifications of that error. An employee is entitled to rely upon the employer's representation of the schedule once it is posted.

Other provisions support this analysis, including Section 7.07 (which allows employees to change their schedule under certain circumstances) and 7.02 (which allows the employer to send call-in employees home, with a premium if the employee is released before working two hours). Nothing in the collective bargaining agreement permits the employer to send an employee working a normal shift home. Nor does the collective bargaining agreement mandate a pay premium for sending an employee home from a regularly scheduled shift after less than two hours work, because the contract does not contemplate the circumstances where the employer is sending such an employee home. Further, pursuant to Section 7.01, which establishes that the normal work day is eight hours, the grievant was scheduled and should have been permitted to work his normal shift on January 28, 2005. The collective bargaining agreement does not support the claim that the employer can unilaterally and without notice alter the normal workday of a scheduled employee. Nothing in the collective bargaining agreement permits the employer to send an employee working a normal shift home.

Further, pursuant to Section 4.03, the employer should have sent junior employees home first. It is undisputed that the employer reduced the workforce, even if only for one day. Contrary to the employer's assertion that this provision applies only to permanent reductions, the contract does not mention permanency or duration. The language applies to any reduction in the workforce.

The Commission should not condone the employer's misrepresentation that overtime will be paid. The grievant signed up for 16 added hours, working an entire weekend to help out the employer when it was short-staffed. But he did not sign up to change his schedule, namely working a weekend so that the employer, at its discretion and without notice, could send him home during his normal shift. It is patently unfair for the employer to mandate that an employee work scheduled overtime and then cheat the employee out of the overtime pay. The employer reneged on its promise, and should be held to perform its part of the bargain.

Finally, the employer's unilateral policy does not control the collective bargaining agreement. It is uncontested there is no document signed by the union modifying the terms of the agreement, as called for in Article 21. The employer relies on a policy that is not binding on the employees.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The County's management rights allow it to set and modify employee schedules in accordance with the low census policy.

Further, the existence of the reporting pay policy is evidence of the management right to schedule, in that it implies management has the right to send employees home in certain circumstances, with reporting pay. The Union bargained for the reporting pay provision because it understood that employees may be unexpectedly sent home due to lack of work.

The County had the right to establish the low census/overstaffing policy, pursuant to several of its management rights, including the right to establish schedules or work, establish reasonable work rules, maintain efficiency, and determine the personnel needed. The policy is reasonably related to a legitimate business objective, and its specific procedures are clearly stated.

Further, the Union's arguments are not supported by the agreement, in that Section 7.06 does nothing to restrict, either directly or indirectly, the County's management right to establish schedules of work and reasonable work rules. There is nothing in Section 7.06 which denied the County the right to send the

grievant home from his regularly scheduled shift when there is a legitimate business reason such as a low census.

There was no "reduction in force" when the grievant was sent home, as used in Section 4.03 of the agreement. That section clearly refers to a situation when an employee is separate from employment; it does not apply to the instant situation. A "reduction in hours" is not a "reduction in force."

Because the County has not relinquished its right to schedule Norwood employees in instances of low census or overstaffing and operated within its rights when it adopted the low census policy and sent the grievant home on January 28, 2005, the grievance should be denied.

In its reply, the Union further posits as follows:

The employer misconstrues Section 7.02, which applies only when an employee has been sent home after being called in during scheduled time off. As previously stated, this section supports the Union's position, not the County's. The County also fails to note the treatise holding that an employer may be denied the right to make temporary work changes when the purpose is to avoid contractual overtime payments, as was here its motive.

The employer also errs in relying on the management right clause as empowering it to change the grievant's schedule. Taking hours from an employee after promising to pay overtime, and sending him home without notice, can hardly be a "reasonable schedule of work." There is no evidence of an emergency or exigent circumstance that would make such abrupt treatment reasonable. The employer cannot credibly argue that it exercised its scheduling authority reasonably in misleading an employee into working overtime on his time off only to revoke that overtime once its own need were met. The employer's treatment of the grievant was unconscionable and totalitarian.

Further, the employer cites cases which do not support its argument. The grievant in VILLAGE OF EAST TROY relied on her hiring letter, which the arbitrator was not contractual. Contrary to those facts, Local 1751 bargained for scheduling language in the collective bargaining agreement, requiring the employer to post the schedule to be honored for the prospective payroll period. The grievant in GREEN BAY AREA SCHOOL DISTRICT was allowed to work her full 7.5 hours for the day, which by itself distinguished that case. Moreover, that grievant's job description and posting expressly stated her schedule was flexible. Local 1751 does not dispute the employer's right to modify the schedule, but the employer must honor the schedule it ultimately posts.

The employer argues that no layoff occurred on January 28, 2005, because the grievant was only sent home for one day. The collective bargaining agreement, however, requires that a "reduction in work force" will take place by seniority. Even if only for a brief period, the employer did on the date in question reduce its workforce by one employee. The clear terms of the agreement must be applied.

Because the employer failed to exercise its managerial rights in a reasonable manner, the grievance should be sustained and the grievant made whole.

In its reply, the County posits further as follows:

Because the County's management rights allow it to modify employee schedules in accordance with the low census policy, the County did not violate Section 7.06 of the collective bargaining agreement. The Union applies illogical reasoning in concluding that the existence of Section 7.07, which allows the employer to change employee schedules in certain cases, is evidence that the county may never change the schedule.

Contrary to the Union claim, the low census policy does not allow the employer to change an employee's schedule on a whim, but only when there is a legitimate business reason to do so. Moreover, nothing in the collective bargaining agreement states that an employee schedule may never be changed. The very existence of a reporting pay policy is evidence that management has the discretion to send employees home when it has a legitimate reason to do so.

The Union assertion that Section 7.02 does not apply to this situation is at odds with both the language of the agreement and the Union's own actions and interpretation. The second sentence of this clause specifically contemplates a situation where a regularly scheduled employee is sent home.

The Union initially argued that the County violated 7.02.01; the County immediately acknowledged the oversight and paid the grievant for a full two hours. The Union then dropped this alleged violation. The existence of a reporting pay provision is further evidence of the employer's right to make unscheduled changes in the work schedule.

The Union errs in claiming that Section 7.01 somehow guarantees an eight-hour shift. The mere fact that the collective bargaining agreement defines a normal workday as eight hours does not guarantee employees an eight hour shift. The County's decision to send the grievant home was not arbitrary, but was made to address abnormal business conditions.

Despite the Union's argument that the one-day reduction in the grievant's hours constitutes a "reduction in force" triggering Section 4.03, there is no authority for such a claim, while several decisions support the County's argument to the contrary.

The fact that the County allowed the grievant signed up for additional hours does not establish a contractual right to overtime pay. The Union errs in claiming that it does.

As the low census policy is reasonable and was issued for legitimate business reasons, it is a proper exercise of the county's management rights. The County does not claim that the policy supersedes any provision of the collective bargaining agreement, but rather that the provisions of the agreement cited by the Union are inapposite to this situation.

Because neither the low census policy nor the decision to send the grievant home violates the collective bargaining agreement, the grievance should be denied.

DISCUSSION

Evaluation of this grievance involves the interpretation of several contractual provisions, not all of which can be harmonized, and some of which are ambiguous.

As noted above, I believe this grievance presents two questions. The first is broad and general, asking whether the employer could establish *a* work rule that sent employees home on a temporary basis outside the normal lay-off process. The second question is specific, asking whether the employer violated the collective bargaining agreement by applying *this* work rule in *this* manner to Bruce Stargardt.

As explained herein, I answer both questions in the affirmative.

In determining first whether the agreement allows the employer to send employees home on a temporary basis outside the normal lay-off process, I must understand and apply sections 3.01.02, 3.01.05, 3.01.11, 4.03, 4.04, 7.01.01, 7.02.01, 7.06, as well as the "Norwood Health Center Policy and Procedure Low Census/Overstaffing."

The Union affirmatively asserts that "the collective bargaining agreement does not support the claim that the employer can unilaterally and without notice alter the normal workday of a scheduled employee." The employer emphatically enumerates several specific and contractual management rights to the contrary.

The employer accurately notes the several provisions in Article 3 which relate to its managerial rights to operate the Norwoods Health Center. Except as specifically limited, the

employer retains all rights to "direct all operations … establish reasonable work rules and schedules of work …relieve employees from their duties for lack of work or any other legitimate reason … maintain efficiency …determine the methods, means and personnel" to conduct Norwoods' operations. Thus, unless the union can cite language elsewhere in the agreement "specifically" providing otherwise, Article 3 empowers the employer to establish a reasonable work rule sending employees home for lack of work.

The Union cites provisions in Article 7 as providing just such a contrary indication. Section 7.01 provides that "the normal workday for regular full-time employees *shall* be eight (8) hours." (*emphasis* added). Section 7.06 provides that the County "*shall* post a Master Schedule of four (4) weeks or eight (8) weeks, no later than the tenth (10^{th}) day prior to the first day of the schedule," based on a five-step scheduling sequence. (*emphasis* added). Section 7.07 reinforces the significance of the Master Schedule as a mutual commitment between the county and the employee, listing specific responsibilities of each in maintaining the scheduled staffing levels. [1]

In seeking to understand and apply Article 7, I am hampered by the fact that a critical clause in the agreement is hopelessly ambiguous. Indeed, Section 7.02.01 is so ambiguous that both parties cite it as support for their analysis.

That section reads as follows:

7.02 Call-in Scheduling:

> 7.02.01 If an employee is called in during his/her scheduled time off, the employee will be paid for at least two (2) hours. *In addition*, employees sent home after reporting to work shall receive a minimum of two (2) hours of pay. (*emphasis* added).

The employer cites the *text* of the second sentence as evidence that it can send employees home from their regularly scheduled shift, noting that the presence of a "reporting pay" provision necessarily implies the employer's ability to curtail an employee's work schedule. [2] The Union cites the *placement* of the second sentence, noting its inclusion in the

[1] I have serious doubts about the applicability of section 7.07, in that section 7.07.05 of the agreement in the record (2000-2001), declares that section 7.07 "shall sunset after December 31, 2001." While the parties did not address this point in their briefs, this clause is clear, unambiguous and self-actualizing on its face. I do not see how I can regard section 7.07 as a valid part of the agreement which I am interpreting in mid-2006. Fortunately, this section, even if valid, has only minor significance, and its absence does not affect the arbitration's outcome. Well after the hearing, I attempted to obtain a current contract from the parties, but was unsuccessful.

[2] I find it odd that the employer declined to cite section 3.01.05, which explicitly grants it the specific management right to "relieve employees from their duties for lack of work or any other legitimate reason." I assume, though, that the parties raised their respective legal arguments advisedly, and thus do not consider this provision in my analysis of this question.

paragraph headed "Call-in Scheduling," which it asserts limits its applicability to just such situations.

Thus, two established concepts of contractual interpretation – that everything in a collective bargaining agreement has a purpose, and everything in a collective bargaining agreement is placed where it is on purpose – are in irreconcilable conflict here. If the second sentence refers only to employees who have been called in, then it is redundant to the first sentence; if the second sentence relates to employees working their normal shift, then it is placed in the wrong section of Article 7.

The Union seems to realize that the text of the agreement presents some difficulty; other than reiterating that nothing in 7.02.01 authorizes the employer to send an employee home early, the Union does not attempt to explain what the phrase "in addition" could mean other than as a way of identifying a different set of employees beyond those referenced in the first sentence.

Given the opaque nature of the text, I consider which interpretation is most likely what the parties had in mind, based on the realities of this workplace.

Among the several administrative difficulties attendant on running a nursing home such as Norwoods is that the client population fluctuates, often due to circumstances outside the facility's control. Administrators know what size staff they will need for certain population counts, but they cannot guarantee what those population counts will be on any one day. Nursing homes can deal with this unpredictability in two ways – by scheduling conservatively, and risk having too few on any one day, or by scheduling liberally, and risk having too many staff available.

Obviously, it is in the interests of both the workers and the managers to schedule precisely the number of employees needed every day. But because the client population cannot be guaranteed, provisions must be made for those times when there are either too many or too few employees scheduled for work.

The collective bargaining agreement contains a provision clearly implementing the first scenario; Section 7.08 is unambiguous in allowing the employer to mandate that an individual employee work overtime. Interpreting Section 7.02.01 as the employer does – allowing the employer to send an employee home, with at least a minimum of two hours' pay – addresses the second scenario as well.

Finally, the Union's own conduct validates the employer's analysis regarding 7.02.01.

In its initial grievance, Section 7.02.01 was one of the three sections which the Union claimed the County violated. While the grievance simply states "7.02.01 Call-In Scheduling,"

and doesn't specifically claim the fifteen minutes needed to bring Stargardt's pay to the two hour minimum, the employer did make that payment, which it believed it was doing pursuant to 7.02.01. The grievant accepted the small additional payment.

Rhonda Kozik's letter of February 18, 2005 formally informed the Union that the County agreed to supplement Stargardt's pay to the two-hour minimum, specifically granting the grievance alleging a violation of Section 7.02.01. The Union then dropped its claim of a *violation* of 7.02.01, and now insists instead that 7.02.01 specifically *does not apply*. In fact, the union, after *endorsing* the County's payment, states that the contract does *not* mandate such compensation, because "the contract does not contemplate the circumstances" in which the employer could send home an employee on her or his regular shift.

The Union cannot have it both ways.

The Union has effectively endorsed the County's settlement, which was premised on the applicability of 7.02.01 as a "reporting pay" minimum for employees sent home from their regular shift, "in addition" to those being called-in. In its written arguments, the Union neither addressed its changing position towards this provision, nor even acknowledged that the employer had indeed made the supplemental payment, which it knew the grievant had accepted.

A preponderance of the evidence thus supports the employer's interpretation of Section 7.02.01.

I turn now to the impact of Section 4.03, and whether its terms apply to the employer's action temporarily sending an employee home. The Union contends that it does, noting that the Section applies "in the event of a reduction in the work force only," and does not set a minimum time period. The cancellation of a scheduled shift, the Union says, constitutes a reduction in work force that can only be accomplished through the layoff provisions of Sections 4.03 and 4.04. The employer claims to the contrary, stating that a temporary reduction in hours is not the same as the separation of an employee from the payroll, as is concomitant with a reduction in the work force.

The Union is correct that, for one shift on January 28, 2005, the employer reduced its work force below that which had previously been scheduled. But the employer did not reduce the work force on its payroll. And a review of the rest of Sections 4.03 and 4.04 indicate that such an action is not a "reduction in work force" as used therein, but is, as the county contends, the actual separation of an employee from the payroll. The very next sentence in 4.03 identifies which employees "shall be laid off first." The next sentence speaks of which employees "shall be laid off next." The Section defines how employees "on layoff shall be returned to work…." Section 4.04 refers to the bumping rights laid-off employees have "in the event that a position is eliminated," with the bumping process continuing "until the least senior employee is laid off."

Taken in their totality, it is clear that the "reduction in the work force" discussed in Sections 4.03 and 4.04 is a layoff, or the actual separation of an employee from the payroll, distinct from a reduction in hours at issue in the instant grievance. Such a holding is consistent with the generally accepted use of these terms, and with the commission case law the county cites. The collective bargaining agreement provides for mandatory scheduling; it does not provide for mandatory minimum staffing.

Accordingly, I find that the adoption of a Low Census/Overstaffing policy that temporarily relieves employees of duty outside the layoff procedure does not violate the terms of Sections 4.03 or 4.04. The provisions of Section 7.02.01, as applied by both parties, refutes the Union's argument that this interpretation makes Section 7.06 meaningless, in that employees who are sent home after reporting pursuant to their normal schedule are due a minimum of two hours pay.

I turn now to the policy itself, as drafted and applied to the grievant.

Norwood Administrator Kozik testified that she met with local union steward Amy Hills concerning the low census policy, and that Hills assured her the policy was not contrary to the labor agreement. Such consultation may speak to the employer's good faith in promulgating the low census policy, but it has no bearing on whether the policy violated the agreement, and it could not constitute a binding waiver by the union if it did. As the Union correctly notes, the labor agreement explicitly states that no amendment or supplement to the contract is valid "unless mutually agreed to in writing" and signed by both parties. No such agreement exists.

Here, too, I am confronted by still another ambiguity, this one inherent in the phrase, "working overtime." That could mean, as it did in the instance giving rise to the grievance, "an employee who is working her/his assigned and schedule shift, but is in overtime status because of additional shifts worked earlier in the pay period," or it could mean "an employee discussion, I use the phrase "previously generated overtime" to describe a situation such as the grievant was in, and "new overtime" to describe the second situation.

Ultimately, I decide this grievance by resorting to two of the most subjective terms in labor relations, "fair" and "reasonable." The collective bargaining agreement empowers the employer to "establish reasonable work rules and schedules of work," which the employer asserts it has done through promulgation of the "fair and consistent" Low Census policy.

I have no doubt that the employer undertook the preparation of this policy with a legitimate motive, namely seeking the most efficient and economical way to operate its facility within the terms of the collective bargaining agreement. However, the meaning it has given to the phrase "working overtime" results in an application that is neither fair nor reasonable. who is in new overtime status because s/he is working an additional shift beyond her/his regularly scheduled shift." For the remainder of this

Although the grievant's particular situation arose because he voluntarily signed up for overtime, it is important to note that the collective bargaining agreement, Section 7.08, empowers the employer to impose mandatory overtime. Thus, when analyzing and evaluating the Low Census Policy that "any staff member working overtime shall be sent home first," I do so with both kinds of overtime – voluntary as well as mandatory – in mind.

Under the employer's analysis, it can order a technician to work mandatory overtime at any time during the 14-day pay period, then involuntarily furlough the employee on the 14th day, simply and solely because the employee was in overtime status due to the employer's action. While I reject the union's description of the county's actions as "totalitarian," I do find the county's action and analysis to be neither fair nor reasonable.

In MARATHON SOUTHERN CORPORATION, 35 LA 249 (Maggs, 1960), the arbitration board considered a situation very analogous to the one before me. There, the employer sent five millwrights home during their regular shift, after they had worked an unscheduled extra shift, specifically to avoid paying an overtime premium. "A desire to avoid having to pay overtime is not a justifying reason" for abrogating an employee's scheduled work-week, board chair Douglas Maggs wrote. (id. At 254).

Moreover, under the published policy, "any staff member scheduled for overtime will be called off first in order of seniority," such notice to come "at least one hour prior to the beginning of the next shift." Since 7.02.01 provides for two hours of pay only for employees "sent home *after reporting for work" (emphasis* added), an employee in this hypothetical would not even get any reporting pay. A system under which an employee can be forced to work additional, unscheduled hours early in the work-week at the potential expense of their normal shift, and receive no compensation at all upon the loss of that scheduled shift, is not reasonable, and therefore violates Section 3.01.02 of the agreement.

It is rational for the employer to want to send employees working overtime home first, in that they are being paid a fifty percent premium over the normal hourly rate. Although it is an unlikely scenario, if there is a situation in which an employee is working "new overtime," as defined above, because s/he was called in for an additional shift beyond their normal 80 hours, and a subsequent determination is made establishing a low census – either due to reductions in census during the shift, or an error in setting that shift's staffing – that employee may be sent home, with proper payment under Section 7.02.01 of the agreement. But the employer may not send home an employee working her or his regularly scheduled shift, who is in overtime status because of additional shifts, either voluntary or mandated, worked earlier in the pay period.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the written arguments of the parties, it is my

AWARD

1. That the County did not violate the collective bargaining agreement by adopting a Low Census/Overstaff Policy that included temporarily relieving employees of duty outside the lay-off procedure.

2. That the County did violate the collective bargaining agreement by applying its Low Census/Overstaff policy to furlough Bruce Stargardt on January 28, 2005.

3. That the appropriate remedy is for the County to make the grievant whole for the overtime he was denied on January 28, 2005.

Dated at Madison, Wisconsin, this 28th day of July, 2006.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

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