BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAUK COUNTY HEALTH CARE CENTER EMPLOYEES' UNION, LOCAL 3148, AFSCME, AFL-CIO

and

SAUK COUNTY

Case 160
No. 65309
MA-13190

(FDD Unit Grievance)

Appearances:

William Moberly, Staff Representative, AFSCME Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717, appeared on behalf of Local 3148.

Todd Liebman, Corporation Counsel, 505 Broadway, Baraboo, Wisconsin, 53913, appeared on behalf of Sauk County.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all relevant times and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of members of the Sauk County Healthcare Center Employees' Union who worked in what is known as the FDD unit, hereinafter Grievants. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on April 7, 2006 in Baraboo, Wisconsin. A transcript was prepared. A briefing schedule was set and rescheduled, and the record was closed on August 28, 2006.

ISSUES

The parties stipulated to the following issues to be decided:

Did Sauk County violate the contract by its actions relating to employee assignment due to the restructuring of staff on 5 East?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTILCLE 3 – MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement. Such right of the Employer to manage its affairs shall be liberally construed and modified only by the express language of this Agreement. Those management rights include, but are not in any way intended to be limited by, the following:

A) To manage, direct, and control the operation of the work force;
B) To determine the type, quality and amount of services to be provided and the appropriate means of providing those services;
C) To hire, transfer and promote, and to demote, discipline, and discharge employees for just cause;
D) To make, modify and enforce reasonable rules or regulations and standards of performance applicable to the work force;
E) To evaluate employee performance and to plan and schedule training programs;
F) To contract with others for goods and services for sound business reasons and, if a subcontract results in the layoff of bargaining unit personnel, the Employer agrees to bargain the effects thereof;
G) To establish the classifications and duties of the members of the work force and to determine the equipment, supplies and physical facilities to be utilized in the performance of those duties;
H) To relieve employees from their duties because of lack of work or any other sound and legitimate business reason;
I) To take any action necessary to comply with state or federal requirements applicable to its programs;
J) To establish work schedules and service hours for its facility; and
K) To determine the size and composition of the work force.

. . .

ARTICLE 9 – SENIORITY

9.01 Seniority: Seniority shall be defined as the employee's length of service in the Bargaining Unit, commencing on the employee's most recent date of hire in the Health Care Center bargaining unit. Seniority shall apply to promotions, transfers, layoffs, recall from layoff, holiday scheduling, and vacation scheduling, as hereinafter provided. Part-time employees shall earn pro-rated seniority based on the number of hours worked relative to full-time (40 hours per week) employment.

9.06 Job Posting Procedure: Whenever there is a job opening within the bargaining unit, either as a result of termination, promotion, transfer or creation of a new position, the Employer shall post a notice on all bulletin boards. Such notice shall provide the job title, rate of pay, job shift, department, when the applications must be submitted, and the place to apply. Such notice shall remain posted for at least one (1) week before the receipt of applications will be closed. A copy of the notice shall be given to the Union secretary upon request.

Employees going on vacation or leave of absence may leave an open bid with the Personnel Department prior to starting their vacation or leave. This open bid must indicate the specific job and/or shift for which the employee wishes to bid. Should a job opening occur in the job or shift indicated, the employee will then be considered for such opening in accordance with the job posting procedure.

9.09 Layoffs: In the event of a layoff, introductory employees and seasonal employees will be laid off first. If further reductions are necessary, employees shall be laid off in the reverse order of their seniority; the last employee hired shall be the first laid off, provided there are qualified employees remaining to fill existing position.

ARTICLE 10 – WAGES AND HOURS OF WORK

10.09 Hours of Work: The normal hours of work for full-time employees shall be established by management based upon the requirements of the facility. The Employer shall generally provide full-time employees the opportunity to work eighty (80) hours in a pay period in accordance with a regular work schedule. A regular work schedule shall not be changed except with one (1) month advance notice to the employee. A regular work schedule may include customary eight (8) hour days, or some other flexible schedule such as nine (9), ten (10) or twelve (12) hour days. The regular work schedule shall include the regular starting and ending times of the shift with the understanding that the Employer may adjust such starting and ending times by up to two (2) hours:

. . .

C) Work schedules for all employees shall be posted five (5) working days in advance.

. . .

ARTICLE 13 – HEALTH AND WELFARE BENEFITS

13.01 Health Insurance:

A) The Employer shall pay ninety percent (90%) of the premiums for group health insurance coverage that is as good as or superior to the current coverage currently enjoyed by members of the bargaining unit. It is understood the Employer may continue to offer coverage under a standard policy or offer dual-choice options at its discretion; the Employer's financial responsibility shall be limited to ninety percent (90%) of the least expensive of any dual-choice option offered which is as good as present coverage.

. . .

C) Employees hired on or after April 1, 2000: All positions filled on or after April 1, 2000, shall be placed within one of the following categories for health insurance benefits. Employees hired shall receive benefits according to the provision of the categories their position has been assigned. The categories are assigned to positions by the Employer based upon the number of hours a position is normally expected to work in a two week pay period illustrated by the following table:

Health Insurance Categories		
Category	**Hours Normally Worked in a Pay Period**	**Percentage of Premium Paid by Employer on Base Plan**
Category 1	70 or more hours	90%
Category 2	At least 60 hours, but less than 70 hours	67.5%
Category 3	At least 38.75 hours, but less than 60 hours	45%
Category 4	Less than 38.75 hours	Not eligible to participate in Employer provided health plan.

1. Placement of Positions of Categories: placement of positions within categories is based upon the number of hours a position is normally expected to work within a two week pay period. It is understood that actual hours may fluctuate based upon the needs of the Employer.

2. Review of Categories: The placement of a position within a category may be reviewed by the Employer, or shall be reviewed upon the request of an affected employee, once annually in October for proper placement within a category. No position may be reviewed until an employee has occupied the position for at least one year.

   a. An employee requesting a change in category must show that the annual average number of hours worked exceeded the highest annual number of hours worked for his/her category. If the employee demonstrates that the number of hours worked exceeded the highest annual number of hours worked for his/her current category, the position category shall be moved to the next higher category unless the Employer can show that the increased hours were due to extraordinary circumstances such as filling in for position vacancies or other emergency, and are not reasonably expected to occur in the upcoming year.

   b. The Employer may adjust the position category downward after an October review if the position is reasonably expected to work a lower number of hours in the upcoming years so as to place it in a lower category. An employee shall be reimbursed at year end for excess insurance premium if the average number of hours worked in the prior year qualified the employee for a higher category.

   c. Changes in position categories shall become effective with the deduction for January health insurance premiums due to impacts on §125 enrollments, budgetary concerns, and other tax considerations.

BACKGROUND AND FACTS

Sauk County operates a Health Care Center (SCHCC) which has had both nursing home wings and a wing for developmentally disabled people, known as the FDD unit or the 5 East Floor. The nursing home and FDD units are licensed separately. The County has certified nursing assistants, CNAs, who work primarily in the nursing home floors but sometimes in both units. The County also has resident living aides, RLAs, who work primarily in the FDD unit but also on the nursing home floors. RLAs are CNAs with additional training. There is no special credentialing, certification or licensing for RLAs other than those needed for a CNA. Generally, CNAs do things for the nursing home clients, whereas RLAs assist FDD clients in doing things for themselves, and other protocols. The types of information recorded and tracked is different. The RLAs work with an individual patient plan for each FDD client. They take care of the person for the entire day. If the person

needs physical care the RLA does it. If the person needs a behavioral approach, such as a behavioral hold or a time out, the RLA does that, too. Different, but sometimes similar client activities are performed or assisted. For example, RLAs do active treatment with FDD clients such as shredding paper, crushing aluminum cans, cutting stamps from envelopes, folding towels, etc. CNAs working in the Alzheimer's unit of the nursing home assist in activities such as folding napkins and towels and stringing balls of yarn. When the RLAs work in the nursing home units they can perform CNA work. The CNAs who work in the FDD unit do not perform the full range of directive activities as the RLAs, but they do perform some. Everyone working on the FDD unit has some degree of responsibility in duties unique to FDD clients, such as redirection of activity. Both units are staffed 24 hours per day. There are three shifts in both units.

RLAs and CNAs are in different job classifications but are in the same pay grade. AFSCME Local 3148 represents all employees of the SCHCC with the exception of supervisors, managers, professional, confidential, craft and seasonal employees. The bargaining unit includes custodians, housekeepers, kitchen aides, CNAs, RLAs, cooks, account record technicians, resident's personal account clerks, billing clerks, maintenance, security, and certified occupational therapy aides. There were 13 RLAs working at the SCHCC in early 2004.

In 2004 the State of Wisconsin directed Sauk County to begin phasing out the FDD unit because the State was pursuing a policy to place developmentally disabled people in more community integrated, less restrictive settings. Among other things, the County was limited to only accepting Court Ordered placements in the FDD unit and to develop discharge plans for remaining residents. Thereafter, the client population or census of the FDD unit would begin to decline. This reduced the need for staffing. The County also anticipated reduced staffing needs in the future and began to restructure employee positions on the FDD unit within the licensing requirements of the FDD unit. The County began meeting with the RLAs and communicating with the Union as to the forthcoming restructuring. An eventual closing date of the FDD unit was not determinable.

To restructure the FDD, Management reviewed the collective bargaining agreement, a former arbitration award, SAUK COUNTY MENTAL HEALTH FACILITY AND LOCAL UNION NO. 3148 AFSCME, WERC M-86-273 (PETRIE, FEB. 1987), and previous restructurings in the SCHCC. They considered FDD client needs and regulations governing minimum staffing levels. County management then determined to restructure the FDD unit by calculating the seniority in the RLA classification and following that while taking various actions to restructure.

The previous arbitration award concerned the County's reduction from full time to part time status of six employees within the Nursing Assistant classification at the SCHCC. Under the terms of the collective bargaining agreement in existence then, the award determined that the County's action was a layoff, but that it was entitled to make the reductions by seniority

within the classification the way it did. The Union had argued that the employer had the right to layoff in seniority order within the bargaining unit, but not to reduce the hours of work for the Nursing Assistants in lieu of layoff. In the other two SCHCC restructurings, employees were laid off on the basis of seniority within job classifications. The Union grieved those actions and the County denied the grievances. Neither reached an arbitration hearing or award. The record does not show any other resolution of those grievances. The collective bargaining agreement language in effect at those times is not of record.

There are approximately 12 CNAs as well as other employees in the Local 3148 bargaining unit who have less seniority in the bargaining unit than the 13 RLAs.

Once the County determined the FDD restructuring would be done by using seniority within the RLA classification, in February, 2005, it made changes to the hours, schedules and classifications of the 13 RLAs effective March 7, 2005. Within the RLA classification the three employees with the most seniority, Beverly Milfred, Linda Peper and Gloria Schneider, had no changes to their position, shifts or hours. The fourth most senior, Robin Johnson, had a change in her regular schedule and remained full time day shift. The fifth, sixth and seventh senior employees, Norma Chandler, Susan Horner and Sherry Karstettler, all went from full time days to full time PMs. The eighth senior, Heidi Jarvis, had a change in her regular schedule but remained full time PM shift. The ninth, tenth, eleventh and twelfth senior employees, Mandi Drea, Rebecca Turner, Rebecca Altheiser and Jason Sincere, had all been full time PM shifts. Drea and Turner went to part time PMs, and Altheiser and Sincere went to part time days. Turner, Altheiser and Sincere went into category 3 health insurance (Drea was grandfathered in at category 1 health insurance). The least senior employee, Jennifer Krayer, was a part time PM and became a part time CNA in the nursing home by the posting procedure. Affected employees whose insurance categories were to change were later offered other positions or schedules which then afforded them category 1 health insurance benefits.

The restructuring presented some of the affected employees with very serious challenges in light of their personal and family needs and schedules. After the restructuring one affected employee retired and five affected employees resigned their employment at SCHCC. One resignation was the employee moving from the area.

Thereafter, the FDD Unit has remained open with a declining population from approximately 23 to 7. There have been some FDD shifts filled by scheduling CNAs. There remained a number of open shifts in the FDD unit and in other parts of the SCHCC for various day, afternoon and night shifts for various dates. The 13 restructured employees had opportunities to bid or post into those shifts. Some of the employees who had been reduced from full time to part time did take some of these shifts and hours in these or other parts of SCHCC. Some FDD shifts were filled by CNAs. Some unfilled FDD shifts were staffed by outside subcontracted workers after there were no bargaining unit employees posting into them. Additionally, there were shift postings for openings for work other than CNA work, such as activity therapy aide, billing clerk, kitchen aide, and tray aide.

Currently there are 7 clients staffed by 2 employees, one of whom is a RLA. There are two CNAs on the PM shift and one CNA on the night shift. CNAs are performing RLA work when the RLA is not present. Schedule, position and shift changes have occurred after the filing of the instant grievance.

In February 2005 the Union filed a grievance concerning the restructuring. The Union's grievance contended the "5 East staff will be removed from their present positions and placed in 'new positions' created by employer in response to downsizing of unit – resulting in constructive termination of employees". The grievance was denied by the County and this arbitration followed. Further facts are as set forth in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the County violated the employees' contractual seniority rights by summarily reassigning employees who were to eventually, but not immediately, be affected by the closing of the FDD unit. The FDD unit is downsized, using CNAs to perform the work of RLAs. Seniority in the Labor Agreement is service in the bargaining unit. While an employee's position may be eliminated, that does not translate into the employee in the position being laid off. Section 9.09 of the agreement requires the employer to layoff the last person hired, provided there are qualified employees remaining to fill existing positions. Knowing the need to eventually eliminate 13 FDD positions, SCHCC should have reviewed the seniority list bargaining unit wide to find that 12 of the 13 lest senior employees were CNAs working on the nursing home floors. A senior displaced employee has the right to bump any less senior employee, in any position for which they are qualified to perform the work of the classification. Here, an RLA could bump a less senior housekeeper, cook, activity aide, ACA, provided they are qualified to perform the work of the job classification. The bumped employee then has seniority rights to bump another less senior employee, and so on, until the least senior employees have no one to bump and are therefore laid off. This protects seniority rights. Authoritative arbitral sources recognize, in a layoff situation, the implied nature of bumping rights in the absence of any contract prohibition in a plant wide seniority system.

As a result of the FDD restructuring, employees with considerable seniority were displaced from the positions for which they had exercised their seniority right to post into. Some were transferred from days to evening or night shifts. Some were transferred from full time to part time. Some had hours reduced enough to cause increases in the employee's health insurance premium portion. SCHCC's actions caused one employee to retire and five to resign. Others begrudgingly accepted the transfers and grieved. After the involuntary transfers there were still numerous FDD shifts and hours available for CNAs or RLAs. Clearly there was work on the FDD unit after SCHCC transferred the employees out of the unit.

The County based its case erroneously on the contention that the FDD unit and the nursing home are separate and distinct departments, that RLAs and CNAs are separate job classifications, that historically the County has laid off employees within a department, and that they have never recognized bumping. However, evidence demonstrated otherwise. The classifications specifications requires RLAs to be CNAs and CNAs are not bumping into RLA positions. RLAs are qualified to perform CNA work. The two other layoffs within the County in the record have unknown dispositions and are unreliable. The County offered no evidence that it never recognized bumping.

The Union also argues that bargaining unit seniority is supported by contract language and bargaining history. It is clear and unambiguous that Section 9.01 of the Labor Agreement provides that seniority is based on date of hire in the bargaining unit and that seniority will apply to layoffs. This is bargaining unit wide seniority. Nowhere in the agreement is seniority based on anything else, such as within classification or department. The agreement does not indicate for purposes of layoffs classification or department seniority will be applied. "Classification" appears at least six other times in the Agreement with specific language for classification issues. Had the parties intended for seniority to be based on time in a classification, the language in such references would have so stated. It is clear the language defining seniority can only be read to support bargaining unit wide seniority. Additionally, the seniority list provided to the union is not by classification, but by bargaining unit wide seniority.

As to the County submitting evidence of two prior grievances, the official record for both is incomplete. The grievances were denied, but the record does not show anything other than that. The records of these grievances are incomplete and cannot be relied on in this matter.

The Union further argues that the displaced RLAs are qualified to fill existing positions. All RLAs are Certified Nursing Assistants as demonstrated by the classification specifications. Whether or not there are legitimate differences between the two classifications, here the RLA positions are being eliminated. It is the CNA positions held by the least senior employees of SCHCC that should have been made available to the RLA through a bumping procedure. RLAs had from time to time filled in for CNAs on other floors, and they all had held CNA positions at SCHCC at one time. The irony is that SCHCC has no problem unilaterally reassigning FDD RLA employees to CNA nursing home positions when it restructured the FDD unit. The Union requests the reinstatement of all the FDD employees with full back pay and benefits, and that these employees be allowed to exercise contractual bargaining unit wide seniority and bump into positions in which they are qualified to perform work.

County

In summary, the County argues the collective bargaining agreement supports its position that it is entitled to restructure positions in such a way as to ensure that qualified employees remain to perform the work. The care of the residents is a highly regulated and morally imperative responsibility. The County rightfully determines how best to provide care in the context of its obligations under the collective bargaining agreement. In almost every case the County retains the right to manage operations in order to fulfill its responsibilities to the residents, public and State regulations. Under Article 3, Management Rights, the County retains significant rights applicable to this case. Only subsection F in 3.01 A through K does not bear directly on the rights of management in this case. The County responded to State mandates to phase out the FDD unit. The restructuring involved a job classification not found elsewhere in the facility. The County had a legitimate need to maintain RLAs on the FDD unit as long as possible, provided work was available. No RLA was laid off. Section 10.09 provides that normal hours of work for full-time employees shall be established by management based upon the requirements of the facility, and a regular work schedule shall not be changed except with one (1) month advance notice. The Union does not allege that the County did not comply with the one month notice requirement. Affected employees were all given appropriate notice.

The County argues that arbitral precedent supports the County's right to conduct the restructuring through job classification seniority. In SAUK COUNTY MENTAL HEALTH FACILITY AND LOCAL UNION NO. 3148 AFSCME, WERC M-86-273, NA #13 (1987) the parties arbitrated a case that is directly on point and the contract language is identical. The decision is comprehensive and well reasoned. The County followed it in the reductions conducted over the past 19 years. It addresses the need of the County in providing skilled nursing and other specialized care over less skilled kinds of work. In the prior case the County reduced six CNAs from full time to part time due to closing two wings of the SCHCC, applying seniority to reduce the least senior full time CNAs to part time. The Union there argued the County did not have the right to reduce hours of work of employees in lieu of layoff. The Union goes further in this case, arguing employees have the right to bump any less senior employee within the bargaining group. The prior case rejected the Union's position. The management rights clauses of the 1986 agreement and the current agreement have not changed in any significant way since the 1987 decision. That decision found the seniority clause (then sec. 7.04 and now sec. 9.09) to be ambiguous. It determined the reduction in hours of the six CNAs constituted a layoff and applied the layoff section. In interpreting the layoff section the decision summarized that sec. 7.04 need not be applied within the bargaining unit wide and combined seniority pool of part time and full time employees; stated another way, the Employer need not go through the preliminary step of laying off part time employees, prior to affecting a layoff of full time employees. In the case at bar the RLAs form a distinct and different classification than CNAs, with substantial differences. The collective bargaining agreement recognizes the County's right to create job classifications. The RLA and the CNA are very different positions. And, both cases essentially involved a change that was something less than actual job loss.

Rather than go through the turmoil and disruption that the Union's argument presents, the County scrupulously applied seniority within the FDD unit and the classification to ensure the best resident care could be maintained as the FDD unit gradually reduced, making reductions ensuring that qualified employees remained to perform the work. The restructuring was reasonable, responsible and within its contractual obligations to the Union.

The County argues there is no language in the contract to support bumping rights. Absent direct contract language or clear past practice, bumping rights cannot be inferred, citing arbitral authority. The Union desires the arbitrator to furnish language that does not exist in the contract. The County scrupulously applied the contract language as interpreted by previous arbitration as well as consistent practice, and exercised its Management Rights. It is hard to fault the County where the County expressly honored seniority. The Union had three opportunities to advance its bumping rights theory. The first was rejected in arbitration. The second two times the Union did not advance the case beyond Step III, thus accepting as final the denial by the County of its agreement. The County asks the arbitrator to deny the grievance.

Union Reply

In summary, the Union argues that the prior arbitration decision and the instant case are more different than alike. Here, the Union has not argued that the employer cannot reduce hours of work. The issue here is if the employer reduces hours of work, what are the rights of employees in the affected positions. Also, here there is ample testimony that there were considerable hours available throughout the facility to accommodate existing staff, and the FDD unit remained open with CNAs and outside agency employees performing shift by shift work in the FDD unit. So while it appears from the prior decision that there was a real need in 1987 to reduce staff or hours, in the instant matter the same cannot be said.

The CBA language and classification structure are very different now than in 1987. There are now RLAs and CNAs in the bargaining unit. For the most part they provide identical services. After the restructuring the County routinely used CNAs in the FDD and some of the reassigned RLAs were placed in CNA positions on other shifts and floors. In both cases training needs were minimal.

The Union also argues that the CBA seniority language is vastly different now than in 1987. The 1987 CBA did not include seniority language calling for bargaining unit wide seniority. The current CBA in Sections 9.01, 9.05, and 9.06 refer to the bargaining unit. Section 9.09 for Layoffs refers to reverse order of their seniority. While the clear language defining seniority as bargaining unit wide did not exist in 1987, the 2003-2005 CBA does not suffer from that ambiguity. Seniority is bargaining unit wide. The seniority list produced, job vacancy postings and layoffs are based on bargaining unit wide seniority. Further, the prior

decision point about qualified employees remaining to fill existing positions is no longer relevant since RLAs and CNAs are frequently assigned to perform the work of their counter group. And, exercising seniority rights here would clearly not adversely affect the employer's ability to provide adequate qualified staff, the concern of the prior decision.

The FDD unit employees had exercised their seniority rights to attain their positions. Part time employees, as inferred from the 1987 decision were assigned available hours by seniority, with no mention of the assignment being specific to floors or hours of work. So, while seniority rights do not guarantee the continued existence of a job, seniority as practiced at the SCHCC has guaranteed the employee's relationship to a position into which they have posted.

The Union further argues that to follow the CBA the County must identify positions that are to be eliminated and, after proper notice, allow affected employees to bump less senior employees from positions affected employees are qualified to perform or can perform with minimal training. There are then subsequent bumps to the point of layoff. This meets personal employment needs. There are numerous hours of work at SCHCC that need to be filled, and could be filled without outside pool or agency employees. Following a bumping procedure before implementing the procedure as the County did would have avoided chaos with no visible effect on patient care.

County Reply

In summary, the County argues that senior employees have no right to bump junior employees, particularly where no layoff took place. There simply is no right of senior employees to bump junior employees under any circumstances, citing the prior mentioned decision. There was no layoff, but at most reassignments of shifts, reductions in hours (with the opportunity to increase hours), and a transfer. Under Sec. 3.01 and Sec 3.10 of the contract the County has the right to do this restructure under the circumstances of the directive by the State. The Union cannot and has not pointed to a clause in the contract relevant to bumping or presented evidence that the County relinquished its rights in regard to bumping. Section 9.09 as argued by the Union deals only with layoffs, and is silent on bumping. Section 10.09 expressly permits the County to change work schedules with advance notice, which the County complied with and took effort to consult the Union.

The contract allows employees to utilize seniority for a variety of areas where seniority provides certain rights. The problem with the Union's argument is that the Union attempts to use bargaining unit wide seniority to gain something they haven not been able to achieve at the bargaining table; bumping. The contract is silent as to bumping and the arbitrator would have to create this language. There was no meeting of the minds on bumping. Under Sec. 9.07 employees do not have absolute seniority rights when it comes to posting for a position. Only

when qualifications, recent work record and abilities are relatively equal is the County required to select employees based upon seniority. Recent arbitral authority affirmed this. To accept the Union's argument would fly in the face of the limited seniority right bargained for by the parties. The general rule is that management has the right to transfer employees absent restrictions. In the contract seniority is not referenced to bumping. The County scrupulously applied seniority. The three most senior employees in the FDD unit and classification subject to restructuring were not affected and the employer correctly and appropriately applied seniority to the employees who were restructured.

The County also argues that the Union's argument that bargaining unit seniority means there is automatically a right to bumping is not in accordance with practice or arbitral precedent. The Union never discusses bargaining history. Neither party is disagreeing with the fact that there is bargaining unit seniority, the argument is on bumping only. The hand calculation of seniority of each affected employee was based on bargaining unit service, not FDD unit service. Seniority controlled which positions were restructured. Application of seniority the Union's way would have serious and negative ramifications for patient care. It would mean a qualified cook or housekeeper could bump nursing assistants or other resident care positions. The parties did not bargain for such broad rights. This is not a manufacturing plant; this is a nursing home. Under the contract the County is responsible for determining what is necessary to provide resident care. Bumping would have a negative impact throughout the Health Care Center and cause considerably more disruption than reasonably necessary.

The County further argues that the Union's third argument applies irrelevant layoff language. There was no layoff. Schedules were changed, employees were transferred, hours were reduced with additional hours to pick up. The job duties of RLAs and CNAs are radically different. The residents cared for and the care they receive is radically different, and there is additional training required for RLA duties. There simply is no bumping. The Union's position would mean a simple schedule change would lead to bumping throughout the facility, something the County never would have agreed to in bargaining.

DISCUSSION

The case and issues are a result of the State of Wisconsin policy to place more developmentally disabled people in a community setting, which is generally considered a lesser restrictive setting than has been provided in health care centers throughout the State. While not entirely eliminating the need for placement in health care centers, this policy has greatly reduced the number of developmentally disabled people living in such health care centers. This is the situation in the SCHCC FDD unit. The reduction in client census from approximates 23 in 2004 to approximately 7 by 2006 has also meant a reduction in the staffing needs of SCHCC for care givers in the FDD unit. In anticipation of these reductions, SCHCC initiated a restructuring of the FDD unit which involved the changes in work schedules detailed in the

background and facts. The Union contends that the way the County made these assignments of employees in this restructuring violated the collective bargaining agreement between the parties. The Union contends that these actions were layoffs, and as layoffs the seniority rights of the employees allows them to bump other bargaining unit wide employees with less seniority, provided the bumping employee is qualified to perform the duties of the position they bump into. The County denies that there has been any layoff, and that there are no bumping rights of affected employees in any event. The County contends it made it's restructuring in strict compliance with any applicable seniority rights under the agreement and arbitral precedent.

Of the 13 RLAs employed in the FDD as of the restructuring, the three most senior, as calculated by bargaining unit wide seniority, had no changes in their position, shifts or hours. The next senior employee had a change in her regular schedule and remained on a full time day shift. The fifth, sixth and seventh senior employees went from full time day shifts to full time PM shifts. The eighth senior employee had a change in regular schedule but remained on a full time PM shift. The next four senior employees all had been on full time shifts and all went to part time shifts. The least senior employee posted from a part time RLA position to a part time CNA position. Those employees whose shifts were restructured from full time to part time, as well any other employees in the bargaining unit, had the opportunity to obtain additional work hours in various positions at SCHCC, including some in the FDD unit, for which they were qualified. The case thus presents affected employees who can be grouped as those who were not immediately affected, those who went from full time to part time, those whose schedules or shifts changed but number of hours remained the same, and the person who posted from a part time RLA to a part time CNA.

The Union is critical of the way the County approached and implemented its restructuring plan whereby SCHCC summarily reassigned employees who were to eventually, but not necessarily immediately, be affected by the closing of the FDD unit. However, when and how the county chooses to provide services to the FDD clients, and when and how to anticipate reduced staffing needs, are areas that the collective bargaining agreement puts solely with the County. The management rights clause in Article 3 states:

> **3.01** The Employer possesses the sole right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement. Such right of the Employer to manage its affairs shall be liberally construed and modified only by the express language of this Agreement. Those management rights include, but are not in any way intended to be limited by, the following:
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> A) To manage, direct, and control the operation of the work force;
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> B) To determine the type, quality and amount of services to be provided and the appropriate means of providing those services;

C) To hire, transfer and promote, and to demote, discipline, and discharge employees for just cause;
D) To make, modify and enforce reasonable rules or regulations and standards of performance applicable to the work force;
E) To evaluate employee performance and to plan and schedule training programs;
F) To contract with others for goods and services for sound business reasons and, if a subcontract results in the layoff of bargaining unit personnel, the Employer agrees to bargain the effects thereof;
G) To establish the classifications and duties of the members of the work force and to determine the equipment, supplies and physical facilities to be utilized in the performance of those duties;
H) To relieve employees from their duties because of lack of work or any other sound and legitimate business reasons;
I) To take any action necessary to comply with state or federal requirements applicable to its programs;
J) To establish work schedules and service hours for its facility; and
V) To determine the size and composition of the work force.

Presuming all other state or federal regulations and guidelines are met, the County has the prerogative to determine how and in what amount it will provide services to its FDD clients. The County can determine what classifications of employees and duties will be used to provide those services, and determine the size and composition of the workforce delivering services to the FDD clients. The County also has the right to establish work schedules and service hours for the FDD unit and to relieve employees from their duties on the FDD unit because of lack of work or other sound and legitimate business reasons. Nothing else in the collective bargaining agreement limits the County in these regards.

The agreement also contains Article 10 – Wages and Hours of Work, which states in relevant part:

> **9.09 Hours of Work:** The normal hours of work for full-time employees shall be established by management based upon the requirements of the facility. The Employer shall generally provide full-time employees the opportunity to work eighty (80) hours in a pay period in accordance with a regular work schedule. A regular work schedule shall not be changed except with one (1) month advance notice to the employee. A regular work schedule may include customary eight (8) hour days, or some other flexible schedule such as nine (9), ten (10) or twelve (12) hour days. The regular work schedule shall include the regular starting and ending times of the shift with the understanding that the Employer may adjust such starting and ending times by up to two (2) hours:

The County can establish the normal hours of work on the FDD unit, which this clause specifically includes full time employees. Whether or not a reduction in number of hours less than eighty (80) in accordance with a regular work schedule may impact the layoff provision in the contract is addressed below. But in the first instance, it is the County's prerogative to determine the hours and schedules of the employees, which is consistent with the provisions of the management rights clause.

There is nothing in the record which suggests that the County is required to provide FDD clients with staffing solely from RLAs. The County has used CNAs in the FDD unit regularly prior to the restructuring, and the Union has not alleged or argued that the use of CNAs to provide services to FDD clients is illegal. When faced with state mandates that would, and did, reduce FDD client populations, it was reasonable for the County to develop and implement a restructuring plan. It is a management right and a scheduling right of the County to determine that its needs could be met by using the combination of RLAs and CNAs that the restructuring produced.

The County has the authority under the collective bargaining agreement to determine how the FDD unit would be staffed. In the course of the restructuring it did so by a number of moves which primarily involved schedule, shift and time changes. The Union argues the County violated the collective bargaining agreement in the way it did this by not following bargaining unit wide seniority.

The Union argues that all the shift changes are layoffs under the terms of the collective bargaining agreement. The collective bargaining agreement does not define layoff. Nor does it contain any terms which might identify or recognize a partial layoff, as some collective bargaining agreements do. In view of the prior Petri arbitration Award in 1987, the question becomes relevant for those affected employees who had their hours reduced from full time to part time. They, like all the affected employees, did not have their employment relationship severed by the County's restructuring. The four still remained employed by the County. Whether a reduction in hours by an employer triggers the layoff provisions in a collective bargaining agreement so that the applicable layoff provisions must be followed has been the subject of many arbitration awards. The general view is that unless a specific number of hours is mandated by the contract, a reduction in hours is not an event which then invokes the layoff provisions of the contract. See, e.g., SUPERIOR MEMORIAL HOSPITAL, CASE 21, NO. 50301, A-5165 (SHAW, SEPTEMBER, 1994); ATHENS SCHOOL DISTRICT, CASE 13, NO. 61756, MA-12056 (EMERY, OCTOBER, 2003); RICHLAND COUNTY, CASE 149, NO. 62365, MA-12254 (MCGILLIGAN, FEBRUARY, 2004). The undersigned is in general agreement with that principle and reasoning. See, e.g., MARATHON COUNTY, CASE 315, NO. 64644, MA-12962 (GORDON, NOVEMBER, 2005). However, there is a very important consideration in this case, and that is the prior arbitration Award issued by Arbitrator Petrie as it relates to the narrow issue of layoff in the collective bargaining agreement between these particular parties.

In SAUK COUNTY MENTAL HEALTH FACILITY AND LOCAL UNION NO. 3148, AFSCME, WERC M-86-273, NA (1987) Arbitrator Petrie was faced with the issue of whether the reduction in the hours by classification of certain Nursing Assistants from full time to part time was a layoff under these parties' agreement. The SCHCC was downsizing its nursing home operations. Like the current situation, there were other classifications of employees in the bargaining unit but only the seniority of the Nursing Assistants was considered and only some of the SCHCC Nursing Assistants' hours were reduced from full to part time. Although the language as to seniority was different then than now,[1] the operative layoff language in effect was the same as now. In the 1987 decision the layoff language was:

> 7.04 Layoffs. In the event of a layoff, probationary employees and seasonal employees will be laid off first. If further reductions are necessary, employees shall be laid off in the reverse order of their seniority; the last employee hired shall be the first laid off, provided there are qualified employees remaining to fill existing position.

In the agreement applicable here the layoff language is:

> **9.09 Layoffs:** In the event of a layoff, introductory employees and seasonal employees will be laid off first. If further reductions are necessary, employees shall be laid off in the reverse order of their seniority; the last employee hired shall be the first laid off, provided there are qualified employees remaining to fill existing position.

The prior decision, after first finding the agreement terms ambiguous, concluded that under this agreement there was a layoff.

> . . . Without undue elaboration, the Arbitrator has preliminarily concluded that the movement of the six Nursing Assistants from full time to part time under the circumstances here present, constituted a layoff under the terms of Section 7.04 of the agreement. The remaining question, accordingly, is did the Employer violate this section of the agreement in accomplishing the "layoff?"

SAUK COUNTY, P.12.

[1] See below as to application of seniority in a layoff situation.

Arbitrator Petrie also stated in the Award:

> (4) The movement of the six Nursing Assistants from full time to the part time status constituted a seniority move or a layoff, and the action must be consistent with the limitations contained in Section 7.04.

SAUK COUNTY, P.16 (emphasis supplied).

With virtually the same language[2] and the same reductions within a classification from full time positions to part time positions, this presents a very compelling reason to come to the same conclusion. The prior decision is a neutral interpretation of important language that the parties had previously bargained for and have worked under since at least 1987. The decision and its reasoning as to layoff is not unreasonable, even though there may be other views.[3] To come to a different conclusion given the same language and fact situation would foster a type of forum shopping. It would deprive both parties from reliance upon an arbitration decision which, as is often the case, both parties rely on for guidance. The parties agreed to binding arbitration and honoring a prior arbitration award is in accordance with the agreement whose language on arbitration has not been shown to have materially changed. Moreover, arbitral authority compels serious weight and consideration be given to a prior award, even if it may not rise to the status of *Stare Decisis* under the law. This is discussed in *How Arbitration Works,* Elkouri & Elkouri, 6th Ed., pp. 573 – 593, which is noted in part:

> Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative. This is true of arbitration awards rendered both by permanent umpires and by temporary or ad hoc arbitrators.
>
> . . .
>
> Prior awards issued by temporary arbitrators, also known as ad hoc arbitrators, also may have authoritative force. Their awards interpreting a collective bargaining agreement usually become binding parts of the agreement and will be followed by arbitrators thereafter. . . .

(Citations omitted)

[2] The word "probationary" has been changed to "introductory", which is not material to this point.

[3] See, for example, *How Arbitration Works,* Elkouri & Elkouri, 6th Ed., pp. 727, 728. See, also, AMPCO-PITTSBURGH CORP., 80 LA 472 (1982), which is also cited in the prior Petrie Award.

Accordingly, the reduction in hours of the four employees from full time to part time was a layoff.

The County argues that there has been a past practice of reducing hours or implementing layoffs by seniority within a classification,[4] as opposed to bargaining unit wide seniority. Those were the two matters grieved by the union. The undersigned does not find those two matters to constitute a binding past practice. The evidence generally required to establish a binging past practice is discussed in *How Arbitration Works,* Elkouri & Elkouri, 6th Ed.

> When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."
>
> Another commonly used formulation requires "clarity, consistency, and acceptability." The term "clarity" embraces the element of uniformity. The term "consistency" involves the element of repetition, and "acceptability" speaks to "mutuality" in the custom or practice. However, the mutual acceptance may be tacit-an implied mutual agreement arising by inference from the circumstances. While another factor sometimes considered is whether the activity was instituted by bilateral action or only by the action of one party, the lack of bilateral involvement should not necessarily be given controlling weight.

pp. 607-608 (citations omitted).

Here there is no evidence that implementing of layoffs by job classification, as opposed to bargaining unit wide, has been an accepted, agreed to practice because the Union did in fact grieve them. That is not an indication of accepting a mutually binding practice. The record is not clear as to what, if anything else may have happened in those two grievances. But they do not establish a binding past practice in this case.

The County also points to the prior Petrie decision as justification for applying seniority within the RLA classification as opposed to a bargaining unit wide reduction. The Petrie Award concluded that a reduction from full time to part time for certain Nursing Assistants implemented by job classification, rather than seniority applied bargaining unit wide, was

[4] Calculated bargaining unit wide but applied to a separate classification.

appropriate under the language of the seniority and layoff provisions in the parties' contract at that time. Here, however, there is a major change from the circumstances in 1987. Then the seniority clause language read:

> 7.01 Seniority. Each employee shall earn, accumulate or lose seniority as follows:
>
> A) While on probation, employees shall acquire and accumulate seniority;
> B) Employees who work a regular schedule of less than full-time, shall earn seniority pro-rata relative to full-time employment ;

In the agreement here, the language has been renegotiated in the meantime. This is a change in language that goes to the ambiguities which Arbitrator Petrie had identified. The language now reads:

> **9.01 Seniority:** Seniority shall be defined as the employee's length of service in the Bargaining Unit, commencing on the employee's most recent date of hire in the Health Care Center bargaining unit. Seniority shall apply to promotions, transfers, layoffs, recall from layoff, holiday scheduling, and vacation scheduling, as hereinafter provided. Part-time employees shall earn pro-rated seniority based on the number of hours worked relative to full-time (40 hours per week) employment.

The seniority is now clearly defined as bargaining unit wide. This affects the layoff language, which references seniority. It states:

> **9.09 Layoffs:** In the event of a layoff, introductory employees and seasonal employees will be laid off first. If further reductions are necessary, employees shall be laid off in the reverse order of their seniority; the last employee hired shall be the first laid off, provided there are qualified employees remaining to fill existing position.

With a layoff occurring for the four full time to part time RLAs, the contract requires seniority to be followed. Seniority is now defined by the agreement as bargaining unit wide. When the County "laid off" the four employees it did so on the basis of their relative seniority in the RLA classification, not bargaining unit wide as now required by the contract. Indeed

the County used bargaining unit wide seniority to calculate the relative seniority within the classification, but it did not use bargaining unit wide seniority in making the layoff. As the agreement requires, the County must make its layoff by first laying off introductory and seasonal employees, then, if necessary, in the reverse order of seniority with the last hired being the first laid off, assuming the four affected RLAs were otherwise qualified to perform the duties in available positions. In this case there is no question that RLAs are qualified and capable of performing the duties of CNAs. It is probable that they are also qualified to perform the duties of other classifications of work within the entire bargaining unit. It also appears that there were other CNAs, and other classification employees, who had less seniority than the four affected employees who would be subject to this layoff before the four RLAs. This may not be a particularly easy task for the County, but, faced with a lay off, it is what the parties agreed to do. That is what this agreement requires. The County violated the contract as to these four employees.

The Union argues that once the layoff happens then the affected employees, all of them, have a bumping right under the layoff clause. The Union argues this should be implied. But, that is not what the language says. It is not unusual for an agreement to have specific bumping rights language if that is what the parties negotiated, intended and agreed to. This is not a situation when such rights can be implied. There is nothing in the language or practice of the parties which implies a specific bumping right or procedure. The layoff language has a specifically different system, as noted above, in how to address a layoff. It is what the parties agreed to do. It is not bumping. This is a nursing home/FDD setting which does require that some of the employees be licensed and hold certain skills. The layoff language recognizes that qualifications are required to be considered and attained in effectuating the layoffs. To imply bumping rights in the face of the language of the agreement would require the arbitrator to effectively place language into the agreement which is not there. This an arbitrator cannot do. See. e.g, EDUCATIONAL ASSISTANT EMPLOYEES LOCAL 1750, AFSCME, AND SHEBOYGAN SCHOOL DISTRICT, CASE NO. 114, NO. 55641, MA-10063 (BURNS, AUGUST, 1998).

As to the other employees, their shifts, schedules and floor units were changed by the County. As discussed above, the County has management rights and hours of work responsibilities to make these changes. None of these other RLAs had their hours reduced by the County so as to constitute a layoff. They all remained employed by the County. None had their employment relationship severed. Although their personal lives and schedules may have been severely disrupted, that does not alter the language in the collective bargaining agreement in Article 3 and Article 10 which gives the County the right to determine schedules and shifts, and where they will be working. No seniority provision addresses this to limit the County. The changes made by the County were not filling open positions so that the posting provisions would apply. It is noted that there were additional hours and times on the FDD unit and elsewhere that these employees, like others, could potentially have posted to in order to get other hours of work. As noted above, arbitral precedent in a number of settings has followed persuasive reasoning in determining such actions by an employer do not constitute a layoff so as to implicate seniority provisions in a layoff clause. SUPERIOR MEMORIAL HOSPITAL,

CASE 21, NO. 50301, A-5165 (SHAW, SEPTEMBER, 1994); ATHENS SCHOOL DISTRICT, CASE 13, NO. 61756, MA-12056 (EMERY, OCTOBER, 2003); RICHLAND COUNTY, CASE 149, NO. 62365, MA-12254 (MCGILLIGAN, FEBRUARY, 2004). Seniority, particularly in this collective bargaining agreement, does not give any particular employee a right to any particular job or position. Seniority does involve the rights of the employees, relative to each other, to remain employed, provided they are qualified to perform necessary duties. All these employees remained employed without the loss of hours. The County did not violate the terms of the collective bargaining agreement in the way it implemented the restructuring as to these employees.

With the County having violated the contract by its actions relating to the four employees who were reduced from full time to part time, the matter of remedy remains. It appears that at least two of these employees posted into other full time shifts as a result of the restructuring. The record is unclear as to whether the remaining two may have either resigned or continued at part time. This may result in some variation of remedy. This involves reinstatement to full time and a make whole provision for losses in the interim.

The reinstatement matter is fairly straight forward. If the four had not been improperly laid off they would have continued as full time employees, rather than part time. To remedy this they should be allowed to resume full time work at the same pay grade and seniority as if they had not been "laid off". Whether the County actually has to lay off any other employee(s) to accomplish this is not the intent of this remedy. The County must offer full time work on a normally scheduled basis for these employees even if it does not have to layoff any other employees. If the County does need to lay off employees to accomplish this it is to be done by seniority bargaining unit wide, not by classification. Any of the four who accept such employment do not have a right to bump any other employees for any positions, shifts or hours.

There is also the make whole matter of back pay. As mentioned above, the record is not clear as to which of the four employees lost hours or worked only part time for some period before obtaining full time work at SCHCC. For any who actually lost hours and accept reinstatement at full time, they should be made whole for those hours provided they have mitigated their losses. The employees have a duty to mitigate their losses.

Generally, arbitrators have reduced the amount of back pay awarded by the amount of wages the grievant earned from interim employers during the period after the improper discharge, layoff or suspension and prior to reinstatement.[5] An aggrieved employee has a duty to attempt to mitigate any loss they might suffer as a result of an improper action of the employer.[6] Here, mitigation would include hours and wages available at SCHCC or with any interim employer.

[5] *Practice and Procedure in Labor arbitration,* Fairweather, 3rd Ed. p. 332.

[6] See, *Remedies in Arbitration,* Hill & Sinicropi, 2nd Ed. pp. 214 et. seq.

For those who stayed, there were other hours available to work and some did take advantage of that. That mitigates their losses. If any could have picked up other shifts and hours they had a duty to do so and that would mitigate their damages. If no such additional shifts or time would be available for them to make up for their lost hours, then the County shall make them whole for that time less any other earnings they may have made from work other than with the County. For any of the four who may have resigned, there is still a duty to mitigate. A reinstatement offer at full time is still required, but any back pay must be reduced by any amount they could have earned from hours or shifts that were otherwise made available at SCHCC after the restructuring, as well as any earnings from other employers after resignation.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is sustained as to the four employees who were reduced from full time to part time. The grievance is denied as to the other employees.

As a remedy, the County shall offer full time employment to the four employees at the same pay grade prior to restructuring and make them whole for mitigated lost wages and associated fringe benefits.

Dated at Madison, Wisconsin, this 26th day of March, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator

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