

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SAUK COUNTY**

and

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

Case 171  
No. 67785  
MA-14017

(Leatherberry Constructive Discharge Grievance)

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**Appearances:**

**Arlene Klazcek**, Assistant Corporation Counsel, 505 Broadway, Baraboo, Wisconsin 53913, appeared on behalf of Sauk County.

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

**ARBITRATION AWARD**

Sauk County, herein the County, and the Sauk County Health Care Center Employees' Union Local 3148, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The parties jointly filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Union concerning the termination of employment of one of its members, Staci Leatherberry, herein Leatherberry or the Grievant. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter of July 28, 2008 in Baraboo, Wisconsin. A transcript was prepared. The parties filed written briefs and the record was closed on October 27, 2008.

**ISSUES**

The County states the issues as:

Was Staci Leatherberry's resignation a constructive discharge by the County?

Did the County have a right to require the Employee to work third shift when she was under light duty restrictions for WC purposes?

The appropriate remedy would be to let the resignation stand.

The Union did not object to the County's statement of the issues, and defers to allow the arbitrator to frame the issue.

The undersigned frames the substantive issues as stated by the County, with the addition of a remedial issue as: If not, what is the appropriate remedy?

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 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in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement.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 workforce;
- 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 workforce;
- 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 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 a 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.

. . .

## **BACKGROUND AND FACTS**

The case is involved with a resignation from County employment by Grievant and whether it was a constructive discharge.

The County owns and operates a Health Care Center, SCHCC, which provides nursing home services to frail and elderly people, among other services. The County has employees at the SCHCC who work in various capacities. Grievant was employed there as a Certified Nursing Assistant, CNA, since January 2005. When she was hired she was provided access to and signed a receipt for a Sauk County Safety Manual which contained various policies and procedures for County employees. At the hearing in this matter she denied she was given a copy of the manual. In June 2005 she posted into a Category 1 day shift position and worked part time in that position until her employment with the County ended on or about September 7, 2007. Her regular work schedule, before an injury involved in this case, had generally been at least seventy (70) hours each two weeks at \$12.03 per hour.

On August 1, 2007 Grievant sustained a work related injury which her medical doctor characterized as a soft tissue strain in her shoulder. She returned to work with some light duty medical restrictions and continued to have pain and discomfort at work. The doctor eventually

took her off work and Grievant was subsequently placed on Workers Compensation. A further examination and MRI had revealed a partial tear in Grievant's rotator cuff and AC joint strain. She continued medical treatment. On September 4, 2007 her doctor released her to light duty work with restrictions not to lift any weight greater than 20 pounds, not to push or pull with her injured right shoulder, and not to use her shoulder at or above her chest. The doctor also had a medical restriction not to perform any overtime. She could work eight hours per day, four to six days per week. At that time there was no indication that these would be permanent work restrictions.

The County was promptly notified on September 4, 2007 of the light duty work restrictions for Grievant's return to work. Grievant's case nurse had given the County a call to let the County know that Grievant was returned to light duty. Grievant also brought the medical return to work forms from the doctor to the County that day. The County then considered its staffing needs and physical work limitations of Grievant to determine where and when she was needed and could perform, in its estimation, suitable, productive work as a CNA within those limitations. This discussion took place that day at the SCHHC and included the County Risk Manager, Carl Gruber, the Assistant Director of Nursing, Juli Brandt, and other SCHHC supervisors. The County followed its Transitional ("Return To Work") Work Program in doing this.

The program states in pertinent part:

### **Policy**

Sauk county will provide employees with an opportunity to "Return to Work" while on light duty with a work related injuries and/or illness. This policy will outline the proper procedures for implementing this program.

### **Policy Authorization**

- **Wisconsin Workers Compensation Act**
- **Wisconsin Department of Workforce Development DWD 80**
- **Wisconsin State Statute 102**
- **Property and Insurance Committee, December 7, 1998**
- **Resolution 11-02, January 15, 2002**

### **Program**

Sauk County has adopted a Transitional ("Return To Work") Work Program to assist employees who are returning to work after having sustained a work related injury. Only employees who have work related injuries are eligible for this program.

The advantages to this program are as follows: The employee is provided the opportunity to get back into the routine of the everyday work life and to again be a part of the “team”. Except at the Health Care Center, it will allow the employee to earn a full paycheck instead of only a partial check from the workers compensation carrier. For the County, it allows for the quick return of its most valuable resource, the **employee**, while providing an effective tool to reduce the costs associated with workers compensation coverage.

When an employee sustains a “work related injury”, it shall be reported in accordance with, the “County Accident Reporting Policy.” Once an employee seeks medical treatment for a work related injury or illness, and it is determined by a physician that the employee will be unable to return to work or will be limited in their abilities to perform their regular job duties, they will be eligible for our Transitional (“Return To Work”) Work Program.

\* If an employee will not be able to return to work in any capacity, The employer {i.e. Safety/Risk Manager, Department Head, Nurse(where applicable) and/or personnel Director} must be notified prior to the employee leaving the physicians office.

\* If an employee is allowed to return to work with restrictions, he/she must contact the employer {i.e. Safety/Risk Manager, Department Head, Nurse(where applicable) and/or Personnel Director} immediately after the physicians visit. All County provided forms, and other medical forms, must be presented at this time to the employer with all work and nonwork related restrictions indicated by the physician.

Once an employee is placed into the Transitional (“Return To Work”) Work Program the employer will develop a suitable, productive work schedule that fits within the restrictions until a plateau of healing has been reached. At that time, the employee will be removed from the program.

Upon removal from the Transitional Work Program, employees will be returned to their regular job duties, provided there are no further restrictions. In the event that there are permanent restrictions, the job duties will be evaluated by the employer to assure that the employee can perform the essential functions of the job with or without accommodations prior to an employee being returned to their regular job duties.

(emphasis supplied)

This program is contained in the Sauk County Safety Manual which Grievant had signed the receipt for when hired. The policy is also available on the Sauk County Intranet. Under this policy the County has returned employees on light duty to work on different shifts and different times than their regular hours as temporary job duties until a plateau of healing is reached.

The type of light duty assigned to CNAs were things like: punching holes in nurses notes and similar things that could then be put in charts; collecting and cleaning bed pans and urinals; clean cushions in wheelchairs; clean wheelchairs themselves; and, handing out some items.

When the County was informed of Grievant's work restrictions there were already two other CNAs at the SCHHC on light duty. One was Jodi Mittlesteadt, who Grievant was actually living with at the time, and the other was Laura Borkenhagen. They were both on first shift. The SCHHC had enough light duty work for one or two people on first shift, but not enough light duty work on that shift for three without putting a burden on the other employees. Both were working the first shift, but as of that day the County planned to put one light duty CNA on each of the three shifts. They determined to do that on the basis of whichever one returned to work first would get the first shift, who came second would get the second shift, and the one who returned third would get the third shift. Borkenhagen was to be moved to the second shift and she had previously been made aware of that. Grievant would be the third to return, and thus got the third shift. The County felt that Grievant would have productive work to do within her limitations on third shift. If one of the other light duty CNAs returned to full, regular duty then Grievant could be moved to a different shift. As of September 7<sup>th</sup> all three of these CNAs had light duty restrictions. Grievant, like the others, would be returned to her full duty and regular shift once her medical light duty restrictions were removed by her doctor.

Borkenhagen had a doctor's appointment on September 7<sup>th</sup>. She returned to work on September 10<sup>th</sup> with a doctor's receipt to return back to work full duty. The SCHHC did not have the information about Borkenhagen's full duty return until September 10<sup>th</sup>. Borkenhagen was not moved to second shift because she had been returned to full duty. As of September 7<sup>th</sup>, the date that Grievant made her resignation effective, the SCHHC only knew it had the three CNAs on light duty restrictions, all three having a regular work schedule on first shift. After SCHHC became aware that Borkenhagen was returned to full duty there was productive light duty work available on second shift. Grievant could then have been moved to the second or possibly even the first shift for this light duty work.

Gruber had a telephone conversation with Grievant on September 4<sup>th</sup> to let her know what her light duty assignment was going to be that met within the restrictions. He told her to report to work for the third shift at 11:00 p.m. on September 7, 2007 at the SCHHC. Grievant

responded that she was very concerned about child care and day care for her two children, and who would pay for that. She said her husband works third shift. She became excited or agitated. Gruber informed her that neither the County nor Workers Compensation paid for child care, that it was not covered under the union contract, and she would need to make her own arrangements. Grievant told him she would not show up on that shift, that she had seniority over others on light duty, the contract required more notice, what the County was doing was illegal, and other similar things. Gruber asked her for her mailing address to send a letter to her about the September 7th work assignment. She gave him a Baraboo address which was a home she just moved out of. She had recently moved to Reedsburg but refused to give the County her new mailing address. After the telephone conversation Gruber mailed the letter he had referenced in the call, dated September 4, 2007 which directed Grievant to report on September 7, 2007 at 11:00 p.m., and sent an email of September 4, 2007 to variously involved County personnel about the substance of the telephone call that day. After that he did not discuss with anyone making a shift change for Grievant.

At the time, Grievant's two children were ages 3 and 4 years. Her husband works days, with varying starting times between 7:00 and 9:00 a.m., for a different employer in Reedsburg. Grievant and her family had recently moved from Baraboo to Reedsburg and were staying with another SCHHC employee, Mittlesteadt, her children and disabled brother. Grievant's grandmother, who lives in Baraboo, had normally helped Grievant with child care and getting her two children on the 7:00 a.m. Head Start buss. Grievant's grandmother also took care of Grievant's minor sister, and Grievant considered her grandmother unavailable or unable to help with childcare in Reedsburg if Grievant would have to work a third shift starting at 11:00 p.m. and ending at 7:30 a.m.

After the telephone conversation with Gruber, Grievant called the Assistant Director of Nursing, Julie Brandt, indicating among other things her child care problem for the third shift, asked if she could be put on the second shift and said she'd have to quit if she could not at least go to second shift. Grievant told Brandt that Gruber had threatened to fire her if she did not show up. Brandt responded that Gruber did not have the duty to fire people for not coming to work, that she was expected to work that night shift, and that if she did not report to work she was refusing a work assignment and would be subject to discipline. Brandt discussed with Grievant the fact that the person Grievant was staying with, Jodi Mittlesteadt, was also a CNA at SCHHC on first shift, and perhaps there could be a child care arrangement between them, with the County looking into scheduling around the overlap in starting and ending times of the two shifts. Grievant responded that that was not acceptable because she didn't think that Jodi should be able to do that or should have to do that.

At some point after September 4<sup>th</sup> Grievant spoke with another SCHHC coworker, Laura Brokenhagen, who was also on light duty. Grievant understood that Brokenhagen was willing to work the third shift so that Grievant could work the first shift on light duty. Grievant did not pass this information on to the County and did not request of anyone else at the County to make or allow this shift switch.

Grievant and Brandt had a telephone conversation the morning of September 7<sup>th</sup> wherein Grievant told Brandt she'd been up since 6:00 a.m. taking care of her children and Mittlesteadt's disabled brother, and she'd be tired if reporting to work at 11:00 p.m. that night. Brandt told her she was expected to report to work or be subject to discipline. Later on September 7<sup>th</sup> Grievant left a voice mail for Brandt indicating that she was resigning effective immediately, that she was not abandoning her patients and was giving notice of her resignation to allow enough time to find a replacement for her. After one of her earlier telephone conversations with Brandt,<sup>1</sup> Grievant wrote a short resignation letter that is dated for September 7<sup>th</sup>. Grievant testified at the hearing that she delivered it to personnel on September 6<sup>th</sup> to be effective for September 7<sup>th</sup>, even though it is dated September 7<sup>th</sup>. However, County email traffic from the afternoon of September 7<sup>th</sup> indicates this resignation letter was the subject of a telephone conversation between Grievant and personnel, who had informed Grievant that they had heard her voice mail resignation but that resignations needed to be in writing. Grievant responded that she already had a resignation letter written, and would drop it off later that afternoon. Grievant was told that if no one were in the personnel office she should put it under the door. These matters are substantiated by the testimony of Grievant and Brandt as to their conversations with each other, and Gruber's and Brandt's testimony as to the events identified in Brandt's email which are then referenced in the email from the Personnel Department (Exhibit C7), with the distinction of an apparent confusion in dates as discussed below. This is also consistent with September 7, 2007 being a Friday and September 10<sup>th</sup> being a Monday. Grievant did deliver a resignation letter to SCHCC, which was file stamped as received September 10, 2007.

Grievant did not report for or return to work on September 7<sup>th</sup> or thereafter. Her husband signed a receipt on September 10, 2007 for the September 4<sup>th</sup> letter from Gruber.

On September 18, 2007 the Union filed a grievance with the County contending the County constructively terminated Grievant by threatening to fire her if she did not change her schedule with only 12 hours notice. The grievance contended the County violated Article 3.01(e) Management Rights, Section 10.09 Hours of Work, and any other relevant parts/sections or practices under the contract. The County denied the grievance, which led to this arbitration.

Further facts appear as are in the discussion.

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<sup>1</sup> The record is not clear if this telephone conversation was one immediately following the Gruber call or the one on September 7<sup>th</sup>.



## **POSITIONS OF THE PARTIES**

### **The Union**

In summary, the Union argues several disputed fact matters: that Grievant was released to light duty on September 5th; that Carl Gruber called her informing her she was to return to work that night on third shift despite Grievant needing child care and being up all day so that she'd report to work tired; that Grievant then called Juli Brandt discussing Gruber's decision to assign her third shift beginning in just 7 hours; that Brandt called her back the next day, September 6<sup>th</sup>, stating she needed to report to work as instructed by Gruber; and, having no other avenue to attempt to change her third shift assignment, Grievant contacted the SCHHC by phone and in writing to resign her position.

On the merits the Union argues, in summary, that the County created a situation which forced Grievant to involuntarily leave her employment with the County by ordering her to report for third shift duty following an on the job injury. The Union contends that the actions of the County rise to the level of a constructive termination. It argues that most arbitrators agree that for a constructive discharge to have occurred an employer must intentionally make working conditions so intolerable to a reasonable person that the person is forced to involuntarily resign. Arbitrators use varying methods to determine the standard:

- Did the employer recently change a working condition that led directly to the resignation and thus, a constructive discharge?
- Did the change and the resignation occur close enough in time, to have established a "cause and effect" relationship?
- Was the change so extraordinary and intolerable that it would have caused any reasonable employee to quit under the same circumstances?

Here the County was unilaterally forcing Grievant off her regular day shift to a third shift assignment because of her work restriction caused by work and covered by Workmen's Compensation. She immediately notified Gruber of her child care problem as the reason it was not possible to work the third shift. Gruber told her it was not his concern. Even when Grievant told him the Union contract requires a one month notice to change a regular shift, Gruber asserted his right to reassign her. Grievant attempted to resolve the dilemma by calling the Assistant Director of Nursing, asking for second shift to be able to provide child care and maintain her job. As a last effort Grievant spoke with Borkenhagen who was on light duty and willing to work the third shift. All efforts failed. And Grievant was forced to choose between childcare for her 3 and 4 year old children or being transferred to third shift. She made the reasonable decision to put the children's welfare first. She resigned herself that no one from management was willing to work with her on the issue and based on the intolerable actions of management immediately resigned.

The Union argues that Grievant raised concerns about not being able to provide child care and that the Union contract (Section 10.09, Hours of Work) requires a one month notice when modifying an employee's regular work schedule. The County relied on language in the Safety Manual allowing reassignment to other shifts and to a productive work assignment. When questioned about the conflict between the Safety Manual and the Union contract, Gruber admitted he was not familiar with the Union contract, that the change was allowed per the Safety Manual and shift changes of a similar nature had occurred previously. A cursory review of the Safety Manual finds no language that suggests the County can change an employee's shift. Additionally, the Manual does not supersede the clear and unambiguous language of the Collective Bargaining Agreement which states "A regular work schedule shall not be changed except with one (1) month advance notice to the employee."

The Union contends that Gruber maintained his tough and insensitive position regarding daycare, telling Grievant it was her problem, not the County's, that he was above the union and he was the law. Gruber was simply not willing to view her concerns as legitimate. While Gruber's concern about having too many light duty employees on first shift is legitimate, with a little further examination he would have learned that one of those employees was released from light duty on September 7<sup>th</sup> and would return to regular assignment on September 10<sup>th</sup>. Grievant would then have been able to work 2<sup>nd</sup> shift, a shift she had already enquired about. Brandt knew Borkenhagen was returning to the doctor on September 7<sup>th</sup>, making it easy to assume Brandt knew that prior to September 7<sup>th</sup>; and, Brandt was aware at that time that Grievant could not provide child care if assigned to that shift as of September 7<sup>th</sup>, and that she could if assigned to day or second shift.

The Union argues that Gruber was notified on September 4<sup>th</sup> that Grievant was released to return to work, and called Grievant around 2:51 p.m. instructing her to return at 11:00 p.m. that night, seven (7) hours later, which would have been the beginning of the September 5<sup>th</sup> night shift. There is no evidence that getting Grievant back to work had to be accomplished within seven (7) hours. By taking a few days to see if anything could be done to address Grievant's concerns everything would have worked it out. Borkenhagen knew within two (2) days she was released from light duty and a position on the PM shift would have been available for Grievant.

The Union further argues that if the County had not created a totally intolerable situation Grievant would have continued her employment. Given the available options and the rush to reassign Grievant's shift with only seven (7) hours notice, even after being notified of the inability to provide child care, the County's decision was intentional and it knew the potential results of their actions. Any reasonable person would come to the same conclusion as Grievant and resign to protect their children. And the County recently changed a working condition that led directly to the resignation, and thus a constructive discharge. Immediately upon being notified the afternoon of September 4<sup>th</sup> to return to work at 11:00 p.m. that night Grievant told Gruber that was not possible due to child care and she followed up by speaking

with Brandt, who told her that her hands were tied. Seeing no one was attempting to help her resolve this serious issue, she resigned immediately. This also suffices to show the cause and effect relationship between the shift change notification and resignation. And the change was so extraordinary and intolerable that it would have caused any reasonable employee to quit under the same circumstances. Responsibilities of parenthood are extreme. Grievant had the parental and legal responsibility. We have read about the mother forced to go to work with no childcare leaving children in the car outside the workplace. Those stories seldom have a good outcome. And for leaving children at home while mother works, nothing good ever comes from that lack of judgment. Grievant made a decision to protect her children and follow the law and not subject her children to bad choices. Any reasonable person would have done the same. The County could have cared less. No one took any time to totally evaluate the situation and find a satisfactory resolution.

The Union also argues that the County blatantly violated the CBA by failing to provide the required one month advance notice of a shift change. Had the County followed the CBA, Borkenhagen would have been released from light duty and the County could have easily accommodated Grievant's request to work PM in order to provide adequate child care.

The Union requests that Grievant be reinstated and made whole.

### **The County**

In summary, the County argues as fact matters: Grievant and Gruber spoke on September 4<sup>th</sup>; Gruber requested Grievant return to work September 7<sup>th</sup>; Grievant told Brandt on September 7<sup>th</sup>, not Gruber, that she had been up all day and would have to report to work tired; there is no indication that Brandt's conversation with Borkenhagen the week of September 3 through September 7<sup>th</sup> included a discussion regarding her doctor appointment; and, Brandt became aware of Brokenhagen's full duty on September 10<sup>th</sup>, after Grievant had given notice of terminating employment.

On the merits, in summary the County argues that the standard for a constructive discharge is that conditions were so intolerable that a reasonable person confronted with the same circumstances would have been compelled to resign. The level of intolerability must be unusually aggravating and surpass isolated incidents of misconduct, injustice or disappointment, citing legal and arbitral authority and examples. A thirty day notice is only required with a change of regular schedule. This light duty change was not a change in Grievant's regular schedule, which is customary, usual or normal. This is distinct from unusual circumstances, including worker's compensation or ADA.

The County argues there is past practice to show the County has, without grievances, required different hours on light duty. A change in schedule for short periods like weekends and overtime was expected.

The County contends it had a right to require Grievant to work third shift on light duty to properly accommodate her restrictions and comply with the Return To Work policy. The contract allows management to set the terms of employment, including the policies in the Safety Manual. The 30-day notice does not apply because the County was not changing the work schedule, instead it was accommodating restrictions. Per the contract, the County had the right to comply with state law. Workers Compensation and ADA requires accommodations be made for work restrictions. The policy reflects that. To impose a 30-day restriction on fulfilling this requirement would not make sense for either employee or employer. A regular work schedule recognizes there are times employees will not be working their regular work schedule. In this case the change was temporary. It would not have lasted past September 10<sup>th</sup> if Grievant has worked with the employer to accommodate her restrictions. The employer had valid reasons for its action, to ensure productive work could be had by each light duty employee, which could not happen if all three were on the same shift.

The County also argues that a reasonable person would not have felt compelled to terminate her employment in these circumstances. The County did not make Grievant think she was terminated, instead they asked her to come into work. She had many options. For example, had she waited one day, or let the County know someone was willing to trade shifts. She waited three days before terminating her employment. She thought about what she wanted to do and this was not a heat of the moment decision. She was not happy with the County. She did not trust the County as shown by her odd refusal to accept the fact that she received the safety manual and that the County was somehow hiding this manual, which is on the intranet and receipted for. She refused to give the County her correct address. Even if an employee is mistaken on their rights under a contract, it does not rise to the level of forcing the resignation. One small mistake by the County is not enough to force a person to leave employment. She stopped trying to work this out. She was tired.

The County argues these cases are almost like just cause for termination, but in reverse. It cannot and should not be mere regret that makes her want her job back, but her state of mind at the time. Here the employer acted in good faith and did not attempt to get rid of the employee.

The County argues that Grievant was not constructively terminated from her employment. She resigned of her own free will. She had other choices and a similarly situated reasonable employee would not have resigned. No constructive discharge can occur if the County acted reasonably and not illegally. The County acted within the bounds of the law and the contract. The County had a right and duty to provide suitable light shift work and a right to impose reasonable and necessary changes in work schedules to employees on Workers Comp with work restrictions. Even if a contract violation had occurred, it was an isolated event that did not rise to the level of a constructive discharge. Grievant could have told the

County she's spoken to Borkenhagen who was willing to switch shifts, but she never did tell the County. She should have. This "impossible situation" would have been solved. There was no threat of termination. She was never told to work or be fired. She possibly would have been disciplined, but not fired. In a constructive discharge case the choice is between some impossible or illegal task, or to be fired. There is a requirement of more than one isolated incident. The Union has not met these tests. There was no impossible or illegal task, no pattern of behavior, and no threat of termination. Grievant had daycare options, including her grandmother, roommate and husband. Third and first shifts overlap, so if grandmother was available for one she would be available for the other. Head Start is not a legal requirement. While not ideal, missing school a few times was an option. Grievant's roommate was potentially available for a limited term. Greivant's own husband, who worked days, had a duty to watch his own children while not at work.

The County further argues that no working conditions were changed. Grievant's regular schedule was a first shift. When she became injured the County accommodated her work restrictions to the best of their ability and through a legal process. It is not tough and insensitive to require an employee to provide his or her own daycare. Gruber explained it would be like any other employee for Sauk county. We each take care of our own daycare.

## DISCUSSION

### Fact Issues

The testimony and evidence at the hearing along with the parties' briefs present several fact questions as set out in the positions of the parties. This has to do mostly with the particular dates of telephone conversations between Grievant, Gruber, and Brandt, whether Gruber threatened to fire Grievant or told her to report to work in seven hours, and when Grievant delivered her written resignation letter. As seen in the above Background and Facts, the County's version of these events is largely adopted. They are more accurate and credible.

Grievant testified that she had her telephone conversation with Gruber on September 5<sup>th</sup>, Gruber says it was on September 4<sup>th</sup>. Grievant delivered her doctors form to the County on September 4<sup>th</sup>, and the case nurse called the County on September 4<sup>th</sup>, the same day as Grievant's doctor appointment. Gruber testified, unchallenged, that he and SCHCC supervisors discussed Grievant's light duty scheduling on September 4<sup>th</sup>. Gruber also informed Grievant in the telephone conversation of the contents of the letter he was sending to her, which is dated September 4<sup>th</sup>. He also sent an email on September 4<sup>th</sup> to other involved personnel outlining the phone conversation he had with Grievant. And, the Union brief argues, at p. 16, that Gruber was notified on Tuesday, September 4<sup>th</sup> that Grievant was released to return to work, he called Grievant some time around 2:15 p.m. instructing her to return at 11:00 p.m. that night, seven hours later, which would be the beginning of the September 5<sup>th</sup> night shift. These circumstances persuade the undersigned that the telephone conversation

happened on September 4<sup>th</sup>. I am also persuaded that Gruber did not tell Grievant that she was to report to work at 11:00 p.m. on September 4<sup>th</sup> or told her that she would be fired. His letter specifically requested her to report to work on September 7<sup>th</sup>. He told Grievant about the contents of the letter when he spoke to her. Grievant's conversations with Brandt occurred at least one, and more likely three days later when Grievant told Brandt she has been up since 6:00 a.m. and would be tired that night for the 11:00 p.m. shift. This conversation is found to have been held on September 7<sup>th</sup> as evidenced by Brandt's testimony and the emails from her and SCHCC personnel of September 7<sup>th</sup>. Grievant's statement to Brandt is consistent with having been informed by Gruber to report on September 7<sup>th</sup>, not September 4<sup>th</sup>. And Grievant herself testified that she received a return phone call from Brandt the following day wherein Brandt informed her she had to report to work as directed by Gruber. This is also consistent with Grievant having been requested by Gruber to report on September 7<sup>th</sup>, and him not having given her only seven hours notice.

Grievant's claim that she was told by Gruber that she would be fired and that he was above the union contract and the law is also not persuasive. Gruber denied making these statements. Brandt told Grievant that it is not Gruber's duty to fire people, which it isn't. He has no reason to make such statements. He did tell her that child care is not covered by the union contract. Grievant's ability to understand and recall her conversation with Gruber is also weakened, which in turn draws into question her accuracy. She was in an excited or agitated condition, which can account for confusion in what she was hearing and understanding. She refused to give Gruber her new mailing address, and the record also indicates the County having some difficulty in getting a telephone number from her. Gruber testified credibly that he did not make those statements. Grievant has not proved that Gruber made those statements, by any standard.

It is further determined that Grievant delivered her termination letter on September 7<sup>th</sup>, not September 6<sup>th</sup> as she testified. This is based on the reference in the September 7<sup>th</sup> email traffic of the County referencing a statement by Grievant of that day that she would drop it off later, after she was told that day it needed to be in writing. And the same email traffic indicates she was told to put it under the door if no one were at the personnel office when she got there. Grievant testified that she could not remember who she gave it to. It is file stamped September 10<sup>th</sup>, a Monday. This is all consistent with Grievant having delivered the resignation letter late in the day on Friday, September 7<sup>th</sup> by putting it under the door, no one being there to receipt for it because of the start of the weekend.

It is also determined that she received the Safety Manual because she signed a receipt for it. This is evidence that she had it, at least at one point in time. If she signed for it and did not have it, that would seriously undercut her credibility as well because she would be indicating something in writing that she knew was not true. The undersigned is not persuaded by her testimony that the County kept the manual from her or any other employee. It was also available on the County Intranet.

### Substantive Merits

Grievant contends that the actions of the County rise to the level of a constructive termination. This is alternately termed a constructive discharge. The collective bargaining agreement at Article 3.01 C) requires just cause to discharge an employee. The argument is that Grievant's resignation was a constructive discharge without just cause, and that the County's actions violated the notice and scheduling provisions of Article 10.09. The County denies there was a constructive discharge or that it violated the schedule and notice provisions of the agreement, and that Grievant voluntarily resigned.

The parties have argued similar, but somewhat differently phrased, standards or definitions of what constitutes a constructive termination or discharge. The Union, without citation to source or authority, argues a three part standard:

- Did the employer recently change a working condition that led directly to the resignation and thus, a constructive discharge?
- Did the change and the resignation occur close enough in time, to have established a "cause and effect" relationship?
- Was the change so extraordinary and intolerable that it would have caused any reasonable employee to quit under the same circumstances?

The County argues the standard defined by the Wisconsin Supreme Court in *STROZINSKY V. SCHOOL DISTRICT OF BROWN DEER*, 2000 WI 97, 237 WIS.2D 19, 614 N.W.2D 443, where the Court was addressing a limited exception to the employment at will doctrine in Wisconsin:

that the conditions were so intolerable that a reasonable person confronted with same circumstances would have been compelled to resign. The level of intolerability must be unusually aggravating and surpass isolated incidents of misconduct, injustice or disappointment. *ID.*, at 66-67.

The County cites this as the standard stated in *KENOSHA SCHOOL BUS DRIVERS AND MONITORS INDEPENDENT UNION AND LAIDLAW TRANSIT, INC.*, DEC. A-6217 WERC (LEVITAN, 1/05/2007). The essence of both versions of the standard, and that used by other arbitrations in constructive discharge cases, is that the conditions must be intolerable to the point that a reasonable employee would be caused or compelled to quit or resign. That is the standard I will apply here.

According to the Grievant, the County forced her to choose between fulfilling her legal obligation to provide supervision for her children and keeping her employment. The County challenges that she actually did face such a choice because her children could have been looked after by her husband, mother, Mittlesteadt, or simply not gone to Head Start for a few days. Importantly, the County never commanded Grievant to perform an illegal act (leaving her children unsupervised or uncared for), nor did the County do anything that could reasonably be

interpreted to mean it preferred Grievant to abandon a legal obligation rather than fulfill it. The County would have been completely satisfied if the Grievant made arrangements for her children's supervision and reported to work as they desired. As Gruber indeed told Grievant, it is not the County's responsibility to provide child care, and she must meet those needs like all other employees do. Therefore, if a constructive discharge occurred in this case it can only be if the County created an intolerable situation in which a reasonable person would be compelled to resign.

It is the change in shift to the third shift which is at the heart of Grievant's case as the reason she was compelled to resign. The other working conditions are not at issue. She had worked light duty before due to the same injury and there is no complaint that the light duty assignment itself caused the resignation. The parties differ as to whether there was enough productive work to be done on third shift, but that is a prerogative of the County to decide under the Management Rights clause of the collective bargaining agreement. As to the actual light duties and working conditions themselves, shift aside for the moment, there is little evidence that the working conditions for the County was hostile or in any other way untenable. At the hearing Grievant did state that she did not get along with one particular supervisor whom Grievant contended was always writing her up for what Grievant felt were unsubstantiated infractions. But this was not explored or developed by either party. Grievant did note that she got along well with other supervisions, including Brandt, the Assistant Director of Nursing. And in fact, Grievant seems to have enjoyed performing her work. An intolerable working condition could only have existed by changing her schedule to third shift while she was on light duty medical restrictions, which conflicted with her childcare needs. Grievant contends that this change in her schedule on short notice in violation of the collective bargaining agreement did exactly this.

Grievant makes several arguments as to the timing of the change of shift and the notice to her. She first argues that she was told by Gruber to report with only seven hours prior notice of the shift change. She also argues that she did not get a thirty (30) day shift change notice. The Union argues that Section 10.09 Hours of work requires a thirty day notice and that the Safety Manual policy on Return To Work does not supersede the contract. The Union argues the policy does not contain language that allows it to change an employee's shift. The first of the Union's arguments fails as a matter of fact. Gruber told Grievant to report at 11:00 p.m. on September 7<sup>th</sup>, and his conversation with her was on September 4<sup>th</sup>. Grievant had much more than seven (7) hours notice. This was not a violation of the contract. This also weakens Grievant's argument about not being able to arrange for child care in that she had more than three days, not less than seven hours, to address the problem. Nor was this a violation of the one (1) month advance notice in Section 10.09 for a change in a regular work schedule. The light duty assignment was a temporary assignment. It was not a change in a regular schedule to which the one (1) month notice in Section 10.09 would apply. The County does have the Management Right to make the type of temporary changes needed to comply with workers compensation laws, the Americans with Disabilities Act, and other limited reasons, as long as



they are temporary. The Return To Work policy is that type of temporary adjustment. Its terms clearly state that once a plateau of healing is reached the employee will be removed from the program. As the County argues, by assigning light duty work on third shift it did not alter her regular schedule, but rather changed her work hours on a temporary basis until she could be returned to her regular schedule. A regular schedule means usual hours of work as distinguished from exclusive hours of work. This is consistent with arbitral precedent, e.g., JACKSON COUNTY, MA-12338 (HOULIHAN, 3/05). There is no guarantee in the contract that the employee's work hours will always be the same under all circumstances. Grievant's regular hours of work were not altered by the assignment to third shift while on light duty and therefore the County was not required to provide a month's notice and it did not violate Section 10.09 of the contract.

Grievant argues that she was threatened by Gruber that she would be fired if she did not report to work. But as noted earlier, this is not what happened. Gruber did not threaten to fire Grievant. Brandt also refuted this to Grievant, while reminding her that she would be disciplined if she did not report to work as instructed. This would have merely put into effect, in a reverse way, the old notion of work now, grieve later, had Grievant simply not reported for work and been disciplined, rather than resign. But not having been told she would be fired, Grievant was not put in the position of having to quit or be fired.

Whether Grievant was compelled to quit must look at the particular circumstances and whether her decision was reasonable under those circumstances. Here there is more each party could have done. The County could have asked Grievant to report at a later date after learning of her childcare concern. But that is a concern that many employees must manage and that does not make the working conditions intolerable. The County might have told her how long they expected the light duty to last, but that would be up to the doctor, not the County and that would not solve Grievant's immediate child care problem. There is no question that this was a light duty assignment and there is no reasonable expectation that it was a permanent change in schedule. Grievant's problem was not permanent. The County might have suggested to Grievant to ask to be placed on an unpaid leave status or explore other time off options under the contract until second shift light work opened up. But, Grievant herself did not pursue this either. It is difficult to say the County acted unreasonably when Grievant herself did not seek these types of options. The standard does not require the employer to look for or consider all possible alternatives, but that it created an intolerable working condition. The standard requires that the employee must act as a reasonable employee. It makes it difficult for Grievant to persuasively argue that the County was acting intolerably when she herself did not make efforts to explore other contractual options. She did say to Gruber that he was violating the contract. She did not suggest a contractual solution other than seniority, which even the Union does not argue is a factor in this case. Grievant did not seek to have her Union help her or intervene before she resigned. This is something she might have done. To not have done so does not add to the reasonableness of her decision.

There is the obvious matter of having three first shift CNAs on light duty restrictions at the same time, and how scheduling them might resolve this problem. It is first important to note that the County did not know until September 10<sup>th</sup> that Borkenhagen would be released to

regular duty on September 10<sup>th</sup>. Grievant submitted her resignation before then. It is not intolerable for the County not to have known this. More realistically is the matter of changing or switching shifts among the three CNAs. Here the County was actually more reasonable than Grievant. It started with a seemingly reasonable schedule of having the first, second and third restricted employee work shifts in that manner. This is not intentionally trying to make things intolerable for Grievant. When Grievant brought up her child care concern the County, through Brandt, suggested that Mittlesteadt help temporarily with child care and the County would try to schedule the starting and ending times of the two shifts to accomplish that. This is not intentionally trying to make things intolerable for Grievant. Grievant refused to consider this arrangement. It was not intolerable for the County to have tried to make this accommodation. Secondly, Grievant knew that Borkenhagen was willing to trade shifts, but Grievant did not tell the County this. The standard requires the employee to act as a reasonable employee in making the decision. With Grievant having the ability herself to suggest to the County a solution that appears reasonable and workable, it is difficult to say that Grievant acted reasonably by not telling the County about this, even if the County had not considered switching with Borkenhagen as well. Thus, Grievant declined to pursue a reasonable effort with Mittlesteadt and declined to inform the County of a reasonably available solution with Borkenhagen. In the face of these two reasonable possibilities which Grievant effectively refused to pursue, it is difficult to see how she acted reasonably, or that the County created an intolerable working condition.

There are the further arguments put forth by the County that other options existed for Grievant's childcare. The most striking is whether Grievant's husband could care for his own children. The evidence at the hearing was that he worked dayshifts that varied in start time. There was no evidence that he did anything to be able or available to care for his children during the early morning hours and when they would need to be ready to get on the bus. There is also the unfortunate circumstance that the children might indeed need to miss some Head Start classes for some time. That is not a desirable outcome. But it is a reasonable consideration in the face of continued employment. At the end of the day, the County did not create Grievant's living conditions. It did try to accommodate her child care scheduling problem so that it could further accommodate Grievant being gainfully employed at a full rate of pay while on light duty. Grievant did not take advantage of at least two options for scheduling changes and other personal options to meet her problem. Grievant's refusal to tell the County what her new address was and her having also been slow to tell the County her telephone number are further indications that Grievant was not cooperating with the County.

Under the circumstances in this case, the Grievant has not persuasively shown that the County created any intolerable working conditions, or that Grievant conducted herself and made her decision as a reasonable employee. She chose to submit her resignation. She was not forced to do so or pressured to do so. She had three days to consider her situation and to make alternative childcare arrangements. She knew by mid afternoon on September 4<sup>th</sup> when she was expected to report to work on the 7<sup>th</sup>. She did not make her telephone resignation until

September 7<sup>th</sup>. Even after that the County contacted her again that day to inform her that a resignation needed to be in writing. Grievant did not submit a written resignation until the late afternoon of September 7<sup>th</sup>. Grievant's resignation was voluntary and was not a constructive discharge or in violation of the collective bargaining agreement.

The County has made a past practice argument that temporary light duty assignments such as this are an accepted past practice of the parties. The facts in support of such arguments are not well developed. A persuasive argument has not been made for any past practice. But given the above determinations that the County did not create an intolerable working condition and the Grievant did not act as a reasonable employee, the existence of the practice proffered by the County is not needed to decide this case.

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

**AWARD**

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 23<sup>rd</sup> day of January, 2009.

Paul Gordon /s/

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Paul Gordon, Commissioner