

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY HEALTH CARE CENTERS EMPLOYEES,
LOCAL 2427 OF THE AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**HUMAN RESOURCES COMMITTEE OF
THE SHEBOYGAN COUNTY BOARD OF SUPERVISORS**

Case 395
No. 68043
MA-14103

Appearances:

Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, for Sheboygan County Health Care Centers Employees, Local 2427 of the American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

Michael J. Collard, Sheboygan County Human Resources Director, 580 New York Avenue, Room 336, Sheboygan, Wisconsin 53081, for Human Resources Committee of the Sheboygan County Board of Supervisors, which is referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested and the County agreed that that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve three grievances, including the shift giveaway grievance which is captioned above and which the Union filed on behalf of "all nursing staff of Local 2427." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on October 10, 2008, in Plymouth, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by December 8, 2008.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate Article 8, Section I of the collective bargaining agreement when it denied the shift giveaway request made by Marilyn Lauersdorf on December 8, 2007?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

. . .

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its Health Care Centers. The Union agrees at all times as far as it has within its powers to preserve and maintain the best care and all humanitarian consideration of the patients at said Health Care Centers and otherwise further the public interests of Sheboygan County.

In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof. . . .

ARTICLE 8

WORK DAY/WEEK, SCHEDULES, SHIFT DIFFERENTIAL

I. WORK DAY/WORK WEEK

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

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

There will be no split shifting except in emergency situations.

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

...

ARTICLE 14

CALL-IN PROCEDURES

A. Voluntary Call-In List

1. Schedules shall be posted for periods of either a calendar month or a four-week period, at the County's option.
2. Part-time and full-time employees may volunteer to work additional hours that they are not scheduled to work on the regular posted schedule by signing a volunteer call-in list which will be posted next to the schedule.
3. On any work day where replacement employees are needed to insure a full staff, volunteer part-time employees will be contacted first. If volunteer part-time employees are not available to complete the staffing, regular part-time employees will then be contacted. The least senior part-time employee will be called first and continuing on a sequential basis until all part-time non-volunteering employees are contacted. Such employees will be offered the available hours and will be given the option of accepting the hours. If available hours still remain, volunteer full-time employees will be called and offered the work hours.
4. If on any particular day there are not enough volunteer call-in employees, Article 14C will be put into effect.
 - (a) Volunteer employees will work on his/her normal assigned shift and may volunteer for alternate shifts.
 - (b) Volunteer employees may volunteer to work half shifts (four (4) hours).

B. Part-Time Employees – No Benefits (With Restrictions)

Part-time employee – no benefits will be used in lieu of mandatory call-in if they are available to be used. This also applies to week-end work.

C. Mandatory Part-Time Employee Call-In

1. If sufficient staff is not available and the volunteer list has been exhausted for any particular day in which replacement employees are needed, mandatory call-in shall be used.
2. The least senior part-time employees shall be called and MUST report to work. This call-in will be done on a rotating basis starting with the least senior part-time employee and continuing with the next least senior part-time employee as the need arises, until all part-time employees on the seniority list have worked.
3. A part-time employee who has worked under the mandatory call-in shall not be called again until all other part-time employees on the seniority list have been called for mandatory call-in.
4. Employees who have worked voluntary hours will be exempted from the mandatory call-in list for one list rotation. . . .

ARTICLE 19

LEAVES OF ABSENCE

1. General Leaves

Any employee who wishes to absent himself/herself from his/her employment for any reason other than sick leave, funeral, jury duty, or any other reason specifically provided for in this agreement, must make application for a leave of absence from the employer. . . . The employer shall determine whether or not justifiable reason exists for granting a leave of absence. . . .

All benefit days, such as vacation and “Floating Holidays” should be used before requesting a leave of absence.

ARTICLE 20

HOLIDAYS

All employees . . . shall be granted eleven (11) paid holidays each year.

. . .

If the holiday falls on a scheduled day off, employees who do not work on the Monday through Friday schedule shall have the option of the holiday pay or be

permitted to take equivalent time off within thirty (30) days before or sixty (60) days after the holiday. . . .

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

(e) Part time employees shall receive holiday pay or time off on a pro-rated basis.

ARTICLE 21

VACATIONS

. . .

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

9. Prorating Benefits. Part-time employees who qualify therefore shall receive vacation benefits on a prorated basis.

BACKGROUND

The grievance is dated December 8, 2007 (references to dates are to 2007 unless otherwise noted), and asserts

We have a long past practice of the following situation being permissible by management. Recently Laura Lefeber was not allowed to receive a work day from Marilyn Lauersdorf. Both are P.T. It didn't involve O.T. . . .

Michael Taubenheim, the Administrator of Rocky Knoll, answered the grievance in a memo dated January 10, 2008, which states

The collective bargaining agreement does not address . . . nor ever guaranteed an employee the right to give away shifts scheduled by management. The facility management guidelines were appropriately followed and it is our position that there is no violation of the collective bargaining agreement. . . .

In a memo dated March 17, 2008, Michael Collard, the County's Human Resources Director, answered the grievance thus:

Article 8, Section I . . . clearly permits a change to be made only if approved by the supervisor or staffing coordinator. It does not require that approval be given.

At a meeting held on March 19, the County Board's Human Resources Committee confirmed the grievance's denial.

The Union represents a unit of professional employees and a unit of non-professional employees of the Rocky Knoll Health Care Center. The grievance concerns the non-professional unit. At one time, the County operated three care centers at the Rocky Knoll location and the Union represented employees at each. In July of 2002 the County closed its Comprehensive Care Center (County Comp) and in May of 2007 sold its Sunny Ridge Health Center (Sunny Ridge).

The October 10, 2008 hearing was set for all three grievances noted above, but witness testimony on this grievance overwhelmed the available hearing time and a summary of the evidence is best set forth as a brief overview of that testimony.

Mary Schwaller

Schwaller has worked for the County for roughly six years, serving on a full-time and on a part-time basis. She worked on a full-time basis at Sunny Ridge prior to its closure as a County facility, but accepted part-time employment to move to Rocky Knoll. She currently works on the PM shift as a Certified Nurses' Aide (CNA). She estimated that over the two year period preceding the grievance, she had roughly twenty-four approvals of shift giveaways, without any denials and without being required to use a benefit day. She has traded and given work shifts across units and across shifts without any concern from management prior to the grievance. The giveaways include instances where she did not use paid leave. She believes that the Schedulers, Patti Walsdorf and Judy Meerdink will no longer approve giveaways unless the employee giving the shift uses a benefit day. This has caused Schwaller difficulty because her move to part-time cut down the paid leave available to her. She did not know why shift giveaways were being denied, but believed the denial of reflected a change in management policy.

Last Spring, Rocky Knoll implemented a new scheduling system that attempted to make hours more consistent over time. CNAs now bid for schedules on the basis of seniority. The new system has made hours more consistent, but because Schwaller moved down the seniority list when she moved to Rocky Knoll, schedules with greater numbers of hours are selected prior to her ability to select. The change in policy hurt her desire to add hours, because low seniority employees lack benefit days to work trades and higher seniority employees can reduce hours more easily than low seniority employees can add them. Because the old policy

left the shift giveaway process to employees to work out on their own, seniority played less of a role. To her experience, employees will work overtime if they can, but a shift trade or giveaway will not be approved if it causes overtime in that time period. Rocky Knoll management can mandate employees to work, but in her experience, the mandate option is sparingly used because of the disruption to employee's lives.

Bob Ostermann

Ostermann has worked for the County for roughly twenty-seven years, although not on a continuous basis. He worked at County Comp in a variety of maintenance and attendant positions. He works at Rocky Knoll as an Attendant, which requires CNA duties for male residents in psychiatric units. He has served as a Union Steward. To his knowledge, employees have given shifts away in the past without having to use a benefit day, and to his knowledge, no employee has grieved County denial of a shift giveaway.

Marilyn Lauersdorf

Lauersdorf works as a CNA on the Night Shift (11:00 p.m. through 7:00 a.m.), and has worked for the County since 1991. On December 8, she filed a form seeking to give a shift, starting in the evening of December 19, to Laura Lefeber-Elonen. Meerdink returned the form to her, checking the "Not Approved" entry and listing a handwritten notation "Due to facility need." This was the first giveaway request for which Lauersdorf received a denial. She has given or received shift giveaways since 1994. She could not recall if past giveaways demanded use of a benefit day, but after the grievance, on at least one occasion, a Scheduler required her to take a benefit day to complete a shift giveaway, even though the trade was mutually consensual and worked a great benefit to another staff member who needed to attend to a family medical issue. The scheduling changes implemented at Rocky Knoll have made schedules more predictable, but have probably produced more call-ins due to the unwillingness of employees to use paid leave to complete a shift trade or giveaway. Lauersdorf believed the drying up of shift giveaways reflected a change in management policy.

Laura Lefeber-Elonen

Lefeber-Elonen, a CNA, has worked for the County for roughly seven years, moving to Rocky Knoll when the County ceased operating County Comp. Lefeber-Elonen did not giveaway shifts until she came to Rocky Knoll. She takes shifts more often than she gives them away. Until this grievance, she was unaware of any requirement that a giver of a shift use a benefit day. The County did not elaborate on why it denied Lauersdorf's December 8 request and the County did not call her in to work on December 19 or 20.

Lefeber-Elonen used the shift giveaway process to take on hours and thus to earn more money that her family needs due to her husband's layoff. The County's new policy has made the shift giveaway process dry up. She would like to remain at Rocky Knoll, but fears she must seek new employment or a second job to continue in her part-time status. She believes that the County will not approve a shift giveaway unless the giver uses paid leave.

Lori Billmann

Billmann has worked for the County for roughly twelve years, moving from County Comp when it closed. She has worked, from her hire as a casual employee, on a part-time basis. With shift trades, however, she has often worked a full-time schedule of hours. The County did not require her to use paid leave when she gave hours at County Comp. Because part-time employees receive limited benefits, the County's policy of requiring the use of paid leave has dried up shift giveaways. Overtime has declined noticeably since December. Because she is willing to work weekends, she has no trouble receiving hours, but this worked to her disadvantage when she sought to get August 14, 2007 off through a trade and was denied because Meerdink assumed she would pick up weekend hours, thus producing overtime. Billmann acknowledged that employees know that trades will not be approved if overtime results, but she felt some consideration should be extended to employees who are willing to take weekend shifts on short notice. Billmann works a posted schedule at Rocky Knoll which does not include regular hours, because she can balance it with her second job.

Nicole Schwaller

Schwaller has worked as a CNA at Rocky Knoll since April of 2000. She started as a part-time employee, became full-time for a short period and returned to part-time status with the closure of Sunny Ridge. She works the day shift, and has often given away shifts. While a full-time employee, she was required to use a benefit day. Prior to the grievance she saw shift giveaways as a benefit of part-time employment, since there was no requirement to use a paid day. In the past, she picked up one to two shifts per week to increase her pro-rated insurance benefit. She is now a full-time nursing student and the new policy regarding the use of paid leave makes it very difficult for her to attend school and maintain her benefits. In September and October of 2008, Schwaller tried three times to give away a shift to attend class. Meerdink denied each request, insisting that Schwaller use a paid leave day. The policy has complicated not only attending nursing school but also attending to her two children. The complications in covering school and work have probably increased her use of sick leave. She acknowledged that in the past employees "were very smart" at arranging trades or giveaways to assure that if there was a call-in by the Employer, overtime would result.

Scott Doro

Doro has served as the Union's President since January of 2007, and has worked as a CNA for the County for about twenty-three years. He started at Sunny Ridge, moving to Rocky Knoll with County closure of Sunny Ridge. He has served the Union in a variety of positions other than President, including Executive Vice-President, Steward, Chief Steward and Roster Assistant. His Union service extends back at least fifteen years.

Doro served as a Union representative in County Labor Management meetings since their commencement in the late 1990's. In a series of meetings between December of 2001 and February of 2002, the County and Union discussed a number of topics, including shift giveaways. The minutes of February 19, 2002 state the point thus:

12. Part time employees give away hours without using benefit day.

Part-time employees may give away days after the schedule is posted. It is the employees responsibility to watch their hours to insure their benefit status is not jeopardized. Management has the option to refuse an employee giving up a day if it results in overtime, or for facility need. This practice will be allowed for six months, beginning in March, 2002, on a trial basis.

These meetings took place during the time the County was preparing to close County Comp. Sometime after the "trial period" the labor/management cooperation process broke down and regular meetings stopped for a considerable time. Doro noted that employees were able to give shifts away without using a benefit day prior to and after the "trial period."

In October of 2003, Doro filed a grievance which alleged the County was not following "the contract for trades or the changing of days off." This reflected that the County had posted an excerpt from its Employee Handbook that stated:

C. TRADES

In order to allow you greater flexibility in your assigned hours, trades submitted must meet the following criteria:

1. Trades should be submitted on an approved form at least one week in advance.
 - a. Trades will only be allowed for emergency situations and need to be approved by the staffing coordinator, and in his/her absence the immediate supervisor.
2. Trades will only be allowed for emergency situations and they need to be approved by the Staffing Coordinator, and in his/her absence the immediate supervisor.
3. You must be familiar with the assignment you are trading for.
4. Trades may not result in more than 40 hours per week or 8 hours/day.
5. Employees may not request trades for any days beyond the current or immediate subsequent pay period.
6. Benefit employees may not give days away without using benefit time.
7. All trades or changes are subject to staffing coordinator or supervisory approval.

Doro felt the posting was more restrictive than the contract and responded with the grievance. He discussed the matter with Jeanne Stark, the Administrator of Sunny Ridge, who issued a memorandum granting the grievance, dated October 6, 2003. He believed they discussed giving shifts away; believed that Stark listened to his statement of the Union's position; could

not recall Stark speaking much, and did not know Stark's position on the grievance until she issued the memorandum. The memorandum states:

Due to the excessive number of requests for trades, the staffing office of Sunny Ridge put the policy of Sheboygan County's Health Care Centers regarding trades and asked all staff to abide by this. Therefore the grievance is upheld and the contract trades will be accomplished per the contract. . . .

With additional discussion with yourself, the following is the protocol that will be followed:

- Staff are responsible for contacting staff with similar qualifications to trade with them. . . .
- Notification and approval to the employee's immediate supervisor and/or Staffing Office **must** be made **prior** to the change. We are requesting that if at all possible these requests be submitted no less than 24 hours to the prior scheduled shift. This eliminates the supervisors not knowing who is supposed to be at work.
- Staff accepting the change will either work the other's assigned unit or the unit designated by facility need.

Doro interpreted the memorandum to include shift giveaways and to confirm that their use did not require the employee giving a shift to use a benefit day. In his view, the County must give a valid reason to deny a giveaway or trade. Overtime costs constitute a valid reason.

The labor management cooperation process resumed at some point after this memorandum. The minutes of the January 14, 2004 meeting note, "Meerdink mentioned that as long as part-time staff can give days away, it locks schedulers out of finding available staff to fill slots." In addition, the minutes of the February 24, 2004 meeting note, "If a new hire needs time off, they are responsible for finding their own replacement." New hires do not receive vacation for one year.

Doro noted that the parties agreed upon the new scheduling policy for the CNAs, but did not specifically discuss shift giveaways during that process. The new system reflects, among other points, the desire of a new administration to cut costs, and has resulted in more regular hours for a smaller complement of CNAs, but with more positions filled than has historically been the case. The increased predictability of hours has made it more possible for part-time employees to seek second jobs. Prior to the new system, the only predictable feature of employee schedules was weekend work. The transfer of employees from Sunny Ridge to Rocky Knoll pushed some less senior employees out, but fully staffed Rocky Knoll for the first time and left a very senior staff in place at Rocky Knoll.

Vicki Weigel

Weigel has worked for the County for roughly eighteen years. She served at least five years in the labor management cooperation process. As she recalled it, the discussions that culminated in the February 19, 2002 meeting notes were based on a County desire to stop shift giveaways. The Union opposed the effort because “we had been doing it for years and years.” The trial period represented a compromise position, and the Union’s desire not to be bogged down into an unending discussion of the issue. To her experience, the County took no action other than that to terminate the practice prior to the filing of the grievance at issue here.

Weigel acknowledged that the Union grieved the denial of a shift giveaway from an LPN to an RN in May of 2005. The denial reflected County demand that the LPN use a benefit day. Collard authored a written denial dated October 13, 2005 and the County Board affirmed the denial at a meeting on November 3, 2005. Collard’s written denial disputed the existence of any binding practice as well as the giving of a shift from a lower to a higher classification/rate of pay. Weigel could not recall the Union grieving the County’s denial of the grievance or the precise reasons why the Union did not appeal the denial. She noted that the practice of allowing shift giveaways continued unaffected by the grievance’s denial.

Charlotte Limberg

Limberg serves as Rocky Knoll’s Director of Dietary Services. She has worked in the Dietary Department for thirty-five years and has held a supervisory position for twenty-five. She has part-time staff in her department represented by the Union. She schedules for the entire department and does not allow shift giveaways. She will grant requests for time off or trade requests, but does so prior to the creation of a schedule and typically grants such requests when they are prompted by emergency circumstances. She reviews such requests on a case-by-case basis, but will permit trades only if they are done before a schedule is posted. The Union has never grieved her actions at any point in her tenure. To her knowledge, the nursing department is the sole department that permits trades or shift giveaways. Limberg will not approve a leave request if it causes overtime or if it has the potential to cause overtime.

Patti Walsdorf

Walsdorf has worked at Rocky Knoll for roughly twelve years, initially as a CNA, but for the past seven and one-half years as a Scheduling Coordinator.

Filling holes in schedules occupies between one-half and three-fourths of her work time. Sometimes a single shift may pose eight holes. Any number over two poses a problem for her, and the potential availability of eight CNAs does not necessarily mean the holes can be easily filled. Overtime call-in is always an option and she does resort to it, but Rocky Knoll management has made a concerted effort to reduce overtime and has succeeded in dropping overtime costs somewhere around seventy-five percent over the past several years. As of the arbitration hearing, she estimated that Rocky Knoll used one shift of overtime per week. As of the prior December, she estimated that Rocky Knoll used three shifts of overtime per week.

There is a connection between giveaways and overtime. The problem is frequent with weekends. Part-time schedules typically demand every other weekend as a regular shift, and shift giveaways increase the likelihood that weekend work, scheduled or non-scheduled, will move the employee over forty hours per week. In any giveaway, the givers make themselves unavailable for a call-in and the takers may increase hours that will prompt overtime later in the work schedule. Walsdorf estimated that when shift giveaways were common, forty to fifty percent of the transactions caused overtime. She felt that the routine granting of such requests in the past prompted as many as twenty-five overtime shifts per month. She did not believe there was any way to predict in advance whether a specific shift giveaway will prompt overtime. No manager ever told her that a shift giveaway was a contractual right, although discussion of the issue has been a constant in her experience as an employee.

She schedules vacation differently than trades or giveaways. Vacation requests are granted based on the current needs of the facility based on projected work schedules. They can be denied only if she has a reasonable suspicion that the facility cannot meet minimum staffing levels if the requesting employee is unavailable.

In her view, Rocky Knoll made a policy decision traceable to Taubenheim to condition the granting of shift giveaways on the use of a benefit day. The policy was not specifically stated, but reflected an ongoing process covering many scheduling variables, to reduce overtime costs. Prior to the changes implemented by Taubenheim, scheduling was less consistent and denials of giveaways rested on whether the request directly caused overtime or caused an immediate and adverse impact on minimum staffing, particularly on weekends.

Michael Taubenheim

Taubenheim became Administrator in late August of 2007. He came to the facility with over thirty years of experience in health care facility management. He worked for sixteen years with Beverly Enterprises, where he was responsible for turning around units which the corporate parent viewed to pose undue regulatory and financial issues. He reported directly to Beverly's chief executive officer. His move to Rocky Knoll posed similar issues to those he had faced, but with the added dilemma that even though reimbursement levels were the same, Rocky Knoll had a higher cost structure.

On his arrival, the cost structure proved a considerable issue. He dealt with departmental managers who did not know the cost of their department and who did not reliably track costs, including those traceable to overtime. The lack of controls on labor costs were "a warning light on the dashboard" pointing to significant management issues. He confronted those issues early on, meeting with his management team to attempt to get them to "own" the staffing process in the sense of being responsible for costs and for the consistency of care provision. Overtime issues were the subject of frequent discussions. His managers estimated that one-half of their overtime costs were traceable to factors within their control. Shift giveaways were a frequent topic of discussion. None of his managers saw it as a contractual requirement. They informed him that practices varied across departments and that the Union

and County argued with some frequency about whether giveaways rose to the level of a binding past practice.

The 2007 budget in effect when he began County employment set an overtime budget of roughly \$140,000.00, but the County spent almost \$250,000.00 in 2007 traceable to overtime. He inherited a 2008 overtime budget of roughly \$125,000.00, but as of the arbitration hearing, the County had spent considerably less than one-fourth of that amount.

The reduction in overtime costs reflects a series of initiatives. When Taubenheim arrived, the County had perhaps fifteen open positions at Rocky Knoll. The County has attempted to fill the positions and although the gap has not been fully closed, the number of CNAs increased. After considerable discussions with the Union, Rocky Knoll made employee schedules more consistent, including the creation of schedules with a fixed set of hours at the base, with additional hours being flexed to complete them. The changes included the creation of schedules without fixed hours to permit flexing to fill the schedule. The scheduling of employees to work every weekend ceased under a Memorandum of Understanding. At present no employee can be called in to work consecutive weekends without Taubenheim's express authorization, which he tries to restrict to emergency situations. The new scheduling matrix coupled with the increased number of CNAs reduced overtime costs. Taubenheim also directed supervisors not to permit shift giveaways without scrutinizing the reasons and without tracking the resultant costs. The reduction in shift giveaways reduced overtime costs by limiting employee ability to create their own schedules including built-in overtime. In his view, these initiatives reflected more than the reduction of costs. They also established greater management involvement in the staffing process which directly sets the continuity, consistency and quality of care given to residents.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union contends that the parties' conduct establishes that part-time employees are entitled "to give shifts away without using paid leave time." Even though the language of Article 8, Section I contains "some ambiguity" concerning "the conditions under which" a supervisor will approve a giveaway, the parties' past practice confirms that approval is granted if,

- 1) there was sufficient advance notice to the Employer;
- 2) no employee would earn overtime by virtue of receiving a shift from another employee, and
- 3) the employee receiving the shift was qualified to perform the work.

The evidence will support a conclusion that the practice clarifies Article 8, Section I by establishing that “the use of paid leave was never a precondition to supervisory approval.” Even if the provision did not exist, the evidence is sufficiently clear to establish “a stand-alone practice.” The evidence establishes that the linkage of the use of paid leave to a shift giveaway request was started “by the Administrator in December of 2007.” However, there is no evidence to support an assertion that prior denials rested on anything beyond changes that resulted “in direct increased costs to the facility” by overtime or by trades involving employees with different wage rates. That the Union has grieved County action to disapprove the attempt of LPNs to give shifts to RNs establishes that “the Union still believes it is only direct *overtime* costs that can be cited as a basis for denial.”

Detailed review of the evidence confirms that two County attempts to change the practice have met Union resistance that prompted the County to abandon the effort. Labor Management meetings in early 2004 confirm that the County knew of the practice of not linking a shift giveaway to the use of paid leave and accepted it as binding. The practice thus demands case-by-case County examination of a shift giveaway request, but the County’s action since December of 2007 seeks to undo that practice by an inflexible and unilaterally implemented linkage of a shift giveaway request to the use of paid leave.

Even if the County is correct that it retains the discretion to deny requests based on institutional need, it “must show a reasonable basis for the denial.” The bare assertion of “per facility need” is not sufficient to meet contractual muster. The Employer argued at hearing that granting the request covered by the grievance would “have created . . . the likelihood that some employee would have needed to work overtime either that night or later in the pay period, by reducing the number of willing part-time employees available for short-notice call-in.” Detailed examination of the circumstances surrounding Lauersdorf’s request establishes, however, that there were many part-time employees available to cover an unscheduled absence even with Lefebvre-Elonen’s acceptance of Lauersdorf’s shift. The absence of data from the County to establish the “facility needs” at the time of the request cannot be ignored. In fact, examination of the evidence establishes no reason to believe the Employer lacks sufficient part-time employees to cover unscheduled absences demanding a short-notice call-in. In fact, the evidence indicates the Employer does not need to cover many such absences and has in fact sent employees home due to low census on shifts with such an unscheduled absence. The assertion that granting Lauersdorf’s request “would have increased the likelihood that some employee would have needed to work overtime later in the pay period” is “highly speculative and dubious.” Even if Lefebvre-Elonen filled out a forty hour week by taking the shift, this inevitably means Lauersdorf’s hours would have fallen below that level to permit her to cover an unscheduled absence. In any event, the denial of the giveaway does nothing to address shift coverage issues if they reflect that “nobody wants to fill shifts on short notice.”

At root, the denial reflects a blanket County policy to demand the use of paid time to justify a shift giveaway. Even if the blanket policy is to avoid increased overtime, it eviscerates Article 14, Section A. Because shift giveaways “occasionally cause overtime”, allowing the Employer to implement a blanket policy would destroy the giveaway process.

Since employees have the right to use paid leave independent of the shift giveaway practice, linking the two reads any meaning out of the giveaway process. This violates standard axioms of arbitral precedent, which demand that each provision of a labor agreement be interpreted to give it independent meaning. Reasonably reading the relevant contract provisions demands that the County “use their discretion to approve or deny” specific shift giveaway requests. To condone the Employer’s blanket policy flies in the face of this and cannot be considered a reasonable reading of the labor agreement. While it is not unreasonable for the Employer to “squawk” in situations that pose an indirect possibility of overtime, the fact remains that the contract and governing past practice demand a direct linkage between a shift giveaway and the imposition of overtime costs.

The value of the past practice to employees is undeniable. However plausible the County’s general concern with overtime costs may be, it does not follow that the contract permits it the authority to unilaterally void the shift giveaway process through a blanket denial of any request not based on paid leave. To remedy the County’s violation of the agreement, the Union asks,

that the Employer . . . cease and desist from . . . preconditioning approval of such requests on the use of paid leave time. In addition, we also ask that the Arbitrator require the Employer to inform the Employees of the outcome of this case and their intention to cease and desist, and that any Employee who would have received a shift from another Employee but for the improper denial by the Employer be paid the amount they would have earned had the request been approved. In addition, any such requests not in the record that have been denied since the filing of this grievance should be treated in a similar manner.

The County’s Initial Brief

The County summarizes the underlying facts as “exceedingly simple”. The difficulty the grievance poses is interpretive, and the County urges that “the language of Article 8 does not support the Union’s position.” The “natural reading” of Article 8 establishes “that it has nothing to do with giving shifts away, but instead deals with trades.” The reference to “change” implies switching, not adding or subtracting from a schedule. Beyond this, Article 8, Section I demands supervisory approval and Lauersdorf did not receive it.

Detailed review of the evidence demonstrates that the Employer “did not consider itself obligated to allow . . . giveaways at any time.” The Personnel Handbook is unequivocal on the point. The Labor Management meeting minutes of February 2002 establish that the County agreed to shift giveaways for a limited time and did so as a matter of its own discretion. That the parties established a trial period is significant, because “something required by the agreement cannot be made subject to a trial period.” The October, 2003 grievance correspondence reflects, from the County’s perspective, a dialogue regarding trades rather than shift giveaways. The October 2005 grievance correspondence also confirms that the County did not recognize any obligation to honor a shift giveaway.

The Union has yet to establish any standard governing the granting of approval for a shift giveaway. Significantly, Article 21, Section 6, establishes that “vacation requests should be granted ‘insofar as the needs of the County will permit.’” The absence of any reference “limiting the County’s discretion” in the Article 8, Section I approval process offers a significant contrast. Such requests are for the “convenience” of employees and presumably involve greater discretion on the County’s part regarding approvals. A prior arbitration award, SHEBOYGAN COUNTY, MA-13056, DEC. 6966 (GALLAGHER, 3/06), establishes an “unreasonable or arbitrary” standard regarding the approval of vacation requests. Since the denial of Lauersdorf’s request rests on “facility needs”, it follows that the County met the Gallagher standard, much less the more stringent standard appropriate to Article 8, Section I.

Article 3 grants the Employer the ability to set hours and is inconsistent “with the idea that employees should be able to essentially determine their own schedules by giving away as many days as they wish.” Nicole Schwaller’s testimony underscores how malleable employee schedules can become in employee’s hands. She is a valued employee, but “the point is that it must be the County’s decision whether to allow changes in schedules.” Accepting the Union’s view is “inconsistent with union seniority rights, since if different schedules are going to be created, employees should have the opportunity to post into them by seniority.”

Beyond this, “allowing giveaways frequently results in overtime costs.” It is undisputed that the County can deny a giveaway request if it causes overtime, and it is clear that “it is often not known at the time of the request whether overtime will result.” Since a giveaway “always takes one part-time employee out of the pool of employees who can pick up additional shifts without overtime”, the County’s discretion to limit giveaways should not be infringed upon. Taubenheim’s testimony establishes how serious the fiscal consequences of unrestricted shift giveaways can be.

Viewing the record as a whole, the County concludes by requesting “that the grievance be denied.”

The Union’s Reply Brief

The “natural reading” of Article 8, Section I urged by the Employer is misplaced. It does not refer to “trades” and its use of “changes” is sufficiently broad to include adding or subtracting shifts. The County’s insistence that paid leave be used to justify a giveaway presumes that Article 8, Section I is broad enough to cover shift trades and giveaways. The point of the grievance is that “the Employer may not unilaterally impose new conditions on use of this benefit.” The rote citation of facility need is not sufficient to meet the demands of Article 8, Section I since the absence of “a legitimate business purpose that provides a reasonable basis for denial” makes the rote citation “arbitrary.” The Union’s initial brief establishes what the past practice demands of the County to appropriately deny a request.

The County’s review of the evidence is incomplete. The meeting minutes of February of 2002 establish mutual understanding of a practice providing for shift giveaways. The

agreed upon “trial period” did not establish a County desire to terminate a known practice. Whatever is said of County intent, it is proven that it continued to grant shift giveaways under the conditions noted in the Union’s initial brief. There is no evidence to support an inference that the Union felt there was no binding practice at issue. Closer review of the grievance correspondence cited by the Employer establishes that the discussions ranged beyond trades and included shift giveaways. Beyond this, none of the correspondence supports an inference “that the County did not have *any* obligation to grant giveaways.” A more balanced reading of the evidence is that “management . . . respected the fact that they were obligated to grant giveaway requests ‘per the contract.’” This cuts against the County’s assertion that it can eliminate the requests via a unilateral requirement that a giveaway include use of paid leave. The County’s assertion that vacation approval, as a contractual matter, must be contrasted to the Article 8, Section I approval process is unpersuasive.

That the County has a greater duty to grant vacation requests due to the value of the underlying benefit than to grant shift giveaway requests ignores the value of shift giveaways. Shift giveaways reflect more than mere “convenience.” Nor is there any real doubt regarding the standard governing their approval:

We need not necessarily look to inferences from dated contract language or presumptions based upon basic principles of contract interpretation to determine what level of discretion the employer has, because here the Employer and the Union have already worked these issues through over time. Prior to this grievance, both the Employer and the Union had a clear understanding of what the conditions of approval for shift giveaways were.

Requiring the use of paid leave to work a giveaway has never been part of that understanding.

Employer assertion that employees can sculpt their own schedules “is a red herring.” Employer concern for seniority is misplaced and irrelevant. Employer concern for “unexpected overtime costs went unsubstantiated.” The Gallagher award is distinguishable from this grievance. Its broad principles regarding approval of vacation requests can be granted without obscuring that “the real question here is . . . whether the Employer can unilaterally place additional limits on the shift giveaway benefit without bargaining.” Article 3 rights have no direct bearing on this point and, in any event, must yield to the more specific language of Article 8 regarding shift giveaways.

Viewing the record as a whole, the Union concludes that the grievance must be sustained and that the remedy detailed in its initial brief be granted.

The County’s Reply Brief

Contrary to the Union’s assertions, the agreement contains no language to support its position regarding shift giveaways. Even assuming Article 8, Section I can be read as broadly as the Union contends, it demands only that shift giveaways be accomplished by the requesting

employee and that supervisory approval for the giveaway be received before it is taken. Nothing in the agreement binds the County “to approve giveaway requests.”

The absence of such language does not make the disputed provision ambiguous. Rather, the absence of such language establishes that the parties did not negotiate any restrictions on supervisory approval. This means the provisions of Article 3 govern the approval process, and those provisions leave the process to the County as a matter of right, limited only by its view of “the effective operation of its Health Care Centers.”

The evidence “demonstrates the Employer’s consistent understanding that giveaways were granted as a matter of discretion, not of right.” Nothing in the Union’s view of the evidence is consistent with an inference that the County, by practice, accepted a standard “which would require approval whenever the recipient of the shift would not directly earn overtime.” County forbearance regarding restricting shift giveaways cannot be translated into County assent to grant them without restriction.

Taubenheim brought significant changes to Rocky Knoll, including the implementation of a new scheduling system. That system “disrupted the giveaways that were formerly tolerated.” It does not follow that whatever tolerance once existed can be translated into a restriction on management implementation of efficiency measures. Some more significant evidence of agreement is required under relevant arbitral precedent to give binding force to past conduct. Here, the Union translates past management tolerance for shift giveaways into the creation of a binding system by which employees can dictate their own schedules. This flies in the face of the bargaining relationship, since “it is certainly a traditional function of management to determine the parameters of part-time employment.”

The Union’s arguments misstate the purpose of Article 14, Section A. That provision “represents a comprehensive scheme for determining which employees are entitled to priority when additional work is available.” Shift giveaways bypass that procedure, since “volunteer lists and seniority rules become trumped by another factor . . . friendship with the employee who wants to work less hours.” The language of Article 14, Section A affords no support for the shift giveaway process.

The Union posits a number of conflicting standards to guide the approval process for a shift giveaway. Beyond this, Union attempts to detail how staffing could be arranged to grant a giveaway request miss the fundamental point that “overtime is sure to result from giveaway requests.” The Union’s documentation on this point must yield to the more knowledgeable analysis of Taubenheim and Walsdorf. Their testimony establishes that “allowing shift giveaways consistently resulted in overtime that threatened the financial health of the institution”. The County concludes that the grievance must be denied.

DISCUSSION

Although the issue is stipulated and questions the propriety of a single shift giveaway under Article 8, Section I, the record shows the interpretive runs deeper. The interpretive dispute focuses on the final paragraph Article 8, Section I. There is no dispute that the December 8 request was accomplished by the employees without County assistance and was submitted in a timely fashion. From the County's perspective, the only requirement in issue is that of supervisory approval, and since there is no dispute Meerdink denied the request "per facility need" there can be no interpretive issue unless the County is obligated to approve all giveaways. The Union counters that long past practice establishes three approval criteria set forth above under "**The Union's Initial Brief**" heading. Because the December 8 request met the criteria, the County had no discretion to deny the giveaway.

Presuming citation of "facility need" by a supervisor is, standing alone, all that is needed to deny a request, it would follow that an arbitrary decision not to grant a shift giveaway to any employee named Lauersdorf would stand on equal footing with a reasoned determination not to grant a request because it drops Rocky Knoll below minimum staffing to meet resident needs. The Union's statement of the three criteria presumes that shift giveaways are granted by Article 8, Section I and that past practice sets the three conditions that bind County approval of any giveaway request. Each of these presumptions is debatable, thus highlighting the interpretive issue.

The language of Article 8, Section I is ambiguous. The County plausibly argues that the language of the final paragraph points to shift trades, not to giveaways. As the County asserts, the reference to "changes" is more compatible with trades than giveaways. The Union, however, plausibly argues that "changes" is sufficiently broad to include trades and giveaways. That each party offers a conflicting, yet plausible, reading of "changes" establishes the ambiguity of the final paragraph of Article 8, Section I.

This points the analysis to past practice evidence as the most reliable guide to resolve the ambiguity. The strength of the Union's position cannot be more forcefully stated than in the quotation set forth under "**The Union's Reply Brief**" section. As preface to examination of this point, the Union argues that the past practice evidence can be seen either to clarify the ambiguity of Article 8, Section I, or to establish a "stand alone" benefit. The evidence will support only the latter. Limberg testified that she has permitted only trades over an extended period of time and that giveaways are restricted to the nursing department. Her testimony is unrebutted and underscores that the terms of Article 8, Section I can support restricting the section to trades. Thus, resort to practice reads "changes" to mean "trades only" in the dietary department, but reads "changes" to mean "trades or giveaways" in the nursing department. From this, past practice cannot address the ambiguity of Article 8, Section I, since the same term is read to yield different conclusions in different departments. This restates rather than resolves the interpretive issue.

The issue is thus whether past practice evidence establishes a stand alone benefit in the nursing department that binds County approval of shift giveaways to three criteria. The evidence does support the conclusion that the County, by practice, will review shift giveaway requests in the nursing department and will approve those that do not adversely impact its reasonable view of “facility need.” It does not, however, support the conclusion that the County, by practice, agreed to approve any giveaway that does not directly produce overtime.

The evidence establishes that the denial of the December 8 request turned on Lauersdorf’s failure to support it with use of a benefit day. This was an early instance of the implementation of a policy. The flaw with the Union’s assertion lies in the second of the asserted three approval criteria. There is no dispute that the County has consistently declined to grant shift giveaways that produce overtime as a direct result of the giveaway. However, the evidence will not support the inference that this also establishes County agreement to absorb all overtime costs ultimately caused by a giveaway.

Nicole Schaller’s testimony highlights the point. She acknowledged that employees gave and received shifts knowing that although no overtime directly resulted from the exchange, it enhanced the likelihood of receiving overtime for working shifts other than involved in the giveaway. This point is implicit in other witness testimony. Walsdorf’s and Taubenheim’s testimony graphically underscores the total amount of overtime involved. The difficulty with the Union’s assertion of the approval conditions is that the binding force of past practice rests on the agreement manifested by the bargaining parties’ conduct over time. Here, the evidence establishes that the County has considered and granted individual shift giveaway requests for a number of years. There is no dispute that the parties mutually recognize overtime is a valid reason for denying a giveaway. The Union’s assertion of a binding stand-alone practice rests on the inference of agreement underlying past approvals. As noted above, it is unpersuasive to infer County agreement to past scheduling practices creating exposure to tens of thousands of dollars of indirect overtime costs when the evidence establishes it can deny scheduling individual giveaways producing direct overtime costs of tens of dollars.

County denial of the December 8 request rested on an unannounced policy of requiring use of a benefit day to secure approval of a shift giveaway. This was one of a number of scheduling initiatives designed to reign in overtime costs. Considerable bargaining effort went into a significant portion of those initiatives. The evidence falls short of establishing that Lauersdorf’s request, standing alone, would have generated indirect overtime costs. This underscores the force of the Union’s arguments. However, there is no persuasive rebuttal of Taubenheim’s testimony regarding the budgetary burden of overtime costs and no persuasive rebuttal of Walsdorf’s testimony that it is impossible to know at the time a schedule is finalized which shift giveaway request will cause overtime beyond the requested exchange. County assertion that the requirement of the use of a benefit day acted as a check on indirect overtime costs is reasonable in light of the evidence produced at hearing. Against this background, the County persuasively asserts that compelling approval of the December 8 request adversely impacts its authority under Article 3 “to determine the specific hours of employment . . . and to make such changes in the details of employment of the various employees as it from time to

time deems necessary for the effective operation” of Rocky Knoll. The evidence of past practice, while sufficient to establish that the County will consider shift giveaways in the nursing department, does not persuasively establish County agreement to disregard total overtime costs in the approval process. Because the practice does not afford a basis to clarify the ambiguous language of Article 8, Section I, the County’s rights under Article 3 prevail regarding this grievance, as noted in the Award below.

This conclusion should not obscure more difficult interpretive issues. The County’s mere citation of “per facility need” complicated the litigation of the grievance. The policy linking approval of shift giveaways to the use of a benefit day was not specifically voiced to the Union and much of the evidence turns on the Union’s attempt to prove the linkage of the denial to the policy. The Union’s assertion that past practice establishes a case-by-case consideration of giveaways rests on a solid core of evidence. A policy limiting County approval of giveaways to those backed by use of a benefit day undercuts this case-by-case consideration. This is the most forceful base of the Union’s arguments. The strength of the Union’s argument, however, lies less in the single request posed here than in the impact of a policy based denial on the case-by-case evaluation used in the past. This argument, even if not specifically posed by a single request, is well argued and deserves to be addressed.

The past practice evidence can be viewed to call for a case-by-case approval process demanding a reasoned evaluation to support a denial. As the Union persuasively notes, rote citation of “per facility need” falls short of establishing such review. The contract is not, however, silent on this point. Article 3 permits the County to adopt “reasonable” rules. County recourse to a policy requiring a giveaway to be backed by a benefit day is less akin to unilateral County action overturning a practice than to the implementation of a rule under Article 3 governing the approval process under Article 8, Section I. A rule should not, under Article 3, be left implicit, and, in any event, must be “reasonable.” The parties have not argued this provision and it is thus not posed for interpretation here. However, it is appropriate to note that although a single denial may not be considered a rule; continued County recourse to the same rationale for denying giveaways is in effect the creation of a rule.

More to the point, the evidence regarding indirect overtime costs is sufficiently well established to make the denial of the December 8 request reasonable. More specifically, the evidence establishing the difficulty, if not impossibility, of predicting those costs at the time of receipt of a giveaway request makes it unpersuasive, under Article 3, to conclude the County must approve every giveaway request which does not directly cause overtime. Whether a policy conditioning approval of a giveaway on the use of a benefit day reasonably acts to check indirect overtime costs over time is beyond this record. If the policy does so, it would appear to be a “reasonable” rule under Article 3. How this develops over time or whether there is a way to approve giveaways without the use of a benefit day and without imposing excessive overtime costs must be left to the parties and is beyond the scope of the stipulated issue. In sum, the Union’s concern with unilateral County action to overturn established approval practices is sufficiently persuasive to pose broader interpretive issues than that posed by the December 8 request standing alone. Under Article 3, it would appear that any policy linking

approval of shift giveaways to use of a benefit day should be made explicit if it is a condition of approval. Under Article 3, it must be reasonable in operation. This implies that it should operate as an effective check on indirect overtime costs without eliminating giveaways that will not cause such costs.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The analysis of practice evidence is less detailed than the parties' arguments. The County, by linking approval of a shift giveaway to use of a benefit day has acknowledged a nursing department practice of considering giveaways subject to a reasonable approval process. There is no need for a more detailed analysis of the evidence of a stand alone practice than that. The weakness in the Union's assertion of the practice lies not in its existence but in its scope. There is no persuasive evidence to warrant an inference of County agreement to assume tens of thousands of dollars of indirect overtime costs when the parties agree that the creation of overtime can reasonably support the denial of an individual request. This affords a weak basis to support an inference that the County agreed to absorb significant total overtime costs provided the causation was less direct. Rather, the practice points to approval of a cost neutral, or at least a relatively cost neutral, exchange for the convenience of the employees. Total overtime costs are relevant to this in the same way as each individual giveaway is.

County assertion of Article 3 rights is persuasive because the past practice evidence falls short of establishing a basis to clarify the final paragraph of Article 8, Section I. Whether that paragraph is restricted to trades cannot be established by the evidence of practice, since the nursing department permits giveaways. Whether the paragraph can be broadened to incorporate giveaways cannot be established by the evidence of practice because other departments restrict it to trades. This leaves past practice evidence to "stand alone" and the absence of specific terms in Article 8, Section I to address the matter makes the general terms of Article 3 relevant.

The parties' arguments on the standard governing the approval of a specific giveaway request, including citation of a prior arbitration, are well-stated, but do not bear directly on the immediate or future interpretive issues. The December 8 denial meets a "reasonable" standard, whether or not vacation approvals demand greater deference to employee requests than do shift giveaway requests. That the County chose not to articulate the policy behind the December 8 denial is its most troublesome aspect, and points to the larger issue of the degree to which a policy based denial undercuts the past case-by-case approval process. However, the force of the Union's position on that point rests on past practice, and the difficulty with that position is the applicability of Article 3 regarding the implementation of reasonable rules. Continued County reliance on a policy linking giveaway approval to the use of a benefit day creates a rule, whether the County makes it explicit or not. Rules, under Article 3, must meet a "reasonable" standard. The County has shown on this record a reasonable basis to be concerned with total overtime costs as well as a reasonable basis to believe linking use of a benefit day to approval of a giveaway acts as a check on those costs. Whether that proves to be the case over time is beyond the stipulated issue. In any event, application of a "reasonable" standard addresses the parties' dispute whether viewed narrowly regarding December 8 or more broadly regarding ongoing requests.

The Union's arguments concerning the value to employees of the more lenient approval practices of the past are forceful. Nicole Schaller's testimony pointedly and poignantly highlights the significance of the giveaway process. She, as well as the other testifying witnesses, point out the value of the benefit to valued employees. "Value", however, connotes "cost" as well as "benefit." More to the point, an arbitrator's authority is not to run a facility but to resolve disputes by giving bargaining parties the benefit of their agreement. County actions restricted, but did not eliminate the approval of shift giveaways. The issue posed is whether its past conduct bound it to absorb the total overtime costs caused by past scheduling practices. To stretch the evidence of agreement underlying those practices that far unpersuasively puts arbitral inference above the authority granted the County by Article 3.

AWARD

The Employer did not violate Article 8, Section I of the collective bargaining agreement when it denied the shift giveaway request made by Marilyn Lauersdorf on December 8, 2007.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of January, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator