

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**OUTAGAMIE COUNTY (BREWSTER VILLAGE)**

and

**BREWSTER VILLAGE EMPLOYEES UNION, LOCAL 980,  
AFFILIATED WITH WISCONSIN COUNCIL OF COUNTY AND  
MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO**

Case 300  
No. 69363  
MA-14582

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**Appearances:**

**Mary B. Scoon**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.

**James R. Macy**, Davis & Kuelthau S.C., Attorneys at Law, 219 Washington Avenue, Oshkosh, Wisconsin, appeared on behalf of the Employer.

**INTERIM ARBITRATION AWARD**

Brewster Village Employees Union, Local 980, Affiliated with Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein referred to as the "Union," and Outagamie County (Brewster Village), herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Appleton, Wisconsin, on February 15, 2010. Each party filed a post-hearing brief, the last of which was received April 29, 2010.

**ISSUES**

The parties were unable to agree to a statement of the issues, but agreed that I might state them. I state them as follows:

1. Did the Employer violate the collective bargaining agreement by the changes it made to policies number 14 and 14A to implement "self-scheduling?"

2. If so, what is the appropriate remedy?

**RELEVANT AGREEMENT PROVISIONS**

“ . . .

**ARTICLE I – MANAGEMENT RIGHTS**

1.01 – Unless otherwise provided herein, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty or to layoff employees is vested exclusively in the Employer.

1.02 – The Employer shall adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin, or other governmental agencies having jurisdiction over Brewster Village, such rules and regulations shall be submitted to the Union for its information, thirty (30) days prior to their effective date.

1.03 – Action to amend or alter or otherwise change said rules and regulations shall be subject to the grievance procedure in this Agreement. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.

. . .

**ARTICLE III – PROBATIONARY PERIOD**

. . .

3.03(B) – Part-Time: [Note: references to January 1 and July 1 in the following text are meant to indicate that the pro-ration process is done once each six months, however the actual dates of the pro-ration periods are based on full, bi-weekly pay periods.] An employee who is hired to work less than forty (40) hours in one week. A determination of the prorated amount of benefits for part-time employees will be made on January 1 and July 1 of each year based on the prior six (6) months. The prorated amount of benefits for newly hired part-time employees shall initially be established at the number of hours they were hired to work, and their next determination will be made on January 1 or July 1, as the case may be, based on the time worked since their hire.

Part-time employees who become full-time will receive full-time benefits upon becoming full-time. Full-time employees who become part-time will

receive prorated benefits upon becoming part-time. The prorated amount of benefits shall initially be established at the number of hour they were anticipated to work in that part-time position and their next determination will be made on January 1 or July 1, as the case may be, based on the time worked since their becoming part-time. If the first January 1 or July 1 determination does not cover a period of least three months, the first determination will be delayed until a three-month period can be utilized. The second determination will then be made on the January 1 or July 1 date based on the prior six (6) months.

...

#### **ARTICLE VII – GRIEVANCE PROCEDURE**

7.01 – The parties agree that only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

7.02 – Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) of the Employer and the Union, shall be handled by the Union Grievance Committee. . . .

...

Step 4. ... The Decision of the arbitrator shall be final and binding on both parties, subject to judicial review. The cost of the arbitrator shall be divided equally between the Union and the Employer. In rendering his/her decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of this Agreement. The arbitrator shall be requested to render his/her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

#### **ARTICLE VIII – WORKWEEK**

...

8.01 – Full-time permanent employees shall work a normal day of eight (8) hours and a normal workweek of forty (40) hours.

8.02 – All permanent employees shall receive every other weekend off. The work schedule shall be made two (2) pay periods in advance and posted on the respective neighborhoods. In the event of a layoff, the work schedule shall be made two (2) weeks in advance of the effective date of the layoff and posted on the respective neighborhoods. Any deviation from this schedule, if requested by an employee, shall be the responsibility of the employee to have someone to work in his/her place as long as it does not involve overtime pay. Exceptions may be made in cases of illness, funeral leave or vacation. Employees shall not

be permitted to exercise their seniority rights for the purpose of “bumping” on shifts or neighborhoods.

**ARTICLE IX – OVERTIME**

...

9.01 – Employees shall be paid at the rate of time and one-half (1½) their regular rate of pay for all hours worked in excess of forty (40) hours per week.

9.02 - Employees shall be paid at the rate of time and one-half (1½) their regular rate of pay for all hours worked in excess of eight (8) hours per day.

...

9.05 – Overtime will be distributed according to seniority from a list of employees who indicated their desire to be called for such overtime. In the event an overtime assignment has been posted at least 48 hours prior to the start of the overtime work and there has been no objection raised, prior to 24 hours before the start of the overtime, that the assignment was not according to seniority, the assignment will stand; provided however, that if a valid objection is raised prior to 24 hours prior to the start of the overtime, the overtime will be reassigned on the basis of seniority.

In the event of errors in the assignment of overtime according to seniority in overtime assignments that are not posted at least 48 hours prior to the start of the overtime work, the senior employee who was available and who was not assigned the overtime will be paid at straight time rates for one-half (1/2) of the hours involved in the overtime assignment, provided however, that the Employer will not be required to make such payment to the first four hours occurring in each period of four consecutive pay periods. When the Employer is attempting to contact an employee who is not working to call in that employee to fill an overtime assignment that arises within 48 hours prior to the start of the overtime work, the Employer will be required to make only one phone call to such employee.

An individual employee shall be limited to four (4) overtime shifts during a pay period, provided however, that the employee who has already agreed to work four (4) overtime shifts during a pay period shall be allowed to work up to two additional overtime shifts during that pay period in situations where no other employee has agreed to work such additional overtime shifts.

Overtime assignments made under this section will be posted each weekday, Monday through Friday, in the binder in the breakroom with the time and date noted on such posting

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#### **ARTICLE XI – HOLIDAYS**

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11.02 – Permanent part-time employees who work at least an average of sixteen (16) hours per week shall receive holidays on the above basis pro-rated according to actual time worked in relation to a full-time employee.

...

#### **ARTICLE XII – VACATION**

...

12.01 (c) Permanent part-time employees who work at least an average of sixteen (16) hours per week shall receive vacation on the above basis pro-rated according to actual time worked in relation to a full-time employee.

...

#### **ARTICLE XIII – SICK LEAVE**

13.01 “... Permanent part-time employees who work at least an average of sixteen (16) hours per week shall receive sick leave on the above basis pro-rated according to actual time worked in relation to a full-time employee.”

...

#### **ARTICLE XIX – SENIORITY**

19.01 – The Employer agrees to the seniority principle. Seniority shall consist of the total calendar time of continuous employment lapsed since the date of original employment with the Employer in this bargaining unit. An employee shall lose his/her seniority and shall terminate the employment relationship for any of the following reasons:

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**ARTICLE XXV – HOSPITAL/SURGICAL AND DENTAL INSURANCE**

...

25.01 (b) The County will pay a percentage of the premium of the HMO hospital/surgical plan on a pro-rata basis for permanent part-time employees who are desiring and eligible for such coverage, according to the following percentages of hours that employee worked as compared to a full-time employee: ...

...

25.02 (b) The County will pay a percentage of the premium of the dental plan on a pro-rata basis for permanent part-time employees who are desiring and eligible for such coverage, according to whether the employee is enrolled in the HMO only hospital/surgical insurance or whether the employee is enrolled in a non-HMO hospital/surgical insurance plan, and according to the following percentage of hours that employee worked as compared to a full-time employee:

...

..... “

**FACTS**

The Employer is a Wisconsin County. It operates a nursing home called Brewster Village. The Union represents various non-professional employees of Brewster Village including, but not limited to, Certified Nursing Assistants. The Employer and the Union have had a collective bargaining relationship which has existed over twenty years. It employs about 150 Certified Nursing Assistants. The Employer operates on a seven day per week, three shift basis. The shifts are an a.m. shift, p.m. shift and night shift. The a.m. and p.m. shifts are termed “day shifts.” The Employer operates on a two week pay period cycle.

The home is divided into four wings. Each wing is called a “neighborhood,” except the first and second floor of one of the wings are each a separate neighborhood. Each neighborhood is subdivided into about three “households” each. There are about forty-one residents to a neighborhood and about fourteen residents to a “household.” There are six Certified Nursing Assistants assigned to a neighborhood during each of the two day shifts and about two assigned during the night shift. The Employer also has two Certified Nursing Assistants who work during night shift who are not assigned to a neighborhood. They work wherever they are needed. They are termed “floats.”

The vast majority of the Employer's Certified Nursing Assistant staff is part-time (regularly assigned to work less than 40 hours per week.) The remaining Certified Nursing Assistants are full-time (regularly working 40 hours per week).

The Employer has a considerable demand for employees to work more hours than their scheduled hours. The Employer prefers to use those part-time employees who want to work more hours because those hours are not paid at time and one-half under the agreement. These hours are called "additional hours" herein. It then will use employees beyond 40 hours in a week. Those hours are called "overtime hours" because they involve premium pay.

The Employer schedules employees through the use of a central scheduling system from a central scheduling office which is administered by a unit employee termed a "scheduler."

Under the system in effect for as long as anyone can remember prior to the changes in dispute, Certified Nursing Assistants who sought additional time notified the scheduler that they wanted additional time by filing out a "preference sheet." The preference sheets were kept on file in the scheduling office.

The operations of the scheduling office were always conducted under the terms of a scheduling "policy" created by management employees. The policy numbers for the scheduling policy are number 14 and 14A. Under the previous system, employees would submit their requests for time off such as vacation, etc, to the scheduler at least four weeks in advance. Employees were freely permitted to "trade" time off for time worked with any other employee in the same classification in the institution. "Trades" could occur in advance or at any time prior to the day worked. The scheduler would then look through the "preference" requests of other employees in the same classification from anywhere in the institution for those who could work additional hours to fill the vacated shift. If two or more employees were available to work the vacated shift, the scheduler selected the most senior person to fill the vacated shift. If the scheduler could not find an employee to fill a shift from those with preference sheets on file, the shift would be posted in the "open hours" book. The schedule was then posted. The posted schedule would delineate those situations where employees took additional hours with an "n" in the schedule at those times. The open hours or if hours were vacated by an employee calling in to be absent at the last minute, the scheduler would use the preference sheets or a "pick up" sheet to select the most senior person who would fill in with additional hours or, if none, then the most senior person seeking to fill in with overtime hours.

The new policy also involved changes to the past policies covering selection of vacation, trades and other scheduled days off. Until the facts in this case, Certified Nursing Assistants who wanted to take vacation would file a "change of schedule" request form with the scheduler notifying him or her on what dates they would like to take vacation. This would be done no sooner than six months and no later than 45 days before the proposed vacation.

Well before the facts of this case, the nursing home industry began to consider the way it conducted business. The concept is called "Culture Change" and, in short, is a designed to

change the systems in nursing homes from a task based system to a living system so that residents are able to develop better relationships with staff and to have the facility be closer to a “home” environment than an “institutional” environment.

The process of building relationships between residents and staff involves “consistent assignment” which is a change to having the same staff people regularly work with a resident rather than having different staff fill in when regular staff are not available. The Employer recognized that this concept tended to conflict with its seniority assignment of staff from all over the facility to perform additional hours as necessary and inconsistent with a policy of allowing all employees to freely trade shifts with anyone in the institution.

State and national regulators began to urge changes to “consistent assignment” industry-wide in a manner which suggested to management that it would not be long before such changes would be required as a matter of legal regulations.

In May, 2008, the Employer began the process leading to the disputed changes. In June, 2008, it created an “action committee” which did not involve the Union.<sup>1</sup> The action committee ran a pilot project on the Symphony Village wing of the facility which project was completed at the end of March, 2009. On May 29, 2009, the Employer met to meet its obligation to bargain with the Union. The Union indicated that it would file a grievance. The Union then grieved the issue and the grievance was properly processed to arbitration herein.

Under the new system, the scheduler posts a draft schedule in the neighborhood, but nowhere else, six weeks in advance. Certified Nursing Assistants in that neighborhood only may make changes on the schedule or by notifying the scheduler by e mail of requests to make trades or take allowable time off. There is a limit to the number of employees who may be off on one day. Only employees on the affected neighborhood can indicate if they want additional hours on any date which becomes understaffed as a result of changes made by Certified Nursing Assistants. The scheduler picks up the draft schedule with the notations on it and posts a new permanent schedule with the changes on it. The schedule is only posted in the affected neighborhood. There is no record on the schedule as to whether the resulting entries were time originally scheduled for the employee or not. The final schedule is posted one week before the schedule starts. After that Certified Nursing Assistants are responsible to work the scheduled time except for sick leave and other emergency time off. The Scheduler then fills open shifts with those who have filed a preference sheet for additional hours from the neighborhood they are to be worked on, if possible, then from anywhere in the facility by seniority of those requesting that time and finally by seniority for those requesting overtime.

Under the new system, Certified Nursing Assistants who want to schedule vacation need only do so up to the day before schedules are posted (two weeks before). Similarly, they can work out agreed-upon changes any time by submitting a change request to the scheduler up

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<sup>1</sup> The Union requested to be involved and was permitted to have a member participate. However, a schedule conflict prevented the member from being involved. The Union did not have meaningful input into the new system’s development.



to one day before the schedule goes up or sending the scheduler an electronic change-of-schedule request thereafter. Trades are always approved unless they result in overtime.

### **POSITIONS OF THE PARTIES**

#### **Union**

The Employer filled vacant shifts by selecting employees who volunteer for the additional hours by seniority following Procedures 14 and 14A for many years until the change in this dispute. Pursuant to Article 1, Section 1.02 the Employer has the right to adopt “reasonable rules” upon giving notice to the Union. The Union has the right under Section 1.03 to grieve the reasonableness of the rules. The Employer has changed procedures 14 and 14A in an unreasonable manner. Under the new policy, available shifts are filled first with employees who regularly work on the neighborhood. The Employer’s reason for this change was due to “culture change” and “continuity of care.” Under Article 19, Section 19.01, the Employer agreed to the “seniority principle.” The Employer’s actions in this dispute violate the seniority principle. Under Article III and other provisions, part time employees are entitled to health insurance and other benefits based upon the average number of hours they worked in the past six months. Additional hours are valuable to part time employees because they can obtain benefits often only by working additional hours.

The Employer’s reason for this change is not reasonable. The concept of “continuity of care” is not a federal or state mandate. The basic concept of “continuity of care” has been occurring all along here. Brewster Village has always been organized by neighborhoods. There is never complete continuity of care even now. There are Certified Nursing Assistants who are in positions called “Floats.” Their job is to fill in wherever needed throughout the facility. Not only are floats assigned to various households, the record demonstrates that employees are assigned to different households when the need arises.

Conceptually “continuity of care” is a good practice, but open shifts are an exception to this practice. Residents have continuity of care for a large portion of the time.

Article VIII, Section 8.02 clearly requires that the work schedules be made and posted two pay periods (4 weeks) in advance in the respective neighborhoods. The Employer is now posting them six weeks in advance. The policy change prevents employees from picking up open shifts as they are not afforded the opportunity to see what shifts are available on other neighborhoods. Employees in other neighborhoods never know if the open shift was taken by a senior or junior employee.

The Union request that the arbitrator issue a cease and desist order and require it to offer open shifts to the employees in the future based upon the seniority principle.

## Employer

The Employer did not violate any specific provision of the collective bargaining agreement. The Employer's change was in response to the state mandated "culture change" to improve resident care. Article I, Section 1.02, preserves to the Employer the exclusive authority to direct the working forces. It permits the Employer to make and change reasonable rules. Unless the Union can point to some express provision of the agreement which nullifies the Employer's right to amend its scheduling practices, the arbitrator must deny the grievance. Article VIII, Workweek, does not limit the Employer's rights in this situation. Under the new policy, schedules are posted three weeks ahead instead of two. This is greater notice than that required by the agreement. The new policy does not require employees to find a replacement if they wish to take time off provided it is within the scheduling parameters. Instead, an employee can now cross off their name on the draft schedule and allow any employee to pick up that shift. Article VIII also supports the Employer because it provides extra straight time to employees within a neighborhood by seniority, before making straight time available to others based on seniority. This indicates that the parties never intended the "seniority principle" of Article XIX to reach extra-hours. In any event, Article VII expressly provides: "Employees shall not be permitted to exercise their seniority rights for the purpose of 'bumping' on shifts or neighborhoods." This demonstrates that unit-wide seniority is submissive to the "neighborhood" structure.

Arbitrator Greco concluded in a case between the parties in 1990, that modification of scheduling policy is a ". . . proper exercise of the County's right to promulgate reasonable work rules . . . ." In the twenty years since that award, the Union has never successfully bargained a change in the agreement which would prevent the Employer from amending its rules regarding employee scheduling. Further, the Union never grieved any amendments to the scheduling practice since that award. The Employer requests that the arbitrator deny the grievance.

## DISCUSSION

### *1. Standards*

The role of the arbitrator is to apply the parties' agreement as it is expressed. When language is clear and unambiguous, the arbitrator applies it as it is written. When language is reasonably susceptible to alternative meanings, it is said to be "ambiguous." Ambiguities are of two common types; patent and latent. A "latent" ambiguity is one which is not obvious from the face of the agreement. When language is ambiguous arbitrators determine the parties' intent by looking at the history of the language, past practices, if any, of the parties, the purposes of the provisions, the context of the language, and the rules of construction applied by courts.<sup>2</sup>

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<sup>2</sup> The concept of "past practice" is defined and its application discussed in NAA, *The Common Law of the Workplace: The Views of the Arbitrators* Sec. 2.20 (BNA, 2d. Ed); Richard Mittenhal, "Past Practice and the

The Employer changed its scheduling policy by changing its rules governing scheduling. Section 1.01 preserves to management its right to “direct” the “working forces.” Scheduling employees to work is generally a fundamental part of that process. Section 1.02 requires the Employer to “adopt and publish reasonable rules.” Section 1.03 allows challenges to the reasonableness of “rules and regulations” in the grievance procedure. This provision is ambiguous because it is unclear if this provision applies to policies which do not affect discipline of employees. In most agreements provisions controlling the reasonableness of rules are generally directed to those rules which govern the conduct of employees. Section 1.03 appears to suggest that the right to challenge the “reasonableness” of a “rule” or “regulation” is primarily directed at discipline, but a fair reading of the provision indicates that it is broader than mere discipline. Section 1.01 effectively prohibits the Employer from disciplining employees without “proper cause.” If an unreasonable rule resulted in an employee being disciplined, the ordinary administration of grievances involving “proper cause” would result in an employee being made whole for all lost wages and benefits lost as a result of the discipline. Thus, reading the right to challenge the reasonableness of a rule or regulation to only be limited to rules involving employee conduct would leave the second sentence of Section 1.03 as redundant and with no separate meaning. Thus, at least some rules which are not disciplinary, but which might affect employees economically, are subject to the prohibition.

At minimum any rule or regulation which violates a different provision of the agreement would be unreasonable and the Union would have a right to challenge the rule at its adoption under this provision and not have to wait until the actual violation occurs. Also at a minimum, any rule or regulation which unreasonably substantially interferes with an employee’s right or ability to obtain an economic benefit specified in the agreement would be subject to challenge on that basis. For the reasons discussed more below, I conclude that a rule or regulation which unreasonably interferes with the administration of the agreement itself may also constitute an unreasonable rule.

Challenges to rules and regulations are of two types. The first is directed toward the rule as it may be written. The second is to the rule as it is applied. The first must be addressed when the rule or regulation is adopted or changed. The second may be addressed at that time or when the method of application first becomes known to the Union. It is not necessary to address Section 1.03 further to deal with this specific dispute.

## 2. *Violation of the “Seniority Principle”*

Section 19.01 provides in simple terms: “The Employer agrees to the seniority principle.” The provision does not say it applies to scheduling nor does it define the “principle.” Arbitrators often look to the “past practices” of the parties to see how the parties themselves apply the terms of their agreement. Here there is no doubt what that practice is: the parties had always applied seniority principles to the selection of employees to perform

additional work and overtime work, with exceptions. Accordingly, this provision applies to this dispute.

The concept of the “seniority principle” is not expressly defined in the agreement. Article XIX provides specific terms which outline the how seniority is to be applied. Having expressed its application in specific circumstances, the better view of the general term is that it is not a hard and fast concept. Similarly, in a prior case between the parties, Arbitrator Greco concluded that the Union had acquiesced in the Employer’s decision to schedule senior employees on weekends in order that junior employees did not have to be required to work an excessive number of weekends.<sup>3</sup> The concept of a “principle” is commonly defined as: “A rule or standard, esp. of good behavior.”<sup>4</sup> The better view of the principle is that it can be fairly stated in this dispute as:

In circumstances in which employees have a substantial economic or other important interest, the Employer will grant the preference involved to senior employees, unless there is a good management reason not to do so.

The Employer has established a legitimate management objective for the substance of the change to rules 14 and 14A. The Employer’s legitimate motivations included complying with what it believed was a request from the State (which it believed would soon become a mandate) that it increase the continuity of care of residents by the same staff. In this regard its motivations included, but were not limited to, attracting future residents, providing better care to residents, and reducing errors. The rule change was reasonably related to those goals by keeping the staff who regularly worked with residents working with them during “additional hours” periods. This is at least a management right, if not a responsibility. The Employer’s actions do not violate the seniority principle.

### **3.     *Impairment of Benefits***

Part time employees make up a very large percentage of the Certified Nursing Assistant staff. Many of the economic benefits in this agreement are pro-rated or provided on the basis of the number of hours part time employees have worked.<sup>5</sup> Some part-time employees regularly seek additional hours to obtain benefits. It is in both the Employer’s interest and employees’ interest to have employees seek additional hours. It is, therefore, an assumption underlying these provisions that employees may seek additional time. A fair interpretation of these provisions is that the Employer may not take actions for the purpose of preventing employees from exercising the right to seek additional hours or to unreasonably interfere in the ability to seek additional hours.

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<sup>3</sup> OUTAGAMIE COUNTY (BREWSTER VILLAGE), WERC Case No. 41920 (Greco, 3/1990)

<sup>4</sup> *The American Heritage Dictionary (Second College Edition)*, (Houghton-Mifflin Company, 1985), but with fairness, it also allows the concept to be used as a hard and fast rule.

<sup>5</sup> See, for example, Article XXV, relating to medical insurance, Article XII, vacations, Article XI, holidays and Article XIII holidays.

That right is subordinate to the legitimate exercise of management rights to determine how to award those hours except to the extent that they unreasonably interfere with the right to seek additional hours. The judgment has to be made on a case-by-case basis. The Union has failed to show that that the change in this case has unreasonably interfered. First, the evidence indicates that the Employer always has a substantial number of unfilled shifts. Second, Manager Sue DuPont credibly testified that even after all of the scheduling procedures are followed there are shifts which are unfilled. There are seven people who regularly seek additional hours and they have as many or more hours than before.<sup>6</sup> Third, there is nothing in the agreement which guarantees that the choices for additional hours be the most desirable. There is no evidence that the resulting hours are necessarily undesirable. Accordingly, the Union has failed to show that the Employer acted to unreasonably interfere with the right to seek additional hours.

There is also evidence that “trades” for all employees, but especially “floats” were restricted by the Employer. Previously, employees could trade with anybody, but under the new system they are restricted to those in their neighborhood. Work day trading systems are common in the public sector. As is the case here, they are often not written into a collective bargaining agreement. They benefit both Employer and employee by avoiding last minute time off issues, reducing overtime, and reducing the need for time off benefits. When they are not written into the collective bargaining agreement, they become “past practices” which underlay the time off provisions, but which are subject to change for legitimate management objectives. It is not likely that the change unreasonably impaired trades for anyone except the “floats.” Further, the nature of the work of the “floats” is that they do become familiar with residents on a number of neighborhoods. The Employer’s reason for restricting them appears less “continuity of care” and more that it is easier to restrict the trades than to evaluate the level of continuity of care represented by the specific trade. The available evidence indicates that the Employer went too far in this regard.

#### ***4. Interference with Administration of Collective Bargaining Agreement***

Section 7.02 provides in relevant part:

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) of the Employer and the Union, shall be handled by the Union Grievance Committee . . . .

The procedure itself encourages the resolution of disputes at the lowest step. Union president Boyce-Richards credibly testified that she sought copies of the draft schedules from all of the neighborhoods when they came out.<sup>7</sup> The Employer refused to provide them. This action appears to be an unwritten part of the procedure. The part of the procedure which limits knowledge of the draft schedules to those on the neighborhoods is inconsistent with the

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<sup>6</sup> Tr. pp, 161, 166-7, Employer exhibit 6

<sup>7</sup> Tr. pp. 55, 74, 99-100

interests of the Employer. There is no reason why others not on a neighborhood cannot apply for open shifts on a neighborhood, even though they would properly be denied the right to work them if someone on the neighborhood changes the schedule. More importantly, there is no reason why the Union cannot know what changes occur in order to answer the questions of staff members about their rights under the agreement. Any other approach would require that the Union file a grievance on every other issue and frustrate the purpose of the grievance procedure of avoiding grievances and/or resolving them at the lowest level. Accordingly, this part of the procedure violates Article 7 of the agreement.

Similarly, the Employer noted changes made to the schedule by putting in an “n” noting the change. There is no reason why changes cannot continue to be noted. The notations would assist the Union in its duties under the agreement. The failure to make those notations also impairs Article 7.

### 5. *Remedy*

The better approach is to identify the parts of the new procedure which violates the collective bargaining agreement in an interim award and to afford the parties an opportunity to address them. I will reserve jurisdiction over the imposition of a remedy in the event the parties are not able to agree. The focus of the hearing was on the allegations of violation and not on the specifics sufficient to identify the remedy precisely. Accordingly, I have concluded that the change in rule 14 and rule 14A violate the agreement with respect to trades for floats, providing draft schedules to the Union when they are posted, recording changes to the draft schedule which are adopted in the final schedule in a way which identifies it as a trade, and by not allowing employees not assigned to a neighborhood to apply for additional hours even though the Employer has the right to prefer those assigned to a specific village for the additional hours.

### INTERIM AWARD

The Employer did not violate any provision of the agreement by changing rule 14 or 14A to adopt self scheduling except as noted in the next sentence. The Employer violated Section 1.02 of the agreement by changing rule 14 and 14A to unduly limit trades by floats, by denying the Union the information specified in the remedy portion of the Discussion and by not allowing all employees to apply for additional hours even though the Employer will prefer employees on a village for additional hours under the rule. I reserved jurisdiction over the specification of remedy if either party requests that I exercise that jurisdiction in writing, copy to opposing party, within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 3rd day of June, 2010.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator

SHM/gjc

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