

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, LOCAL 5001**

and

MILWAUKEE COUNTY

Case 568

No. 64733

MA-12991

(Federighe et al. Grievance)

Appearances:

Hawks, Quindel, Ehlke & Perry, S.C., by **Attorney Jeffrey P. Sweetland**, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of the Union.

Attorney Timothy R. Schoewe, Milwaukee County Deputy Corporation Counsel, Milwaukee County Courthouse, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233 on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Wisconsin Federation of Nurses and Health Professionals, Local 5001 (herein the Union) and Milwaukee County (herein the County) were parties to a collective bargaining agreement dated March 13, 2001 and covering the period January 1, 2001 to December 31, 2004, and providing for binding arbitration of certain disputes between the parties. On May 2, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of the County's alleged assignment of certain bargaining unit employees in the Registered Nurse I classification to Registered Nurse II duties without paying out of class pay as provided by the contract, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on April 4, 2006. The proceedings were not transcribed. The parties filed briefs by May 18, 2006, whereupon the record was closed.

ISSUES

The parties stipulated to a framing of the issues, as follows:

Did Milwaukee County violate the Memorandum of Agreement when it did not pay Registered Nurse II pay to Registered Nurse I employees assigned as Charge Nurses at the Milwaukee County House of Corrections?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

1.02 BARGAINING UNIT DEFINED

(1) Whenever the term “nurse” is used in this Agreement, it shall mean and include bargaining unit nurses of Milwaukee County in the following classifications: Registered Nurse I, Registered Nurse II Utilization Review, Registered Nurse II (Sheriff’s Department), Registered Nurse II (Mental Health), Registered Nurse II Staff Development, Nurse Practitioner, Clinical Nurse Specialist (Mental Health) and Clinical Nurse Specialist, Mental Health Emergency Service Clinician, RN, Community Service Nurse, RNII-AODA, Staff Development Coordinator, EMS Instructor, RNII Adult Services Division, RNII Department on Aging, Infection Control Practitioner, Regular Pool Nurse (Corrections), RNI (Pool), and RNI-Mental Health (Pool). Whenever the term “employee” is used it shall mean in addition to those set forth above, the following bargaining unit classifications: Forensic Chemist.

1.05 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to

carry out the duties of the various departments and divisions. In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Federation.

In the event a position is abolished as a result of contracting or subcontracting, the County will hold advance discussions with the Federation prior to letting the contract. The federation's representatives will be advised of the nature, scope of work to be performed, and the reasons why the County is contemplating contracting out work. Notification for advance discussions shall be in writing and delivered to the President of the Federation by certified mail.

1.06 WORK OF THE BARGAINING UNIT

...

(3) The County agrees that employes shall normally be assigned job duties consistent with their classification. The general term "all other duties as may be assigned" which appears on the civil service examination announcement is intended to mean duties consistent with the classification and subject to the provisions of sec. 2.09 of this Agreement.

2.09 TEMPORARY ASSIGNMENTS

(1) Employes may be assigned to perform the duties of a position in a higher classification and shall be paid as though promoted to the higher classification under the following conditions:

...

(b) Such employe works in the higher classification for not less than 3 consecutively scheduled working days. Paid time off shall not be included in the computation of the 3 consecutive scheduled working days but said days shall not be interrupted thereby, and

(c) such employe performs the normal duties and assumes the responsibilities of the incumbent of that position during the period of the assignment.

...

2.44 CHARGE DIFFERENTIAL

- (1) Registered Nurses employed at the Sheriff's Department, or House of Correction, who are assigned Charge Nurse duties, shall receive a 25 cent per hour differential for the performance of such duties in 2001, 50 cents in 2002, 75 cents in 2003, and \$1.00 in 2004, provided that:
 - (a) Such employe is designated as the Charge Nurse on the work schedule by the Sheriff or his/her designee, or the House of Correction Superintendent or his/her designee, and
 - (b) Such employe is assigned to such duties for a minimum of 4 hours. In no event shall the Charge Nurse Differential be paid to more than one employe for the same hours.
 - (c) Such employe, during the term of the assignment, shall be exempt from the provisions of 2.08.
- (2) The County will make every reasonable effort to select employes from among those who have volunteered for such assignment.

BACKGROUND

Milwaukee County has a long-standing collective bargaining relationship with the Wisconsin Federation of Nurses and Health Professionals, which represents registered nurses working for the County in a number of different departments and agencies. Among the facilities in which bargaining unit nurses serve are the County's two correctional facilities, the County Jail and the House of Correction. The Jail is under the authority of the County Sheriff, whereas the House of Correction is under the authority of a separate Superintendent, who reports to the County Executive. Bargaining unit members who regularly work at these facilities include Nurse Practitioners (NP), Registered Nurse I's (RN-I) and Registered Nurse II's (RN-II). Within the table of classifications, RN-II's rank higher than RN-I's and receive a higher rate of pay.

The nursing staff at the House of Correction work in three shifts: Day shift (6:45 a.m. – 3:15 p.m.), PM shift (2:45 p.m. – 11:15 p.m.) and Night shift (10:45 p.m. – 7:15 a.m.). Each shift has an assigned Nurse Supervisor who is there part of the time. Nurse Supervisors (NS) are not bargaining unit members. The daily work assignments of the nursing personnel

include Charge Nurse, Co-Charge Nurse (weekdays), Infirmary and Blocks A2, B2, O2 and R6, Sick Call and Triage, Med Pass, Medication Coordinator and Pharmacy and Medical Assistant. As indicated by Sec. 2.44 of the contract, nurses assigned the duties of Charge Nurse for at least four hours within a shift received an additional wage premium, which in 2004 was \$1.00 per hour. The Charge Nurse directs the flow of health care in the facility, reviews paperwork from inmates returning from outside appointments, reviews lab reports, coordinates the activities of the other nurses on the shift, directs emergency response and follows up with questions to and from outside health care providers. In the absence of a doctor or Nurse Supervisor, the Charge Nurse is often the highest ranking medical staff person on site.

Prior to February 2004, each shift was assigned one RN-II as part of the regular shift. Typically, the RN-II on each shift would be assigned Charge Nurse duties. When the RN-II was absent, Charge Nurse duties would be performed by the RN-I's. All nurses performing Charge Nurse duties, regardless of classification, received the wage premium for their hours worked in that assignment. In February 2004, the Day shift RN-II, Velma Staples, retired. From that point onward, the County did not assign another RN-II to the Day shift. Since that time, RN-I's have been assigned the Day shift Charge Nurse duties on a rotating basis and have received the wage premium when performing those duties.

On January 31, 2005, The Union filed a grievance against the County on behalf of bargaining unit members Sally Brennan, Kristen Babe, Deanna Sherrer and Linda Federighe, all of whom are RN-I's on the Day shift. The Union alleged that at various times the Grievants had all performed Charge Nurse duties for at least three consecutive days and, therefore, in addition to the Charge Nurse wage premium, they were entitled temporary assignment pay for performing the duties of an RN-II, pursuant to Sec. 2.09(1) of the contract. The County denied the grievance at each stage of the contractual procedure and the matter moved to arbitration. Additional facts will be referenced, as necessary, in the Discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that acting as Charge Nurse is the quintessential duty of an RN-II at the House of Correction. It is the Union's contention, therefore, that RN-Is acting as Charge Nurses are filling an RN-II assignment. Under Sec. 2.09 of the contract, if such an assignment lasts for more than three consecutive days, an RN-I acting as Charge Nurse is entitled to receive an RN-II's rate of pay, in addition to the wage premium paid for the position of Charge Nurse. There is no dispute that the key difference between an RN-I and an RN-II is that, when present, an RN-II will always act as Charge Nurse, which was the case on all shifts at the HOC prior to Velma Staples' retirement. The only reason RN-Is now rotate as Charge Nurse on day shift is that there is no longer an RN-II assigned to that shift.

The primary distinction between an RN-I and an RN-II is that RN-IIs serve in a leadership capacity. This is consistent with them acting as Charge Nurses. So, RN-Is acting as Charge Nurse also perform in a leadership role and, thus, are acting as de facto RN-IIs. The Charge Nurse coordinates all the activities of the other nurses on the shift. The importance of the role is manifested by the fact that a wage differential is paid to those who perform it, regardless of classification. Management attempted to downplay the significance of the role and provide other rationale as to why RN-IIs are assigned when available, but the record is clear that the Charge Nurse is the key person on the shift and RN-IIs are preferred for filling the role. This is true even when an NS is present.

The County may be attempting to reduce its number of RN-IIs for budgetary reasons and may be planning to use more RN-Is in the future, but the reality is that when RN-IIs are on duty on the other shifts, they are assigned the Charge Nurse role. Charge Nurse is a unique characteristic of the RN-II position, so when RN-Is perform that function they are working outside their classification and deserve RN-II wages.

The Charge Nurse wage differential is not a substitute for RN-II pay. Charge Nurses receive a \$1.00 per hour premium when performing that function, but this is so for RN-IIs as well as RN-Is. Thus, in order to properly compensate RN-Is when they are working outside their classification they must receive RN-II wages in addition to the premium. Further, it is immaterial that the County refers to the Charge Nurse role as an assignment rather than a position. Sec. 2.09 makes no such distinction. The duties of Charge Nurse are unique and are the defining characteristic of the RN-II position.

RN-I Kristen Babe worked as a Charge Nurse for three or more consecutive days on many occasions between August 1, 2004 and November 6, 2004. She is entitled to RN-II wages for all such work. Furthermore, if the grievance is sustained the Union will be able to establish that other similarly situated RN-Is are also entitled to the temporary assignment pay.

The County

The County contends that the Union's position is that all nurses who are assigned as Charge Nurses become, in effect, RN-IIs. This contention was not the basis of the original grievance and is not arbitrable. This would be a de facto reclassification, which would be beyond the scope of the arbitrator's power. The arbitrator's authority is limited to interpreting and applying the language of the contract, but may not go beyond the terms of the contract, which the Union seeks. The County concedes that the contract questions are arbitrable, but the question of reclassification is not. (citations omitted).

On the substantive issues raised in the arbitration, there is no dispute that the nurses assigned to act as Charge Nurses were not paid exactly as provided by the contract. The Union is attempting to also obtain RN-II pay for RN-I's acting as Charge Nurses through the back door. The language of the contract undercuts the Union's claim. Sec. 2.44 provides for premium pay for any nurse assigned as a Charge Nurse. The language does not distinguish

between RN-Is and RN-IIIs, but merely refers to registered nurses. The record shows that the practice has been that any registered nurse, whether RN-I or RN-II, gets the premium for working as a Charge Nurse.

It is undisputed that there is no classification of Charge Nurse, rather it is a job assignment. There is no evidence that the Charge Nurse assignment falls entirely and exclusively within RN-II duties. None of the witnesses testified that Charge Nurse duties were synonymous with RN-II duties. Further, there is no evidence of any occasion in the past where an RN-I working as a Charge Nurse received both the wage premium and temporary assignment pay for working as an RN-II, so there is no past practice supporting the Union's position. There is evidence, however, presented by Monica Pope-Wright, that RN-Is acting as Charge Nurses at the jail do not get temporary assignment pay. So, to the extent that there is relevant past practice, it supports the County. Bases on the record, the practice and the language of the contract, the grievance should be denied.

DISCUSSION

Arbitrability

Sec. 2.44 of the collective bargaining agreement provides that a wage differential of \$1.00 per hour is to be paid to registered nurses assigned to Charge Nurse duties for minimum of four hours. The Union maintains that the Charge Nurse assignment is a function of the RN-II classification, so that any nurse acting as a Charge Nurse is, in effect working as an RN-II and is, therefore, entitled to temporary assignment pay as an RN-II, as well as the Charge Nurse differential.

First, let me dispense with the issue of arbitrability. Sec. 2.09 of the contract provides for temporary assignment pay for bargaining unit members assigned to work in a higher classification for three or more consecutive days and specifies that such assignment need not be in writing to be grievable. The grievance specifically cites Sec. 2.09 as the contractual basis for the Union's claim. The County agrees that to the extent set forth in the grievance itself, the matter is arbitrable. In its brief, the Union specifically states, "The Union submits that a RN I at HOC who is assigned to perform Charge Nurse duties for three or more consecutively scheduled working days is in fact receiving a RN II assignment that qualifies for temporary assignment pay under Sec. 2.09." (U Brief at 10) I do not see the Union's position, therefore, as being an effort to obtain reclassification through arbitration. Rather, it is an assertion that the Charge Nurse assignment is a function of the RN-II position, which, when performed by an RN-I, merits temporary assignment pay. This, in my view, is a question of fact within the arbitrator's purview and is consistent with the grievance. I find, therefore, that the matter is arbitrable.

Merits

The Union's position is that the position of Charge Nurse is specifically encompassed in the duties of the RN-II classification. Therefore, in addition to receiving the wage differential attached to the Charge Nurse assignment, any RN-I working as a Charge Nurse for more than three consecutive days should also receive temporary assignment pay at the RN-II rate. For the reasons set forth below, I do not agree.

The position of Charge Nurse is referenced in Sec. 2.44 of the contract wherein the parties established a wage differential to be paid to any Registered Nurse assigned to Charge Nurse duties. Those duties are not described in the contract, nor has the County created a written position description, but testimony elicited from the witnesses at the hearing established that the Charge Nurse, in effect, acts as the coordinator of nursing activities on the shift and the wage differential attaching to the assignment is evidence of that fact. No other nursing assignment at the Sheriff's Department or House of Correction qualifies for a wage differential.

The classifications of RN-II and RN-I are described in County job announcements received as Joint Exhibits #3 and #4, respectively. Neither description makes reference to the assignment of Charge Nurse, or any other particular job assignment within the functions performed by bargaining unit members. Both descriptions make reference to the employees at times being expected to assume leadership or supervisory roles. A comparison of the descriptions yields little basis for distinction between them, except that the RN-I works "under direction" and the RN-II qualifies for a higher wage rate.

There is no question that the RN-II is the higher classification, as evidenced by the higher wage rate attaching to it. One would expect, therefore, that RN-IIs, in general, would be more experienced and highly trained than RN-Is. Given a situation where there are both RN-IIs and RN-Is working on the same shift, it would not be surprising, therefore, if the RN-IIs were typically given the daily work assignments requiring a greater degree of experience and leadership ability. Charge Nurse being the key assignment on a work shift, it is not surprising that an RN-II on a shift would be preferred for that assignment over an RN-I. That does not mean, however, that an RN-I assigned as Charge Nurse is doing RN-II work.

Sec. 2.44 specifically refers to "Registered Nurses" assigned as Charge Nurse, without distinguishing between RN-I and RN-II. The most reasonable inference to be drawn from that is that any Registered Nurse in the bargaining unit is eligible to work as Charge Nurse. This contemplates that any Registered Nurse, regardless of classification, may at some point be assigned to act as Charge Nurse. And, in fact, nurses from both classifications have been assigned to fill the Charge Nurse role and have been paid the wage differential, as specified by the contract. The Union counters that inference by noting that in every instance where an RN-II is present on a shift at the HOC the Charge Nurse assignment is given to the RN-II. The argument, therefore, runs that RN-Is, who only serve as Charge Nurses when there is no RN-II present, are acting as RN-IIs when they do so. Another way of looking at it, however, is that

management makes daily shift assignments based on the skills, experience and qualifications of the available personnel and in all likelihood will give the more challenging assignment to the most qualified available employee. When there is only one RN-II on a shift, that person would likely be deemed more qualified than any of the RN-Is, but that does not mean that the Charge Nurse assignment is part and parcel of the RN-II classification, only that, all else being equal, an employee in a higher classification, if available, will be preferred for a leadership or supervisory role over an employee in a lower classification.

It appears from the record that in the past all three shifts had at least one RN-II assigned to them. Thus, this situation was created by the retirement of an RN-II from the Day shift whom the County decided not to replace, leaving no RN-II on that shift. At least in the recent past, however, there has never been more than one RN-II assigned to any given shift. Allowing for vacations, illnesses, accidents and other planned or unplanned leaves, therefore, the situation must have arisen at some point where an RN-I worked as a Charge Nurse for at least three consecutive days, but there is no evidence that temporary assignment pay was given on any such occasion. Even if that did not occur, however, the evidence in this record establishes that RN-Is at the County jail do regularly serve as Charge Nurses without receiving temporary assignment pay without objection. Given that the nurses at the jail are in the same bargaining unit and subject to the same collective bargaining agreement, this indicates that the Charge Nurse assignment has not heretofore been deemed exclusively an RN-II assignment. To the extent that there is any relevant past practice, therefore, it would seem to me to support the position of the County. Taken as a whole, the record does not persuade me that RN-Is working as Charge Nurses are working out of class such that they are entitled to temporary assignment pay in addition to the Charge Nurse differential.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

Milwaukee County did not violate the Memorandum of Agreement when it did not pay Registered Nurse II pay to Registered Nurse I employees assigned as Charge Nurses at the Milwaukee County House of Corrections. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 2nd day of October, 2006.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
7048

