

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 393
No. 68031
MA-14095

Case 394
No. 68034
MA-14096

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, 508 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 the Wisconsin Employment Relations Commission appoint an arbitrator to resolve three grievances. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as arbitrator in all three grievances. One grievance questioned a shift giveaway; was filed by the Union on behalf of "all nursing staff of Local 2427"; was captioned by the Commission as Case 395, No. 68043, MA-14103; and led to DEC. NO. 7392, which I issued on January 26, 2009.

The grievances captioned above are the two remaining grievances. The Union filed the grievance captioned as Case 393, No. 68031, MA-14095 to question a shift trade between Licensed Practical Nurse (LPN) Robin Bucko and a Registered Nurse (RN). The Union filed the grievance captioned as Case 394, No. 68034, MA-14096 to question a shift giveaway between LPN Judy Adomavich and an RN. Hearing on Case 393 and Case 394 was held on December 16, 2008, in Plymouth, Wisconsin. The hearing was not transcribed. The parties stipulated that the evidence submitted regarding Case 395 would be considered part of the record for Cases 393 and 394; that the record developed at the December 16 hearing would apply to Cases 393 and 394; and that I should address each grievance, but could do so in a single decision. The parties filed briefs by January 25, 2009. The Union filed its reply brief on February 9, 2009. The County did not file a reply brief. I confirmed the County's waiver of a reply brief via e-mail dated April 2, 2009, which noted "the record closed as of 2-9-09."

ISSUES

The parties stipulated the following issues for decision in Case 394:

Did the Employer violate Article 8, Section I of the collective bargaining agreement when it denied the giveaway of shifts requested by full-time LPN Judy Adomavich on December 16, 2007, for the day shifts on December 18 and December 19, 2007?

If so, what is the appropriate remedy?

The parties did not formally stipulate the issues for Case 393, but I read the record to pose the following issues:

Did the Employer violate Article 8, Section I of the collective bargaining agreement when it denied the shift change requested by LPN Robin Bucko on December 4, 2007, to trade shifts with an RN on January 1 and on January 3, 2008?

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 13

TIME AND ONE-HALF

Time and one-half (1-1/2) shall be paid for all hours worked in excess of eight (8) hours per day or forty (40) hours per week. . . .

Effective January 1, 1981 employees who work on the below listed holidays shall be paid at the rate of time and one-half (1-1/2) per hour.

- | | |
|---------------------|---|
| 1. New Year's Day | 5. Thanksgiving Day |
| 2. Memorial Day | 6. Day After Thanksgiving |
| 3. Independence Day | 7. Christmas Eve Day (December 24 th) |
| 4. Labor Day | 8. Christmas Day |

...

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. . . .

BACKGROUND

The grievance form underlying Case 393 reads thus:

On 12/11/07 Robin Bucko LPN was denied a trade (with) a RN. Reason being, this type trade is too costly for the County.

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

It is the position of the Center Management that Robin Bucko LPN presented a request for a trading of shifts and identified an individual who was not in the same Bargaining Unit and from a different Job Classification. This trade would have resulted in overtime for each staff member. The staff member knew the facility's decision and offered no alternative. The facility management guidelines were followed and it is our position that there is no violation of the collective bargaining agreement. As a result of the individual identified to trade with Robin Bucko being from a different Bargaining Unit and Job Classification the Employee's request was denied. . . .

In a memo dated March 17, 2008, Michael Collard denied the grievance at Step 2, stating:

. . . In this grievance the union contends that management at Rocky Knoll is required to allow an RN to trade a work shift with an LPN. The union alleges that such a practice has existed for many years, and was the subject of a grievance settlement from Sunny Ridge. The only grievance decision on point that I have been able to find or have had called to my attention is 1989-2427-31, in which the Sunny Ridge administrator ruled:

The intent [of Article 8] was not to facilitate trivial last minute changes nor excuse employes from the responsibility of planning ahead and communicating those situations to their Supervisor prior to the posting of Schedules. In summary, the contract does not give employees carte blanche privileges to dictate the work schedule. Specifically Article 3, Management Rights Reserved, states that management has the right to "direction of the work force."

Grievance denied.

Similarly, in this grievance Rocky Knoll management relies on their right to direct the work force, in particular to determine the balance of RN's and LPN's working each shift. This grievance is denied.

Collard confirmed the Human Resources Committee denial of the grievance at Step 3, in a letter dated March 21, 2008, which offered no further elaboration of the denial.

The grievance form underlying Case 394 reads thus:

Violation of Past Practice & Unfair Practice. No employee should be forced to be paid out for their vacation when they found someone to work for them only to have management deny it. Judy Adomavich was forced to be paid out for 2 vac. Days due to this denial of vacation on 12/18 & 12/19.

Taubenheim answered the grievance in a memo dated January 10, 2008, which states:

. . . It is the position of the Center Management that Judy Adomavich LPN presented a request for vacation for the 18th and 19th of December, 2007 and identified an individual who was not in the same Bargaining Unit and from a different Job Classification to cover these requested days. The staff member knew the facility's decision and offered no alternative. The facility management guidelines were followed and it is our position that there is no violation of the collective bargaining agreement. As a result of the individual identified to cover for Judy Adomavich being from a different Bargaining Unit and Job Classification the Employee's request was denied. . . .

Collard denied the grievance at Step 2 in a letter dated March 17, which states:

. . . In this grievance the union contends that the grievant (an LPN) should have been allowed to take vacation on December 18 and 19, 2007, since she had found an RN willing to work those shifts in her place.

Under Article 3 . . . the management of Rocky Knoll is entitled to “management of the work and the direction of the working forces.” They have the right to determine how many RN’s and how many LPN’s may be scheduled to work on any given shift. There is no provision of the collective bargaining agreement that would require otherwise . . .

Collard confirmed the Human Resources Committee denial of the grievance at Step 3, in a letter dated March 21, 2008, which offered no further elaboration of the denial.

The balance of the background is best set forth as an overview of witness testimony. The witnesses testified without distinguishing between the two grievances.

Judy Adomavich

Adomavich has worked for the County as an LPN for twenty-eight years. At the time of the grievance, she worked on a full-time basis. For her entire tenure, she has exchanged shifts with RNs. She estimated she averaged at least two such exchanges per year.

She made the request that prompted her grievance on December 16, 2007. She had vacation left that dated from her tenure at Sunny Ridge. Adomavich asked Patti Walsdorf, the Scheduler, how to effect a shift change to permit her to use the remaining two vacation days and was informed that there were no LPNs available, but she could contact RNs to determine if an exchange could be made. Adomavich found an RN, Brenda Straub, who was willing to take shifts on December 18 and 19, which Adomavich could then use for vacation. Walsdorf received the form and denied it without further comment. This confused Adomavich since Walsdorf had approved a shift giveaway on November 20, by which Adomavich took vacation on December 20 while an RN, Jorja Doherty, worked her scheduled shift. On the same date Adomavich asked Doherty to take the December 20 shift, she asked Straub to pick up the shifts on December 18 and 19. The only reason for the delay in filing the two shift giveaway requests was that Straub could not commit to take shifts until mid-December.

The December 16 denial was the first denial Adomavich ever received. She was aware that the County could deny shift giveaways, but had not had one denied. As a result of the denial, Adomavich received pay for two vacation days rather than time off. She had difficulty with vacation requests in 2007 due in part to the closure of Sunny Ridge. Taking the vacation she carried to Rocky Knoll was complicated by the fact that vacation requests of full-time Rocky Knoll employees were given a seniority preference to those of transferring Sunny Ridge

employees. She can still pick up shifts from RNs, but cannot give a shift to an RN since the December 16 denial. She estimated that she had picked up six or seven RN shifts in the six month period preceding the arbitration hearing. At no point in her tenure did management question her competence to perform the duties of a shift she received from an RN.

Robin Bucko

Bucko has worked for the County on a part-time and a full-time basis as an LPN for twenty-two years. She became full-time in February of 2008, and works the night shift. She has traded shifts with RNs throughout her career, and estimated that she averaged ten trades per year, although the frequency of trading varied year-to-year. She testified that she had not had trades denied prior to 2007.

Bucko retained a number of the application/approval forms by which Rocky Knoll implemented shift trades and giveaways. During calendar year 2006, Bucko gave two shifts away to an RN, and received four shifts from an RN, including one holiday. The holiday was Christmas Eve, and was initially not approved. The "Not Approved" entry for the holiday read "Need to (check) what the rate of pay would be pending the Labor Management discussion results." Bucko testified that she ultimately did work the holiday for RN Jorja Doherty. Her receipt of that shift started as a trade involving December 23, 24, 30 and 31. The trade request forms sought approval for Bucko to take December 23 and 24 from Doherty, with Doherty taking December 30 and 31 from Bucko. One of the three forms documenting this transaction noted that December 23 was not approved because, "12/23 will be OT for Robin." Bucko believed she ultimately secured approval to work that date.

The forms retained by Bucko note that during calendar year 2007, she gave one shift to an RN. She received three shifts from an RN. In late September, she was denied approval to take one shift from an RN because it "would be OT for Robin." She noted that the request did not involve overtime at the time the request was made, but would have resulted in overtime due to her taking shifts after the time of the initial request. She filed the form which prompted the grievance on December 4, 2007. Walsdorf denied the request, which was a trade seeking to have Doherty to work January 1 for Bucko and to have Bucko work January 3 for Doherty. The form notes, "if an LPN is willing to work this would be OK."

Bucko picked up a large number of shifts while a part-time employee. Her goal was to work a full-time schedule even though no regular full-time schedules were available to her. She was able to consistently fill out a full time slate of hours by receiving shifts. Bucko acknowledged that the County could deny a requested trade due to the creation of overtime or due to facility needs, including maintaining a sufficient number of RNs to staff a shift. Her estimate that she had received approval for roughly ten trades annually without a denial prior to this grievance reflects that trades are not initiated if the requesting employees are aware that the request fails to meet the criteria noted above. The December 4, 2007 request did not create overtime, even though it involved a holiday. It was, at the time requested, an even trade of

hours. The trade switched the payment of holiday overtime, but that trade can benefit the County if and when the switch flows from an RN to an LPN. At no time prior to December of 2007 had the County advised her that a trade involving an LPN and an RN was not permissible because of the difference in classifications.

Jorja Doherty

Doherty has worked for the County for thirty-two years. She was an LPN during her first three years of service, and then became an RN. As an RN she traded shifts with LPNs “many times” estimating that the instances were “too numerous to count.” Prior to the December, 2007 denial that prompted the grievance, the County placed no limitation on any trade. The County approved trades involving overtime. Because she worked on a part-time basis, the trade process was a valuable source of income for her. Trades have been started by employees and by management staff, with Schedulers often asking her to pick up a shift well after a schedule was posted.

In many respects RNs and LPNs are interchangeable. Although the County has tried to maintain a minimum staffing level for RNs, the actual staffing levels fluctuate widely. She perceived the fluctuation to reflect “management convenience” and believed the staffing of RNs per shift ranged from three to five. She has, however, worked shifts with one or two RNs. In her view, anything below three is unsafe. If Doherty assumed a shift for an LPN, she worked as an RN. In one instance in October of 2006, Doherty worked a holiday for an LPN, and received the holiday pay of an RN. She assumed trades could be denied, but could not recall ever having a trade denied.

She acknowledged that RNs and LPNs have different licenses and that those licenses reflect differing educational requirements, spanning one-year LPN training programs to four year RN training programs. The examinations underlying the different licenses reflect the more rigorous requirements of an RN, which in turn puts higher level diagnosis and assessment duties into the hands of an RN. Various direct care functions, including the giving and monitoring of IVs also fall to RNs rather than to LPNs. RNs also serve as Charge Nurses, which puts a unit employee in charge of the facility for health care purposes for those shifts not staffed by managerial employees. Rocky Knoll RNs have a separate bargaining unit from LPNs and are covered by a separate labor agreement. That agreement compensates RNs at a higher rate than an LPN.

Rocky Knoll negotiated with each unit to normalize scheduling. Some progress was made, but the RN unit was unwilling to give up positions to stabilize work schedules.

Vicki Weigel

Weigel acknowledged that the May, 2005 grievance noted in testimony on Case 395 (DEC. NO. 7392 AT 11) traced to a grievance by Bucko regarding a shift giveaway with an RN.

That grievance challenged the County's denial of the giveaway, based on Bucko's failure to use a benefit day. Collard's October 13, 2005 answer to that grievance includes the statement,

In any event, these statements do not address the question of whether an LPN is permitted to give hours away to an RN at a higher rate of pay. The County has a very good reason for limiting such a practice.

She acknowledged that the Union did not grieve this denial. She did not believe the issue of shift giveaways or trading between classifications played a significant role in the processing of the grievance. The matter was discussed during Labor Management meetings and produced an agreement that shift giveaway and trading practices be continued on a trial basis. In her view, County objections to shift trading cannot obscure that it has consistently permitted trades and giveaways since the 2005 grievance. The Union's failure to grieve is more likely traceable to the changeover in representatives than to acquiescence. The 2005 grievance, as numbered by the County, reflects that calendar year 2005 was contentious and generated a large number of grievances.

Michael Taubenheim

RN/LPN trading of shifts implicates the patient acuity staffing model that Taubenheim brought to Rocky Knoll. Consistency in scheduling is significant to this model, as are nursing classifications, since the difference between the skill and certification levels of RNs and LPNs relate directly to patient acuity. Rocky Knoll implemented the change late in 2007 and into 2008. Between October and December of 2007, Taubenheim went to great length to educate management staff on the need to make the scheduling of nursing staff more consistent. In his view, predecessor management had allowed staffing to become almost random, turning on employee choice. Acute-care patients, such as those with diabetic or other significant ongoing medication issues, create care needs demanding that staffing be as consistent as possible day-to-day, without significant variance on which staff member meets those needs. The change in staffing models prompted bargaining in the Spring of 2008 with the County and the representatives of the two units representing RNs and LPNs. The RN unit did not go as far as the Union in addressing the staffing issues necessary to make work schedules more consistent. As a result, RN staffing levels are harder to address than are those of LPNs.

In December of 2007, Taubenheim instructed Schedulers not to allow trades or giveaways. This did not, in his view, demand that all shift trades end. Rather, it changed accountability for them. Past managers delegated too much authority to Schedulers, who in turn treated shift trade requests as if they had to be granted. In Taubenheim's view, allowing RN staffing to range between three and five RNs per shift compromised patient care. The goal in staffing was to have five RNs and five LPNs fill a day shift. Having three or fewer RNs per shift poses significant care issues. Taubenheim directed Schedulers to attempt to meet these goals. Whether or not the goal could be met, Taubenheim wanted Schedulers to pass shift trade requests to the Director of Nursing. This reflected the patient acuity model of staffing,

which treats staff levels as a “clinical” issue rather than a “manning” issue. The difficulty in implementing this change is reflected by the departure of at least one manager who could not effectively make the change. The broader policy issue regarding staffing was not meant to draw managerial staff into the day-by-day difficulty of filling a schedule. He was not aware of any operational need that demanded the denial of Adomavich’s trade request with Straub.

Staffing issues reflect the complexity of the regulatory environment. State and federal regulations of Rocky Knoll demand “sufficient” levels of nursing staff. Beyond this, County policy determines “sufficient” nursing staff levels. His responsibility, as the County employee responsible for the administration of Rocky Knoll, is to meet the minimum care levels established by State and Federal regulation and to assure compliance with more rigorous County policy demands. He is, under each level of regulation, responsible for compliance and for assuring the highest level of compliance within the County’s budget. The interplay of the regulations can be seen in the County requirement that only an RN can serve as Charge Nurse. State and Federal regulations would permit an LPN to play that role.

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 highlights that the shift giveaway was to permit the Grievant “to utilize accrued vacation time prior to the end of the year.” The Grievant had attempted to effect the shift giveaway “prior to the distribution of the December schedule”. Walsdorf initially denied the request “because there were no LPNs available to replace her.” Walsdorf suggested that the Grievant “should look for an RN to work for her” and further suggested Straub, an RN, as a replacement. A subsequent trade request, involving Straub, “was denied without explanation.” As a result, the Grievant “was forced to take . . . vacation as pay rather than time off.”

A review of the evidence confirms that trades between an LPN and an RN to permit vacation usage “were acceptable to management and would be approved” until “sometime in December of 2007” when the County unilaterally ended the practice. A review of the disputed request establishes that there was no reasonable basis to deny the request. The County’s Step I answer asserts that the giveaway involved employees in different classifications in different bargaining units. No further rationale was offered in the processing of the grievance. The asserted rationale ignores that “such trades were routinely approved in the past absent overtime or other considerations affecting facility needs, regardless of the fact that the trade was between different classifications and bargaining units.” The practice extended over at least twenty-five years. The grievance seeks no more than to enforce the Grievants’ “right to give the shifts to an RN, not the RN’s right to receive the shifts.”

The difference in classifications makes no difference regarding the reasonableness of the County's denial. The County has ignored any difference in cost "for so long as to provide the employees with a reasonable expectation that the practice is allowed under Article 8." Beyond this, the County receives a reciprocal savings "by conversely allowing RNs to give their shifts to LPNs." Throughout 2008, the County continued to allow RN to LPN shift giveaways, but "would no longer allow the reciprocal benefit to the bargaining unit."

Article 8, Section I is "somewhat ambiguous" regarding shift changes, but "has been interpreted to allow the type of giveaway requested by (the Grievant) absent overtime or qualifications considerations." The record contains but one example of County denial of an LPN giveaway to an RN. This single instance does not constitute a repudiation of the practice and flies in the face of the arbitral precedent cited in Case 395. To be reasonable, County implementation of Article 8, Section I demands "that management assess each shift trade or giveaway request individually, and not create new limits or contingencies to be applied regardless of whether a particular request actually affects facility needs."

As the remedy appropriate to the County's violation of Article 8, Section I, the Union seeks "that the Arbitrator require the Employer to post a notice that (an) LPN will continue to be allowed to give away shifts to RNs under Article 8, Section I, and that each time an LPN requests to give away a shift to an RN, the request will be evaluated on its own merits and will be allowed as long as it does not interfere with any significant operational need of the facility." Beyond this, the Union seeks that the County be required to pay Straub the amount she would have earned had it approved Adomavich's request. The payment "for the two shifts is a reasonable penalty for the Employer's arbitrary and capricious actions in these cases, and should provide sufficient deterrence to further similar acts in the future."

The County's Initial Brief

The County urges that the fourth paragraph of Article 8, Section I governs the grievance and "clearly and unambiguously requires management approval before a change of any sort may be accomplished". Beyond this, the paragraph "does not place any limits on management's ability to make the decision to approve or disapprove requests according to whatever criteria management considers appropriate." This leaves the grievance to challenge whether "there is a binding past practice sufficient to show agreement that the county was required to grant either all, or some category of, requests to either trade shifts or give away shifts between RNs and LPNs of (a) different bargaining unit." At most, the Union's view of past practice evidence asserts "that since requests have frequently been approved, they should always be approved."

The arguments and precedent cited in Case 395 bear directly on Cases 394 and 394. Since the Grievant and Bucko testified that the County can deny trades based on "the best interests of the facility as determined by management", it follows that the Union's position "is thus completely inconsistent with the testimony". Beyond this, the Union has failed to prove a

consistent practice. Four of the requests submitted into the record by the Union were denied “in whole or in part” by the County.

The County’s position in its Step 2 response to Bucko’s grievance establishes that there can be no claim of a binding past practice. The basis for the Union’s failure to grieve is irrelevant, since the disagreement directly rebuts the assertion that the parties shared a common understanding of how to treat trade requests across bargaining units. Weigel’s testimony confirms that the Union understood the County asserted its right to deny such requests “even though the county continued to grant them most of the time.”

Testimony from County witnesses establishes that the “best interests of the county required an improvement in scheduling practices for the licensed staff at Rocky Knoll.” County ability to consistently maintain appropriate LPN and RN staffing is undercut by the grievances. Granting them would alter County desire to maintain consistent RN staffing on the disputed shifts.

Significantly, the grievance questions “the rights of the RNs at Rocky Knoll.” RNs have their own bargaining unit and are “represented by a different union under a different collective bargaining agreement.” The remedy requested by the Union highlights the potential for conflict. That Straub makes more as an RN than the Grievant does as an LPN is itself proof of a legitimate County basis to deny the trade. More significantly for Case 394, “the RN is the only person who lost earnings as a result of the request being denied.” In Case 393, the Grievant would have lost the holiday premium in the trade, while the RN lost the opportunity to earn the holiday premium based on a higher base rate. That the record is silent on the ability of RNs to trade or giveaway shifts to an LPN under the RN labor agreement underscores the difficulty of stretching the evidence to the remedy the Union seeks.

Granting the grievance in either Case 393 or 394 would eviscerate the County’s “right to determine how many LPNs and how many RNs are needed to work each shift.” This level of service decision should not be left to the arbitration process. There may well be a need for rules to establish consistency of staffing levels, but “it is management that ought to determine those rules.” The language of Article 3 confirms this. The management rights of Article 3 are “much more specifically stated” than “any right to have trades or giveaways approved that might be read into a perceived ambiguity in article 8.” Article 3 is more specific and should control. It follows that the record, read as a whole, “demands that the grievances underlying Cases 393 and 394 should be denied.”

The Union’s Reply Brief

The County overstates its authority under Article 8, Section I. That it can deny a request cannot obscure that it must have “a reasonable basis” for the denial. This is confirmed by CITY OF APPLETON (POLICE DEPARTMENT), DEC. NO. 6416, MA-11690 (Jones, 8/02); and CITY OF STEVENS POINT (FIRE DEPARTMENT), DEC. NO. 6196, MA-11180 (Jones, 2/01).

These cases confirm that an employer's right to deny shift trading does not extend to a blanket right to prohibit the activity without a reasonable basis for doing so.

The record will not support the County's assertion that it disputed the binding force of a practice of considering trade requests on their individual merit. The assertion ignores that the practice clarifies ambiguous contract language and further ignores that the alleged dispute boils down to a single request denied in 2005. That denial was grieved and the Union provided a reasonable reason for not processing it to arbitration.

More significantly, the consistent practice manifests no reason to believe the County ever cared that the trades extended beyond classification and bargaining unit lines. Stripped to its essence, the County's argument is less a challenge to the consistency of the practice than the assertion that the Union's conduct in 2005 constitutes a waiver of the right to grieve. It takes more to "wipe away years of mutual contract interpretation" than the bare claim that "mutuality doesn't exist." The evidence shows that the County continues to honor such trades for its own convenience, but fails to recognize that "Article 8 clearly allows changes of shift for the convenience of the Employee."

The weakness of the County's position is evident regarding Case 394. In that case Straub occupies a "more highly educated and skilled" position, and thus her replacing the Grievant "does not appear to impact any facility interest." The "only ostensibly legitimate reason for denying the request is that the Employer now wishes to take advantage of the savings associated with LPNs replacing RNs while disallowing the payback associated with RNs replacing LPNs." A reasonable reading of Article 8, Section I in light of arbitral precedent demands "that the employer must demonstrate . . . that some legitimate interest is negatively affected in a way that has not previously been deemed acceptable."

Assertions of undue cost will not withstand scrutiny. Adomavich continues to receive RN giveaways at the County's request. Nor will assertions of staffing concerns withstand scrutiny. The County has on its own scheduled RNs and LPNs at levels equal to or less than the levels that would have existed had the disputed trades been honored. Neither Case 393 nor Case 394 would reduce "the number of RNs on duty below four or above seven." Case 393 would have actually improved the level of RN staffing. Thus, the evidence leaves nothing to support the County's claim of a reasonable basis to deny the requests.

Granting the grievances does not stretch arbitral authority too far. Article 8, Section I affords authority to reach the remedy the Union seeks. The remedy asks only that the requests of two unit members be honored, and has "no impact upon any other bargaining unit." The agreement leaves an arbitrator "free to fashion a suitable remedy for the Employer's violations." Nor will granting the grievances undercut Article 3, which does not specifically address how shift changes will be effected. A failure to grant the grievances will in fact undercut the more specific language contained in Article 8, Section I. The Union concludes that the record demands Article 8, Section I be honored by implementing the remedy detailed

in the Union's initial brief. A failure to do so permits the County to act under Article 3 in a fashion which arbitrarily and unreasonably undercuts the language of Article 8, Section I.

DISCUSSION

Background Common To Each Grievance

The issues underlying Cases 393 and 394 are essentially stipulated and focus the interpretive issue on Article 8, Section I, and specifically on the application of its final paragraph. This points the analysis to Case 395 and to DEC. NO. 7392. As noted in that decision, "The language of Article 8, Section I is ambiguous", thus pointing "the analysis to past practice evidence as the most reliable guide to resolve the ambiguity" (DEC. NO. 7392 AT 19). More specifically, Case 395 focused on the Union's view that past practice, either as a guide to interpret Article 8, Section I or as a stand-alone benefit, established that three criteria govern County approval of shift trades and giveaways. The Union stated those criteria thus (DEC. NO. 7392 AT 13):

- 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.

DEC. NO. 7392 (AT 19) rejected past practice as a guide to resolve the ambiguity of Article 8, Section I due to the variance of the approval process between departments:

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 decision noted, however, that past practice evidence had interpretive significance:

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.

. . .

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. (DEC. NO. 7392 AT 21).

These conclusions are applicable to Case 393 and to Case 394. Cases 393 and 394 add a factual complication not posed by Case 395, which is that the shift giveaway in Case 395 involved employees within the same bargaining unit. Against this background, the analysis turns to the application of the final paragraph of Article VIII, Section I to the evidence underlying each remaining grievance.

Case 393

The trade at issue moved Bucko from working January 1, a holiday paid at time and one-half, to January 3, substituting Doherty to work January 1. The Union's argument treats the trade as an even exchange, with the time and one-half premium being switched from Bucko to Doherty. The rationale for the County's denial varies. Waldorf's denial makes the trade permissible "if an LPN is willing to trade." Taubenheim's denial confirms this, highlighting the difference in "Bargaining Unit and Job Classification" and adds the presence of overtime "for each staff member" as well as Bucko's failure to offer "an alternative." Collard's denial adds an issue regarding "the balance of RN's and LPN's working each shift." Testimony at hearing adds Collard's October 13, 2005 denial of Bucko's Grievance 2005-2427-30, which challenges the existence of any practice permitting an LPN to give hours to a higher paid RN.

Article 8, Section I does not clearly and unambiguously govern the request, but does specify that a shift change receive supervisory approval and that the employee seeking the change make the arrangements. There is no dispute Bucko made the arrangements, and this leaves the grievance to question the reasonableness of the denial of supervisory approval.

None of the bases for the denial asserted by the County challenges the existence of a stand alone past practice permitting RNs and LPNs to trade shifts. Under Case 395, this does not mean the County is obligated by practice to grant any such request. This would contradict the language of Article 8, Section I, demanding County approval prior to a shift change. As noted in Case 395 "change" is broad enough to cover shift trades or giveaways in the Nursing Department. Against this background, the shift change requested by Bucko is permissible "for the convenience of the employee" provided the express requirements are met. Case 395 pointed to the appropriate extent of past practice evidence, by highlighting that even though a specific request for change might be denied as a substantive matter, past practice evidence demands that as a procedural matter, the request calls for "a case-by-case approval process demanding a reasoned evaluation to support a denial" (DEC. NO. 7392 AT 21).

The evidence underlying Case 393 is troublesome regarding the County's approval process. Procedurally, it evolved over considerable time, spanning Walsdorf's initial denial to the processing of the grievance. Taubenheim's testimony establishes that he had, by the time Bucko made the request, taken the authority to approve or deny a request from Walsdorf. Thus, her notation that "if an LPN is willing to trade, this would be OK" affords no guidance on the basis for the denial. In any event, it is impossible to square with Walsdorf's approval of a trade between the classifications less than one month earlier. There is, then, no articulated

rationale to distinguish between the two requests. This is the fundamental weakness of the County's case.

However, the evidence is also troubling regarding the substantive reasons for the denial. Neither party disputes that LPN or RN staffing levels can support a denial. Neither party disputes that a trade can be denied if it causes overtime. Nor is there any dispute that patient acuity levels can support a denial. The problem in the evidence is whether such considerations in fact prompted County denial of Bucko's December 4, 2007 request.

Taubenheim's answer to the grievance asserted the trade produced overtime for each employee. The record is less than clear on this point. It is evident that the trade shifted the time and one-half holiday premium from Bucko. Even assuming that counts as "overtime" for Doherty, it is not clear if or how the trade brought overtime to Bucko. What the labor agreement governing RNs provides for overtime or for holiday pay is speculative and arguably beyond the scope of the grievance. Article 13 of the labor agreement governing the grievance treats overtime and holiday pay as "time and one-half" premiums. The Union's assertion that patient acuity or RN/LPN minimum staffing levels were not implicated by the request is forceful, but the assertion rests on staff schedules which Taubenheim did not recognize and do not appear to be the final schedules for the time periods in question. No witness spoke to specific patient acuity needs for the time period in question. Thus, the record establishes that there are several substantive issues that could support a County denial but that there is no specific showing which, if any, of those bases actually prompted it.

The most significant issue posed is whether the denial can rest on the fact that an RN and an LPN cannot trade shifts because of the difference in their classification, unit status or pay rate. The record will not support the use of this, standing alone, to serve as a basis to deny Bucko's request. The County has intimated that if there was such a practice, the matter would pose a permissive subject of bargaining. This could be the case and if it is, would have a bearing on whether such a practice could survive the expiration of the labor agreement, but that legal point has no direct bearing on a contractual issue while the agreement is in effect. More to the point here, the contract does bear on the matter. Article 8, Section I does not specify a classification to which it applies and the provision has a direct bearing on a labor agreement that spans a number of classifications. The language is sufficiently broad to permit, for example, a trade between a CNA and an LPN. Thus, the difference in classification, standing alone, affords no evident limitation on the ability to change shifts. Ignoring this, the labor agreement specifies different pay rates within classifications, thus assuring that many shift changes may produce or reduce labor costs depending on salary schedule placement. More significantly, the evidence is unequivocal that LPNs and RNs have successfully changed shifts for many years. As the County persuasively asserts, this cannot compel the approval of a specific change request and cannot compel it to adopt uncritically the approvals of prior administrations. However, the evidence does establish that the difference in classification, including unit placement and pay rates, is insufficient standing alone to provide a reasoned basis for the denial of a change request.

Collard's October 13, 2005 denial of a prior grievance by Bucko is the strongest evidence that supports the assertion that the County will deny cross-classification trading. That denial, however, ignores that the practice preceded and succeeded the denial. LPNs continued to receive RN hours following the denial of the requests posed by Cases 393 and 394. Thus, as a matter of fact, there is no persuasive evidence to support the assertion that the cross-classification nature of a trade will, standing alone, support a denial.

Nor will the contract support such a blanket denial. Such a denial does not turn on the specifics of any request, but stands as a general policy to be given unit-wide application. Article 3 addresses this point, but points such a policy analysis toward a rule making process. It stops short of requiring direct County promulgation of rules in writing, but the fact remains that a general policy requirement, even if unwritten, that operates without regard to the facts of a specific request, is a rule. Under Article 3, such rules must be "reasonable." County use of an unannounced policy as a "rule" cannot withstand scrutiny under a reasonableness standard. The absence of a consistently articulated rationale by the County is, standing alone, sufficient to flaw its assertion of a "rule" precluding trades between RNs and LPNs. If there is to be such a rule, it needs to be stated. If it is stated as a rule, it needs to be reasonable in its application. The record here will not permit a conclusion of reasonableness for the evidence shows no statement of a rule and no indication of consistency in its application. Rather, the record shows the County honoring an RN/LPN trade in November of 2007, only to deny a similar request less than one month later.

In sum, Article 8, Section I does not entitle the Union to the approval of any specific shift change request that involves an RN and an LPN. The provision is ambiguous, but does state express requirements. One of them is supervisory approval which, absent the promulgation of a rule under Article 3, connotes a case-by-case analysis. The approval process is the procedural element of Article 8, Section I and the basis of a specific approval or denial is its substantive element. Evidence of past practice cannot clarify the case-by-case approval practice because any specific request will turn on the underlying context, which can implicate nursing staffing levels, patient acuity considerations, presence of overtime costs and other patient-based considerations. Past practice evidence does, however, affect the substantive and procedural elements of Article 8, Section I by establishing that the County has yet to apply a rule to the approval process. In the absence of such a rule, Article 8, Section I, viewed in light of past practice, calls for the County to apply a case-by-case approval process demanding a reasoned evaluation to support a denial of a change request, including those involving RN/LPN trades or giveaways.

The fundamental interpretive difficulty posed by the grievance is remedial in nature. The absence of a consistent rationale for denying Bucko's December 4, 2007 request violates the procedural element of Article 8, Section I. The record is sufficient to establish that the County did not justify the denial under Article 8, Section I through a rule-based policy denial precluding the trading of RN/LPN shifts. The record is not, however, sufficiently clear to support a conclusion that the County's denial violated the substantive element of Article 8,

Section I. It is not clear whether the trade produced overtime. That Collard's October 13, 2005 response fails to establish a rule against RN/LPN trades standing alone cannot obscure that the County has failed to approve such trades based on cost considerations. Beyond this, the record does give some reason to question the application of LPN/RN staffing levels on the dates in question. The Union has established that the County has varied over time regarding minimum staffing levels for RNs and LPNs. This falls short of establishing a basis to warrant an arbitrator establishing them in a single case.

The Award entered below resolves this dilemma by stating what Article 8, Section I demanded of the County regarding Bucko's December 4, 2007 request. There is no make-whole element to the Award because of the weakness of the evidence regarding the substantive element of Article 8, Section I. The Union has sought a cease and desist order, together with the posting of a notice. Neither is appropriate on this record. The authority of an arbitrator to impose a cease and desist order poses potential issues regarding the precedential value of an arbitration award. There is no need for this, because the record does not demonstrate anything beyond a fundamental interpretive dispute posed by the parties regarding the final paragraph of Article 8, Section I. Because that section demands a case-by-case approval process, there is no reason to believe a cease and desist order carries any weight beyond the conclusions stated in the Award. Nor is there support for a bargaining order. Such orders connote the statutory duty to bargain, and this is a case of contract interpretation. Beyond this, bargaining orders are typically stated to address a failure to bargain, which is a unit-wide issue. Any issue of contract interpretation is arguably unit-wide, but the evidence shows the parties put considerable, and successful, effort into bargaining regarding the implementation of staffing and scheduling changes to make work schedules more predictable. In any event, the evidence shows that a small portion of the unit is directly involved in the trading process. Against this background, the formal statement of the resolution of the interpretive issue is the remedy appropriate to the violation proven here.

Case 394

Cases 393, 394 and 395 state distinguishable grievances, but the lines between them blur since they arise from a common context. Much of that context turns on the movement of Sunny Ridge employees to Rocky Knoll. That one-time event may or may not have ongoing significance, but the core of fact necessary to resolve Case 394 has already been stated regarding Cases 393 and 395. The most significant consideration that distinguishes this matter from those cases is caught in the following summary of Walsdorf's testimony:

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 (DEC. NO. 7392 AT 12).

The trade between Adomavich and Straub highlights the inconsistency underlying the County's denial. Adomavich sought two separate shift giveaways to take vacation time off, and the request questioned here arose after Taubenheim had moved the authority to approve such trades from Walsdorf. The reason the request was delayed was that Straub did not know until mid-December if she could cover the two dates sought by Adomavich in November. The Straub trade thus fell victim to the policy changes implemented by Taubenheim in the Fall and Winter of 2007.

Taubenheim's denial of the grievance focuses on the difference in classification between Adomavich and Straub. As noted in Case 393, that difference is not sufficient standing alone to support a trade denial unless articulated and applied as a rule consistent with Article 3. In this case as well as in Case 393, the County stopped short of claiming the denial as a rule. Its willingness to continue to allow Adomavich to pick up RN shifts stands in direct contrast to the reasonableness of any such rule.

The difficulties posed by Adomavich's request run deeper than those posed by Bucko's in Case 393. Article 21, Section 6 highlights that Adomavich's request implicates more than the final paragraph of Article 8, Section I. Walsdorf's testimony underscores that vacation requests demand greater consideration than other shift change requests. It is not evident whether the request here constitutes a "vacation schedule" request under Article 21, but this does not pose a specific interpretive issue here. Rather, the absence of any County consideration of the point further underscores the absence of a reasoned, case-by-case approval process. More specifically applied to Case 394, the Union has proven not just a violation of the procedural element of Article 8, Section I, but also of its substantive element. There is no showing that the County attempted to define whether its facility needs precluded its ability to honor Adomavich's request to give two shifts to Straub to permit her to take two vacation days off. Taubenheim acknowledged that he knew of no operational need that precluded the shift change and that his movement of such authority from a Scheduler to a nursing supervisor was not intended to eliminate shift changes. Against this background, it is inappropriate for an arbitrator to infer such a "facility need" in the absence of persuasive evidence supporting it.

Thus, the evidence establishes County violation of the procedural and the substantive elements of Article 8, Section I through its denial of Adomavich's December 16, 2007 request. The remedial issue is thus distinguishable from that of Case 393. The cases are, however, related. Thus, the same reasons that a bargaining order and a cease and desist order were not well-suited to Case 393 make them ill-suited to Case 394. However, Case 394 poses a request for vacation time off, unlike that of Case 393. Even though Article 21 is not posed for interpretation here, it is evident on the face of Section 6 of Article 21, that the parties have recognized the significance of vacation time off, as opposed to vacation time paid. The Union has persuasively argued that time off has a benefit that cannot be simply measured in pay. It does not follow from this that an appropriate remedy is to "punish" the County by paying Straub. Even if such a measure grants a disincentive against future contract violations, it unpersuasively moves the focus from Adomavich to Straub. Even ignoring the potential

infirmity of extending a remedy beyond the bargaining unit, it is less than evident how a payment to Straub makes Adomavich whole for her loss of time off during a holiday season.

The Award entered below attempts to value the loss to Adomavich by giving the County the option of crediting two vacation days to her current vacation balance or paying her for them. The point of the choice is to make Adomavich whole. If the County chooses to credit her vacation balance, the presence of two additional benefit days will make it easier for her to secure a shift giveaway or trade. This cannot recreate the time off that she lost, but will enhance the opportunity for her to get time off, while affording the County the opportunity to credit her account at no out-of-pocket cost if the County chooses not to replace her. The pay option reflects the imprecision of valuing time off and the difficulty of the contractual background to the violation. It constitutes double payment in the same sense that making whole an employee discharged in violation of a contractual just cause standard constitutes double payment if the discharged employee is replaced prior to reinstatement. In the same sense, it constitutes a make-whole measure. The Award bases the payment option at Adomavich's rate when she made the request. This values the violation at the time of the violation and highlights that the point of the remedy is not punitive, but make-whole. The choice is the County's because Article 21 has not specifically been placed in dispute. This makes the remedy a function of Article 8, which does not compel shift trades or giveaways. The Award balances these conflicting considerations by putting the choice to the County, but the benefit to Adomavich. Putting the choice to Adomavich would obscure that an employee cannot compel a change under Article 8, Section I.

AWARD

Case 393

The Employer did violate the procedural, but not the substantive element of Article 8, Section I of the collective bargaining agreement when it denied the shift change requested by LPN Robin Bucko on December 4, 2007, to trade shifts with an RN on January 1 and on January 3, 2008.

The remedy appropriate for the Employer's violation of Article 8, Section I, is the statement of County authority to deny trade requests consistent with the labor agreement. The County has the authority under the final paragraph of Article 8, Section I to deny a specific trade request such as Bucko's. A denial can either be by unit-wide policy implemented as a rule under Article 3 or by a case-by-case review of an individual request, which weighs employee convenience under Article 8, Section I against the Employer's view of the facility needs of Rocky Knoll under Article 3, which can include nursing staffing levels, patient acuity considerations, presence of overtime costs and other patient-based considerations. Whether the County acts by unit wide policy implemented as a rule, or by the case-by-case review of an individual request, including those involving RN/LPN trades or giveaways, its denial must be reasonable.

Review of the reasonableness of an Employer denial of a shift change request under the final paragraph of Article 8, Section I has a procedural and a substantive element. Evidence adduced at hearing established that the Employer's denial neither articulated a unit-wide policy implemented as a rule under Article 3, nor provided a case-by-case review of Bucko's request, thus violating the procedural element of Article 8, Section I. However, evidence adduced at hearing failed to establish that employee convenience under Article 8, Section I outweighed the Employer's view of the facility needs of Rocky Knoll under Article 3, thus failing to establish a violation of the substantive element of Article 8, Section I. As a result, the remedy includes no make-whole element specific to Bucko's request.

Case 394

The Employer did violate Article 8, Section I of the collective bargaining agreement when it denied the giveaway of shifts requested by full-time LPN Judy Adomavich on December 16, 2007, for the day shifts on December 18 and December 19, 2007. The Employer's denial of Adomavich's request to take two vacation days through a shift giveaway to RN Brenda Straub neither articulated a unit-wide policy implemented as a rule, nor provided a case-by-case review of the request which weighed Adomavich's convenience under Article 8, Section I against the Employer's view of the facility needs of Rocky Knoll under Article 3, which can include nursing staffing levels, patient acuity considerations, presence of overtime costs and other patient-based considerations.

Because evidence adduced at hearing failed to establish any operational, patient-based need that outweighed Adomavich's convenience under Article 8, Section I of the collective bargaining agreement, the denial was unreasonable and demands that Adomavich be made whole for the Employer's procedural and substantive violation of Article 8, Section I. As the appropriate remedy, the Employer shall make Adomavich whole by either: (1) crediting her with two (2) vacation days, to be taken in accordance with the governing provisions of the collective bargaining agreement; or (2) paying Adomavich for two (2) vacation days, at her pay rate in effect on the date of the Employer's denial of her December 16, 2007 request to give two shifts to RN Brenda Straub.

Dated at Madison, Wisconsin, this 5th day of May, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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