

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**KENOSHA COUNTY**

and

**KENOSHA COUNTY INSTITUTIONAL EMPLOYEES,  
LOCAL 1392, AFSCME, AFL-CIO**

Case 286  
No. 69350  
MA-14575

(Light Duty Grievance)

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**Appearances:**

**Lorette Pionke Mitchell**, Senior Assistant Corporation Counsel, Kenosha County Courthouse, 912 56<sup>th</sup> Street, Kenosha, WI 53140-3747, appeared on behalf of Kenosha County.

**Nick Kasmer**, Staff Representative, AFSCME Council 40, Southeastern District, PO Box 580734, Pleasant Prairie, WI 53158, appeared on behalf of Kenosha County Institutional

**ARBITRATION AWARD**

Kenosha County, herein the County, and Kenosha County Institutional Employees, Local 1392, AFSCME, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission as to a dispute with the County over the application of a light duty policy concerning a member of the Union. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing in the matter was held on April 7, 2010 in Kenosha, Wisconsin. No transcript was prepared. The parties filed written briefs, later declined to file reply briefs, and the record was closed on July 12, 2010.

**ISSUES**

The parties stated the issues essentially the same, and the Arbitrator frames the issues as:

Did the County violate the collective bargaining agreement between the parties when it did not allow the Grievant to continue to work on light duty?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE I – RECOGNITION**

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Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services or the use of volunteers that will result in layoff or reduction of hours worked by bargaining unit employee(s).

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**ARTICLE XII – ACCIDENT AND SICKNESS PAY MAINTENANCE PLAN**

Section 12.1 Accident and Sickness Pay Maintenance Plan.

Effective January 1, 1975, an Accident and Sickness Pay Maintenance Plan was established. The following benefits will be paid in a case of non-occupational accident or illness:

- (a) All regular full-time employees will receive thirty (30) calendar days at full pay with coverage starting on the first day of accident, if authorized by a physician, first day of hospitalization, first day of out-patient surgery and seventh (7<sup>th</sup>) day of illness.
- (b) From the 31<sup>st</sup> day to the 365<sup>th</sup> day, an employee will receive two-thirds (2/3rds) of his regular pay. Regular pay means forty (40) times the employee's regular straight-time hourly rate.

- (c) Benefits under this plan are not limited to one (1) accident or one (1) illness per year, but are available any time and employee has an accident or becomes ill; provided that if an employee has received benefits hereunder and there should be a recurrence of the same condition or illness, no waiting period will apply if there is a recurrence within two (2) weeks of return to work. If there is a recurrence after two (2) weeks Benefits on the job, another waiting period will apply.
- (d) No payments will be made under the Accident and Sickness Insurance Plan unless the employee submits an application for benefits and a doctor's statement shall be submitted to the Personnel Department who will make the necessary arrangements for the payment of benefits.
- (e) If, while an employee is being paid under the Accident and Sickness Insurance Program, a wage increase occurs during his absence, he will be paid benefits reflecting such increase. Except in Workers Comp cases, no overtime may be worked by an employee who has returned to work under light or limited duty except in cases of extreme emergency and under the mutual agreement of the Union and Management.
- (f) Benefits will be paid under the Accident and Sickness Pay Maintenance Plan for pregnancy or for any matter relating to pregnancy. The benefits will start after a physician has certified that the employee is no longer able to work on account of disability resulting from pregnancy, and shall continue until such time as the doctor certifies that the employee is able to return to work.

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## **ARTICLE XVI – WORKER'S COMPENSATION**

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Section 17.2 Leave of Absence Due to Illness. Employees receiving benefits under the Accident and Sickness Pay Maintenance Plan shall be considered on illness leave of absence for the duration of the accident and sickness payments and for one (1) additional year thereafter. An employee who is unable to return to regular employment and do the work assigned at the end of that period of time will be terminated unless the County and Union mutually agree, in writing, to extend the employee's seniority for an additional period of time.

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### **BACKGROUND AND FACTS**

Barbara Stein, herein Stein or Grievant, is an employee of the County and a member of the bargaining unit. At all relevant times she was a Licensed Practical Nurse working at the County's Brookside Care Center. She has been employed by the County for approximately 25 years.

On or about November 6, 2003 the County issued a memo to all Brookside Care Center employees on the County policy for Limited Duty, which stated as follows:

Effective immediately the Brookside Care Center is implementing a policy permitting employees who have filed for benefits under the Accident and Sickness Maintenance Plan to work with restrictions.

Under this new policy, employees who are restricted or "coded" due to injury or illness will return to work either at a job which meets their physical restrictions, or, at their normal job which will be adjusted to permit them to work within the physical limitations imposed by their treating physician.

To permit an accurate assessment of an employees limits, A&S forms must include the physical conditions under which an employee may return to work, for example, "may not lift over 20 lbs.," or "must limit bending to 3 to five times per hour," etc. Brookside employees are responsible for telling their physician about the requirement for a detailed description of their restrictions.

The effectiveness of this policy will be evaluated following a one-year trial period.

This new policy will improve our staffing and, in turn, improve your employment experience. Thank you for your cooperation.

After one year from the issuance of this policy and prior to the instant grievance the County did not take any formal action to change or modify the policy and did not notify the Brookside Care Center employees of any change to the policy. When working on light duty or coded employees receive their regular rate of pay regardless of the actual duties they perform while coded.

The County does not always have work available within the medical limitations for any particular employee at Brookside, and looks at each employee's limitations and work available. This policy is similar to what the County generally does with other employees in other departments and some employees with medical limitations do not have work available to do

due to the specific demands of the position. Under the policy an employee does not necessarily need to be able to do any of their normal job duties if there is other work available within their medical limitations. Since the issuance of the policy there have been employees at Brookside Care Center working light duty, or coded, under the policy. Under the policy “coded” employees work if they can reasonably do so and the County can reasonably accommodate them. This continued after the initial one year period to the current time period and is still in effect. Brookside has allowed LPNs to work light duty. This included LPNs doing desk work at a desk position and other work rather than all their usual and normal LPN duties. Occasionally LPNs are assigned to do desk work when they are not on light duty or coded. The desk is usually staffed by a Registered Nurse, but not always. Other work done by employees while on limited duty or coded includes working in medical records, filing, stamping, laundry folding and some limited non-strenuous patient care, manning phones, taking and processing Doctors’ orders, calling for transportation of residents, informing families of patient conditions, ordering lab work, calling pharmacies, doing discharge instructions, among other things.

In October of 2008 Grievant had back surgery for injuries she suffered in a 2007 non-work related automobile accident. After her surgery her treating Physician did not release her for work and she was on Accident and Sickness Leave, A&S, as provided in the parties’ collective bargaining agreement. On April 20, 2009 she returned to work under light duty limitations as set by her treating Physician to: no lifting greater than 10 lbs.; no bending, twisting, or stooping; no pushing of med cart, and; “Light Duty”. Upon her return to work she could not perform all the regular and usual function of an LPN because of the medical restrictions. Among other strenuous things, LPNs frequently push med carts, lift up to 55 lbs., and frequently bend, twist and stoop in performing their job duties. Therefore, Brookside placed her on light duty working in the desk nurse position along with a Registered Nurse. While in that position she did mostly paper work. She was not asked or told by management to perform any other duties which she could perform within her medical limitations. A RN usually did that work in that position. After a few days the RN was put on the hall to accommodate Grievant being at the desk. Grievant did not have to contact an RN for any duties while working on this light duty at the desk.

LPNs and RNs are not necessarily interchangeable positions, but many of the duties can be shared<sup>1</sup>. LPNs can gather data, but RNs do needed assessments and I-Vs per nursing regulations. Desk work might in some circumstances require more strenuous exertion depending on patient needs and that may be work in excess of some, or all, of Grievant’s medical limitations. There are times when nurses have to lift while delivering patient care. Brookside has had RNs as well as LPNs on light duty doing desk work. Brookside is required by regulations to have an RN at the facility 24 hours per day without any other minimum staff to patient ratio. However, Brookside does look at the number and acuity of patients in its

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<sup>1</sup> The Registered Nurses working at Brookside Care Center are in a different local labor union than Grievant.

staffing. Brookside has seven halls, and always assigns either a RN or LPN to each hall. Sometimes, but not always, there is a nurse at the desk, generally an RN with a larger scope of duty than a LPN.

Approximate a week after her return to light duty Brookside informed Grievant that it could no longer accommodate her restrictions. Management had previously observed Grievant working at the desk along with an RN and the hall already had an LPN without restrictions. This resulted in one additional nurse working over the normal staffing on some days. The RN was then put on the hall and Grievant remained at the desk. Management then determined that the needs on the floor where Grievant worked was for an LPN, that there was no need on that wing for a person just doing paperwork that a normally scheduled nurse would do, and there was no job or duties available that Grievant could do within her medical limitations. Other locations, other shifts and other positions or duties which Grievant could perform within her medical limitations were not discussed by management with her. The Director of Nursing made the decision to return Grievant to A&S leave after a conversation between the Director and the County's Risk Manager & Personnel Analyst, who had also spoken with the scheduler at Brookside about the prior availability of desk work for Grievant. The County does take into consideration the financial impacts to the County of an employee's qualifying for full pay, as opposed to 2/3rds pay, in administering the A&S benefit, including a return to work for more or less than two weeks before going out again on A&S Leave. The Risk Manager & Personnel Analyst did not know that Grievant anticipated another surgery in May of 2009.<sup>2</sup> Grievant was told by management that she was not to return to work and she was being placed on Accident & Sickness Leave. Grievant left the facility that day.

Grievant returned to Brookside the following day to work, but after about an hour was again sent home. Thereafter she called the office on several days wanting to return to work, but was told she could only return to work when she had no medical restrictions.

On April 30, 2009 the Union filed a grievance on Grievant's behalf over her not being allowed to work within her medical limitations, as explained in more detail below.

Grievant subsequently scheduled another anticipated surgery for on or about May 18, 2009 that was related to her initial surgery. In her application form for A&S benefits for this May 18, 2009 surgery her Physician filled out a Physician's statement concerning that upcoming surgery. Among the questions asked and answered on that form were the following:

What is patient's first day of disability? 05/18/09 – Surgery (Bone Growth Stimulator Removal)

Is this patient temporarily totally disabled and unable to work as a result of his/her illness/injury? Yes X

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<sup>2</sup> The Director of Nursing also discussed her decision with the Building Administrator, who agreed with that decision.

If yes, please provide a projected return to work date. Approximately June 1, 2009.

If patient is not totally unable to work, under what restrictions can the patient return to work? N/A – Patient to be temporarily totally disabled.

Grievant had her surgery on or about May 18, 2009. On May 29, 2009 her Physician released her to return to work on light duty with the instructions of no lifting greater than 10 lbs. until next appointment. When Brookside received that return to work slip it did not allow Grievant to return to work. Management recognizes that this medical restriction was much less restrictive than the prior medical restriction. Management wanted her back only at full duty and did not accommodate any of her limitations.

Grievant continued to ask Brookside to return to work, and for a reason why she was not being allowed to work within her Physician's limitations. She wanted something in writing. By letter of June 22, 2009, the County wrote to Grievant about her work status:

Dear Ms Stein:

It has come to my attention that you would like a more formal communication from management regarding your work status. This letter is that communication.

I have been informed that in late April of this year Barbara Beardsly, Director of Nursing, sent you home after advising you that Brookside Care Center would no longer accommodate your medical restrictions. You were told that you would be permitted to return when you are able to perform full duty work. Full duty work means you must be medically unrestricted from performing all the essential functions of a Licensed Practical Nurse.

As I presented to the Administration Committee of the County Board of Supervisors at your grievance meeting at which you were present: Management has the right to return you to the A&S benefit while you continue to be limited by work restrictions. I also stated that after many considerations a decision was made to return you to the A&S benefit until you are able to work full duty.

Management maintains this position. The County will not allow your return to work at this time. Your Accident & Sickness leave will continue per the contractual benefit. You are required to provide the Personnel Office with medical update at least every 30 days. You are required to advise Brookside

and Personnel when you are medically released to full duty work. At that time, we will have your ability to perform unrestricted LPN work assessed by an independent occupational physician, which may include a functional capacity evaluation.

Please understand your physical abilities must be sufficient so as not to compromise your safety, or the safety of those you work with or the residents you care for. I sincerely wish you a successful recovery.

Feel free to contact me at (262) 635-2541 with any questions or concerns you may have.

Regards,

/s/

James J. Olson

Risk Manager & Personnel Analyst

As of July 27, 2009 Grievant's Physician removed all work limitations and restrictions, and she returned to work without restrictions as scheduled after an independent fitness for duty evaluation.

The grievance filed on April 30, 2009 contended that the management at Brookside chose not to follow the policy dated 11/6/2003. Employee was sent home. It contended that the policy dated 11/6/2003 was not followed. The Article or section of the contract alleged to have been violated was Section 1.2 and any and all sections and articles that apply. The requested action was to make employee whole. Management contested the grievance on the basis that it has the right to determine and apply the Accident & Sickness policy. It contended that it attempts to accommodate restrictions to the extent the employee can perform meaningful work and is not risking herself, clients or coworkers. The Management maintained it manages this on a case by case basis and that it did attempt to accommodate Grievant's very limited restrictions. After attempting unsuccessfully to perform contributive work the County had no choice but to return Grievant to A&S. The County then denied the grievance on the basis that management has the right to assign duties, there is no contractual obligation to allow a return to restricted duty, management makes that decision on an individual basis depending on restrictions and job duties available, the budget must be considered which does not allow pay to two people to do one person's job for an extended period of time, and that after April 29<sup>th</sup> Grievant went to her doctor who changed her restrictions to NO WORK AT ALL. (Emphasis supplied). This arbitration followed.

Further facts appear as are set out in the discussion.



## POSITIONS OF THE PARTIES

### Union

In summary, the Union argues that the County violated the light duty policy and the collective bargaining agreement when it unilaterally placed Grievant on Accident & Sickness , A&S, leave in April of 2009 and when it refused to return her to work in May of 2009. The light duty policy was not followed by the County. The policy was issued in 2003 and is straight forward. The policy specifically states that employees who are restricted or coded due to injury or illness will return to work either at a job which meet the physical restrictions, or, at their normal job which will be adjusted to permit them to work within the physical limitations imposed by their treating physician. Grievant should have been allowed to work with her restrictions either at a job she could perform with her restrictions or in her own position with accommodations. The policy did not expire and no reevaluation of it occurred by the County. It continues as a number of employees are still working light duty at Brookside, working coded or with restrictions. Grievant should have been allowed to return to work between her initial release to work and her second surgery, and then from the date she was released to return to work in late May and the date she did return to work.

The Union also argues that the County's decision to place Grievant on A&S leave was unreasonable. Both decisions to remove her and then not allow her to return to work were unreasonable. Employers' decisions cannot be arbitrary and capricious, and the essential question is whether or not the decision is unreasonable, citing arbitral authorities. Section 1.2 of the collective bargaining agreement states that: "The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner." The County Personnel Director testified the County cannot make unreasonable decisions. The County's decisions regarding Grievant must be reasonable or else they violate the agreement. Its decision was unreasonable because it allowed other employees to work coded at Brookside, and did so for various periods of time. Despite accommodating these employees' restrictions the County refused to accommodate Grievant's restrictions. That was unreasonable. For desk work, as an LPN, compared to a RN, the only real duty Grievant could not perform were assessments. An LPN does the fact gathering for assessments and then a RN makes the ultimate decision. Grievant could have performed all the duties a desk nurse performs except for the final assessment of a patient. The County also has a practice of placing LPNs in the desk nurse position semi regularly, all supported by testimony and exhibits. In Grievant's initial return to work, even with her restrictions she could have performed the duties of a desk nurse. She could also answer phones, orders, set transportation for residents, duties with lab work, informing families of resident changes, and do paperwork. None of these duties would have been affected by Grievant's initial restrictions. She certainly could have done that under the restrictions she received in May of 2009. It is likely the County decided it was not going to allow her to work coded, as proven by its correspondence to her

that states she will be on A&S until able to work full duty. The County did not ask her if she felt she could perform various duties, but made a unilateral decision to remove her. Instead of treating Grievant like the other employees who were allowed to work coded, the County decided it would make no attempt to accommodate her restrictions. That was unreasonable and discriminatory.

The Union requests the County be ordered to cease and desist from further like actions as well as make Grievant whole.

### County

In summary, the County argues that the collective bargaining agreement reserves management rights, which include “the right to decide the work to be done and location of work.” Management rights in the CBA allow the County to manage its A&S plan and send a worker home that is not ready to return to work. Section 12 sets forth the A&S plan. In another section the County reserves the right to terminate an employee after an extended leave. With respect to light duty work, the County has allowed persons at Brookside to work coded pursuant to the 2003 memo that opened the opportunity for light duty work after extended sick leave. However, the County has not precluded its right to manage the A&S plan under the contract and send home a nurse who is incapable of performing even a portion of her duties. It was revealed that Grievant could not have performed the other light duty LPNs did at the desk or other light duty positions, laundry for example. Given the limitations of her return to work and the complaints from the RN on duty with Grievant, a question arose whether Grievant was capable of performing any work. She testified she could do paper work. The need on that floor was for an LPN, which is a strenuous job. On Grievant’s return to work in April her restrictions were noted and she was assigned to the nurse’s desk, apparently a usual assignment for such a return. She was returned to work with the conditions that she not lift greater than 10 lbs., no bending twisting or stooping, no pushing of med cart, and light duty. Her assignment displaced an RN who pointed that out to the supervisor who in turn noted that too many people were scheduled and that Grievant was not performing meaningful work. Grievant admitted herself that she was limited to paperwork. LPN qualifications require as essential job functions a significant amount of standing, walking, sitting, pushing, pulling, climbing, stooping, crouching, kneeling, reaching, communicating with coworkers and patients and lifting and carrying up to 55 pounds. Based upon the requirements of the job her ability to perform her job was extremely limited. Although a light duty assignment should [be]at a midpoint between the two, she should have progressed to a point where she could transition back to her usual responsibilities. She was sent home, and again sent home. She continued to call the office. She was told to return to work when she could work with no restrictions. She then provided a note that her disability was total. She had a growth stimulator removed from her back in a May surgery and returned to work when she could work full duty. The County did not violate the CBA when it sent Grievant home. The 2003 Memo does not create an unfettered right to return to work after an illness. It allows persons to return to work with restrictions. In the case of Grievant it was determined that she was incapable of meaningful work.

The County also argues that the Union cites the 2003 Memo as authority for the right to have Grievant work light duty. There was a crisis in the jail at the time the memo was issued and there was a need to change the County light duty policy. The crisis carried over to other County Departments, and Brookside faced worker shortages as well. The former policy of not allowing work at less than full capacity was then changed and the 2003 Memo was issued to ease the pressure of workforce demands. Brookside is now under new management and faced different pressures. Management has retained the right to control whether someone is assigned to light duty or not by requiring A&S forms including physical conditions required for work. In this case, Grievant's restrictions were too limiting to perform any meaningful work, even at the desk. There was discussion whether as an LPN she could perform the assessment required by the Nurse on Duty. In the past the person may work the desk if able. Grievant's ability to work the desk was called into question by the nurses assigned to her shift, particularly the RN who was displaced. The Director of Nursing determined that the needs of the wing at the nursing home were not being served by having Grievant sit at the desk.

The County argues that management has the right and responsibility to take corrective action when an employee has a physical or mental disability that endangers the employee's safety or that of others. The employee may be subject to transfer, demotion, layoff, leave of absence, or termination, citing arbitral authority. The County has a duty to the residents at Brookside of a safe environment. The demands of an LPN there are high. The law requires a certain number of Nurses be present on each hall and that only certain nurses can perform certain tasks. Assessments are not within the scope of an LPN's duties, and an LPN cannot replace the RN. It is imperative for safety and smooth operation that the RN is at the desk. In this case Grievant wanted to work the desk. She couldn't even move charts without being over her restrictions. She could not pick up anything that required her to bend. She could not push a cart. Grievant was not required to be at 100%, but was at 20 %. There were too many people scheduled and she was sent home. Management questioned paying an LPN at 100% for 20% effort. Brookside did not need Grievant to sit and do paperwork. Brookside called the County risk analyst and requested Grievant not be allowed to work until she could work full duty. The April restrictions did not allow Grievant to do meaningful work. The RN at the desk was displaced to the hall so Grievant could sit at the desk. Management saw this and the duties Grievant could do were too limited. She was not ready to return to work despite the Doctor's note. Someone with lifting restrictions poses some risk. The employer has the right as well as a duty to take corrective action once it is clear the employee's physical or emotional condition endangers his own safety or the safety of other employees, citing arbitral authority.

The County further argues that it is not required to grant every employee returning from A&S a light duty placement. An additional nurse had been scheduled so Grievant could sit at the desk. The Memo is not mandatory. The County has denied light duty to other Brookside employees returning from A&S. Other LPNs on light duty at the desk were from worker comp cases. Other Brookside employees have been refused light duty and put back on A&S. There is no practice of returning all A&S workers back to Brookside on light duty to work at the desk. There is no contractual duty to provide light duty on the part of the County.

The County is not required to create light duty for Grievant, citing arbitral authorities. The 2003 Memo uses the permissive word “will”, not “shall”, so it does not mandate that every returnee get placed. The decision is made by the County on a case by case basis, and is not made in a discriminatory manner. It is reasonable. The placement on light duty is conditioned on the physical ability of the employee to perform a job, the status of his/her recovery and the limitations stated by the Doctor. The position is taken into consideration. The County is under no duty to create work when none exists.

The County argues that the work of an LPN is strenuous. Grievant worked at an LPN’s rate of pay when her ability was extremely limited. The Director of Nursing investigated her status and determined there were no positions at Brookside that could be made available to Grievant. Troubling facts came to light after Grievant was sent home. She had to undergo additional surgery and the stimulator in her back had batteries only good for six months. Grievant knew she would have additional surgery to remove this in May. She was angered at the change of date and she could have only planned to work light duty for three weeks before returning to surgery. She was sent home on April 27<sup>th</sup> after it had been determined that she could not perform useful work. She reported the next day and was told to go home, and was returned to A&S at 2/3rds pay. If she had been allowed to work for two consecutive weeks, then when she returned to A&S it would have been at full pay the next 30 days. She was later fully restricted, and when asked what changed answered that the May 18<sup>th</sup> surgery was scheduled. She was not subsequently eligible for higher A&S when she was returned to her full restrictions on May 4<sup>th</sup>. On May 18<sup>th</sup> she had another surgery to remove a growth stimulator in her back that had been placed there in the earlier surgery. It is curious as to whether this was anticipated or previously schedule or not. Grievant returned to work on July 27, 2009 at full duty. She was not ready before then to return to work when the Doctor issued the earlier return to work notice. There was no job at Brookside that she was capable of doing under her restrictions. She wanted to do just paperwork and such light duty was not available. She knew she was scheduled for an additional surgery but returned to work, nonetheless. The County was not unreasonable in asking her to return to A&S until recovered.

The County requests that the grievance be denied.

### DISCUSSION

The issue in the case involves the application of the County policy concerning limited duty as contained in the County Memo of November 6, 2003. Grievant, an LPN, had been out of work on Accident& Sickness leave and sought to return to work under the medical limitations as set by her physician. After about a week of working at a nurses’ desk within her medical limitations the County determined that it did not have sufficient work available within her limitations and the needs of Brookside Care Center, sent her home and placed her back in A&S leave. County Management told her that she would not be allowed to return to work until

she had no medical restrictions. Grievant then had another related medical procedure which resulted in total temporary disability for approximately 11 days, after which her physician again released her to return to work with fewer medical limitations than previously. The County did not allow her to return to work until she had no medical limitations.

The Union argues that the County unreasonably applied its 2003 limited duty policy in violation the collective bargaining agreement Article I, Section 1.2 Management Rights, by not allowing Grievant to work light duty while allowing others, including other LPNs, to work light or limited duty. The County argues that it did properly apply the policy given Grievant's medical limitations and its staffing needs, and that it maintains the right to manage its A&S policy as well as the limited duty policy.

The Management Rights clause in the collective bargaining agreement provides: "The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner." It also provides that the County has "the right to decide the work to be done and the location of the work." As the County argues, it has the right to establish a policy such as the limited duty policy issued in the November 6, 2003 Memo. It also has the right to administer that policy as part of its management rights. But as the Union argues and the Management Rights clause itself states, the rules must be reasonable and they may not be applied in a discriminatory manner. This is in keeping with the general arbitral principal involving management rights. As stated in *Elkouri & Elkouri*, HOW ARBITRATION WORKS, (5<sup>th</sup> Ed.) at p. 660:

Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the "sole judge" of a matter, management's action must not be arbitrary, capricious, or taken in bad faith.

The application of the 2003 limited duty policy is subject to this standard as would be other policies. It must be applied reasonably and not in an arbitrary, capricious or discriminatory manner. See, e.g., CITY OF MENOMONIE, Case 65, No. 42643, MA-5757 (Imes, August, 1990). See also, e.g., LINCOLN COUNTY, Case 190, No. 58088, MA-10839 (Boher, May, 2000); WINNEBAGO COUNTY, Case 318, No. 58201, MA-10815 (Levitan, March 2000); VERNON COUNTY, Case 87, No. 47248, MA-7210 (Schiavoni, September 1992).

Grievant's April 20, 2009 return to work medical limitations were: no lifting greater than 10 lbs.; no bending, twisting, or stooping; no pushing of med cart, and; "Light Duty". She was returned to work and put on the nurses' desk at first with a RN and later alone when the RN was moved to the floor. The 2003 limited duty policy provides in pertinent part that

Under this new policy, employees who are restricted or "coded" due to injury or illness will return to work either at a job which meets their physical restrictions, or, at their normal job which will be adjusted to permit them to work within the physical limitations imposed by their treating physician.

The record shows that there were some employees at Brookside who had medical limitations and were not allowed to return to work until the limitations were removed. Grievant's initial return to work had her working on paper work within her medical limitations while at the nurses' desk. Management and the scheduler at Brookside had considered what work it had that she could do as an LPN and had her doing this in the desk nurse role. The desk nurse is sometimes staffed by an LPN rather than a RN, although it is the County's preference to have an RN on the desk given the wider scope of duties for a RN. And, the County has also had LPNs on limited duty working on the nurses' desk. Not all of those involved Worker's Compensation cases. The record does not disclose the nature and extent of the medical limitations of the LPNs working light duty at the nurses' desk. But the record is clear that they did so, and that other employees at Brookside besides LPNs worked on light duty. RNs have worked on the nurses' desk while on light duty. While on the desk the County was adjusting Grievant's normal job to permit her to work within her physical limitations under the policy.

Management then determined that its staffing needs did not call for an RN to be on the floor, but that its needs were for an LPN at full duty. On that basis the County sent Grievant home and returned her to A&S because she could not perform the full duties of an LPN. The County made no further attempt to accommodate Grievant's duties as an LPN either in the duties to perform or by scheduling different shifts and locations. It did not ask her what duties she could perform, as opposed to considering the medical limitations. It did not consider what other jobs or duties outside those of an LPN that Grievant could do within her medical limitations. That is what the policy looks at when applied to an employee who cannot do their normal job adjusted to the physical limitations. Contrary to the argument of the County that Grievant could not perform contributive work and just wanted to just sit at the desk, she wanted to work and had been performing paper work functions at the desk. The County took the immediate position when Grievant began calling them that she would only be allowed to return to work with no medical limitations. The County argues that it applies the policy on a case by case basis, and sometime employees are not allowed to return to work on limited duty. Some of the examples presented by the County were from the Highway department and Sheriffs Department. Neither Department is covered by the collective bargaining agreement at issue, and there is nothing in the record to show that the normal duties and possible other available work in other Departments are at all analogous to Grievant's situation. Even though some employees at Brookside have not been allowed to work limited duty, by refusing to apply the policy at all to Grievant the County acted in an arbitrary and capricious manner, not a reasonable manner. The County was no longer looking at her situation on a case by case basis because it refused to look at her abilities, limitations and available duties within those limitations at all. Further, Management admits it recognizes that Grievant's medical limitations after May 29<sup>th</sup> were much less restrictive than the April 20<sup>th</sup> medical restriction. Yet it still maintained its earlier position that Grievant could only work if she could perform her full duties as an LPN. The County had no reason why other work or conditions were not considered other than the full duties of an LPN or why she must be able to work without any medical limitations under the limited duty policy.

While it is true that the County need not make a new position for an employee to work in with medical limitations, that it need not create work where none exists, and budgetary considerations are a reasonable consideration, the policy still requires actual duties and available work within medical limitations to be considered. The County cites JACKSON COUNTY, Case 185, No. 67160, MA-1370 (Morrison, August, 2008) for the proposition that the County has no contractual duty to provide light duty. However, in JACKSON COUNTY the facts, terms of the collective bargaining agreement and legal standard applied were quite different than the case here. There, the grievant had returned to work on limited duty. During approximately the next three months she was having difficulty performing those limited duties. The County then sought further medical information in an attempt to further accommodate her medical disability. Over approximately the next month it became apparent that the grievant was not able to perform her limited duties, and she was placed on Family Medical Leave. The collective bargaining agreement there contained a specific reference to the Americans With Disabilities Act, and the arbitration specifically applied the statutory provisions of the ADA in determining that the County had made reasonable accommodations for the grievant initially, and was under no duty under the ADA to put grievant to work doing even less work. The Arbitrator there found that the ADA did not require that, and on that basis the County had not violated the collective bargaining agreement. Here, after Grievant returned to work the record shows that she was able to perform work assigned to her at the nurses' desk, the County did not make any further attempt to find duties within her limitations, and there is a separate light duty policy that is being applied rather than a contractual referenced to a different standard in the ADA. Thus, while JACKSON COUNTY might identify a general principal of there being no contractual duty to provide light duty in that case, it does not provide precedence or guidance in how the limited duty policy here is to be applied to the facts of this case.

The County argues that it can, and did, consider its staffing needs when it sent Grievant home, and that it has a legitimate concern for her safety and that of the employees and residents who may depend on Grievant. However, the County did not and does not explain why it did not seek other duties and jobs other than those of an LPN that Grievant could do within her medical limitations. The County offered testimony at the hearing that there were no duties Grievant could perform with her ten pound lifting limit. Yet it has allowed other LPNs to work coded or on light duty at the desk, and the record demonstrates that there are numerous duties at Brookside which require little if any lifting, bending, twisting or other actions covered by Grievant's medical restrictions. It did not explain why other LPNs were allowed to work light duty, but Grievant was required to have no medical limitations to return to work. The County was able to accommodate Grievant and did so for a week before determining it would not let her work until she had no limitations. The County did not tell her that it would review her work status or limitations if they changed, or that it would continue to consider different shifts, locations or other work she could do within her limitations as those opportunities arose, including those which do not implicate anyone's safety. The undersigned is not persuaded that there was no contributive, meaningful work and no duties that Grievant

could perform at Brookside. The County has a reasonable concern for the safety of its employees and the Brookside residents. But there is no evidence here that anyone was in danger or their safety jeopardized by having Grievant there working at duties she was able to perform. Other nurses and Certified Nursing Assistants were available in case more strenuous effort was needed. The County simply determined it was not going to apply the policy to her. By requiring Grievant to be able to work at full duty is to not apply the policy to her at all. It has a policy but is not applying it to Grievant without any reason. The County has taken the position that Grievant, as an LPN, must be able to perform her full range of duties yet has a policy of accommodating limitations. It does not explain how requiring Grievant to be at full capacity when it has a policy it has applied otherwise is not arbitrary and capricious. Were the County to apply this same condition to all LPNs then no LPN could work unless able to perform all their duties without limitation. This would exclude all LPNs from any consideration under the policy. That has not been how the County has applied the policy before this time.

The A&S leave provisions require updated Physicians' statements and Grievant supplied one for her anticipated May surgery. In the statement it is clear that Grievant's total temporary disability was prospective, and would begin as of the date of her surgery on May 18, 2009. That limitation was expected to last until approximately June 1, 2009, and in fact lasted only until May 29, 2009 when the medical limitations were lessened to only the 10 lb. lifting restriction. Thus, there was only a period from May 18 to May 29 when Grievant was not able to perform any work. For that period of time there is reason not to apply the policy to her and it was not unreasonable for the County to not allow her to return to work. Whether Grievant knew she needed further surgery or not is not determinative here. That is not part of the 2003 limited duty policy and it is not part of the A&S leave benefit. The parties have provisions of a collective bargaining agreement to follow and County has its policies to follow. That they may produce favorable results for one party or the other does not determine if a contractual provision has been followed or a policy applied in a reasonable manner.

The County argues that it has the right to send home an employee who cannot perform even a portion of their duties. However, other than the approximately 11 days as set out above the record here shows that Grievant could perform a portion of her duties. The problem as perceived by the County was that it had two employees performing duties when it only needed an LPN rather than an RN performing some of those duties, and wanted an RN rather than an LPN performing other duties. Clearly Grievant was able to perform some work and was doing so. The County admits in its argument that Grievant's return in April to the nurses' desk was apparently a usual assignment for such a return. The County points out that the RN who was displaced from the nurses' desk complained about that. But it is not up to the complaints of a member of a different bargaining unit to determine if there are duties available either in Grievant's usual job or if there are other duties available within the medical limitations.



The County did not apply its limited duty policy towards Grievant in a reasonable and non-discriminatory manner during those times she was able to return to work with limitations set by her Physician and otherwise did not allow her to work light or limited duty but instead required her to be able to perform the full duties of an LPN before returning to work. This violated Section 1.2 of the collective bargaining agreement which allows the County to adopt reasonable rules and regulations but prohibits it from applying them in a discriminatory manner. The County did not violate this policy between May 18, 2009 and May 29, 2009 when Grievant was temporarily totally disabled.

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

**AWARD**

1. The grievance is sustained.
2. As a remedy the County will make Grievant whole for the difference between her A&S benefits and the lost wages and benefits she would have earned had she been allowed to stay at and later return to work, except for the work days within the 11 days she was temporarily totally disabled. And, had she otherwise qualified for a higher rate of pay or to the elimination of the waiting period under the A&S benefit but for being sent home in April and not allowed to return to work before her surgery on May 18, 2009 then the higher rate and elimination of the waiting period will be included in the make whole remedy under Article 12, Sections 12.1 a), c) of the collective bargaining agreement.

Dated at Madison, Wisconsin this 13<sup>th</sup> day of August, 2010.

Paul Gordon /s/

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Paul Gordon, Arbitrator