BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 1871

and

DANE COUNTY

Case 212
No. 72861
MA-15284

(Recreation Therapy Scheduling Grievances)

AWARD NO. 7904

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin, appearing on behalf of AFSCME Local 1871.

Kristi A. Gullen, Attorney, Dane County, 210 Martin Luther King Jr. Blvd, Room 429, Madison, Wisconsin, appearing on behalf of Dane County.

ARBITRATION AWARD

AFSCME Local 1871 (hereinafter "Union") and Dane County (hereinafter "County") requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on May 12, 2014, in Madison, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs, the last of which was received on August 10, 2014, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County challenged the inclusion of the Assistant Aide as an aggrieved party asserting that none of the grievances identified the Assistant Aide as a grievant and therefore the Arbitrator does not have jurisdiction to address or include the Assistant Aide in a remedy.

The parties framed the substantive issues as:

> Did the Employer violate the collective bargaining agreement when it implemented changes to the Recreation Department schedule in July 2013 and ongoing? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II
Management Rights

2.01 Management Rights. The Union recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and powers or authority which the Employer has not official abridged, delegated, or modified by this Agreement and such powers or authority are retained by the Employer. These management rights include, but are not limited to the following: The rights to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to lay-off, to discipline or discharge for just cause, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to contract out work, to determine and uniformly enforce minimum standards of performance, all of which shall be in compliance with and subject to the provisions of this Agreement.

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ARTICLE V
Grievance and Arbitration Procedure

5.01 Grievance. A grievance is defined to be a controversy between the Union and the Employer, or between any Employee or Employees and the Employer as to:

(a) A matter involving the interpretation or application of this Agreement.

(b) Any matter involving an alleged violation of this Agreement in which an Employee or group of Employees maintain that any of their rights or privileges have been impaired in violation of this Agreement.

5.02 Procedure. Grievances shall be processed in the following manner: (Time limits set forth shall be exclusive of Saturdays, Sundays and holidays.)

Step 1. The employee and/or the steward shall take the grievance up orally with the employee's first line of supervision outside of the bargaining unit within ten (10) days of their knowledge of the occurrence of the event. The Supervisor shall attempt to make a mutually satisfactory adjustment, and, in any event, shall be required to give an answer within ten (10) days to the grievant, if any, and the Union steward.

Step 2. The grievance shall be considered settled in Step 1 unless within ten (10) days after the supervisor's answer is due, the grievance is reduced to writing and presented to the department head. The department head shall respond to the grievance in writing within ten (10) days to the grievant, if any, and the Union steward.

Step 3. The grievance shall be considered settled in Step 2 unless within ten (10) days from the date of the department head's written answer or last date due the grievance is presented in writing to the County Executive or designee (Director of Administration or Chief of Staff of County Executive). The County Executive or designee shall respond in writing to the Union Steward, grievance committee or Union representative (with a copy to the President of the Joint Council of Unions) within ten (10) days.

Step 4. If a Union or Employee grievance is not settled at the third step, either party may take the matter to arbitration as hereinafter provided.

5.03 Arbitration.

(a) The grievance shall be considered settled in Step 3 above, unless within ten (10) days after the last response is received, or due, the dissatisfied party (either party) shall request in writing to the other that the dispute [is] to be submitted to an impartial Arbitrator.

(b) The Arbitrator shall, if possible, be mutually agreed upon by the parties. If agreement on the Arbitrator is not reached within ten (10) days after the date of the notice requesting arbitration or if the parties do not agree upon a method of selecting an Arbitrator within ten (10) days, then the Wisconsin Employment Relations Commission shall be requested to submit a panel of five (5) arbitrators. The parties shall alternately strike names until one remains and the party requesting arbitration shall be the first to strike a name. Each party shall pay one-half (½) of the cost of the Arbitrator.

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ARTICLE IX
Hours of Work & Overtime Compensation

The regular workday and workweek shall be as follows:

9.01 Clerical and Office Workers. Eight (8) hours per day, five (5) consecutive days, Monday through Friday, forty (40) hours per week (any deviation flextime shall be by mutual consent of the parties). Any time worked in addition to the regular workday or workweek shall be paid for as provided in 9.08.

(a) Job Center. The County shall provide adequate security for employees during the hours of operation. Security personnel shall be on duty at the Job Center at all times that employees are present at the Job Center. Security personnel shall be available, upon request, to escort employees to their vehicles after the end of the workday. The County shall provide for good lighting of the Job Center parking lot.

9.02 (a) Badger Prairie Health Care Center Employees Who Work a Regular Rotation Schedule Other than CNA's. These employees (including CFS) shall work a regular rotation schedule which repeats every three (3) weeks. The schedule shall consist of one of twelve (12) rotation patterns as agreed upon by the parties. Each

position shall be assigned a specific rotation schedule. Employees shall receive time and one-half (1-½) pay for any time worked over eight (8) hours per day and shall receive time and one-half (1-½) pay for any time worked outside of their regular schedule of hours in excess of eighty (80) hours per pay period.

(b) Badger Prairie Health Care Center Employees Working as Floats For the Above Schedule and Not On A Regularly Established Schedule Other than CNA's. These employees shall be called to work ten (10) eight hour days each pay period and shall receive time and one-half (1-½) pay for work over eight (8) hours per day or eighty (80) hours per pay period.

The exception to 9.02(a) and (b) shall be that with advance approval, and upon the mutual consent of the supervisor and the affected parties, employees holding the same classification may alternate days off within the two (2) week pay period.

(c) Certified Nursing Attendant (CNA) Staffing Levels and Scheduling.

1. The starting ratio shall be a minimum of 70% Core positions (fifty-six [56] positions) and a maximum of 30% Float positions. This is based on the staffing levels as of November 1, 1999. Any changes in staff assignments after February, 2000 will maintain a minimum of fifty-six (56) Core positions.

a. It is understood that should the County desire to change the status of any CNA position but not change the total number of CNA positions, the County shall use seniority in making the selection and the employee involved shall be entitled to exercise seniority to bump a junior employee in another CNA position.

2. The following definitions apply.

a. Core – Will be assigned to specific units and shifts with set rotating days off. Employees in this category are full-time who are guaranteed every other weekend off.

b. Shift Floats:

i) A.M. Floats – May be assigned to any unit on the a.m. shift with set rotating days off. Employees in this category are full-time who are guaranteed every other weekend off.

ii) P.M. Floats – May be assigned to any unit on the p.m. shift with set rotating days off. Employees in this category are full-time who are guaranteed every other weekend off.

iii) Night Floats – May be assigned to any unit on the night shift with set rotating days off. Employees in this category may be full-time or part-time who are guaranteed every other weekend off.

c. Float Floats – May be assigned to any unit, any shift, with a variable rotation of days off. Employees in this category may be full-time or part-time who are guaranteed every other weekend off.

3. CNA Scheduling: CNA's employed at Badger Prairie Health Care Center shall be scheduled to have every other weekend off. Employees who work a regular rotation schedule shall receive time and one-half (1-½) pay for any time worked over eight (8) hours per day and shall receive time and one-half (1-½) pay for any time worked outside of their regular schedule of hours or in excess of eighty (80) hours per pay period. Employees working as Floats for and not on a regularly established schedule shall be called to work ten (10) eight hour days each pay period and shall receive time and one-half (1-½) pay for work over eight (8) hours per day or eighty (80) hours per pay period.

…

(d) Licensed Practical Nurses shall have their schedules of work for each bi-weekly pay period posted by 12:00 p.m. on each Friday preceding a bi-weekly pay period. The schedule shall include two (2) a.m. shifts and two (2) p.m. shifts to be picked on the basis of seniority. The equivalent hours of each shift will be equal to the FTE of the employees who select the shifts. To the extent possible, requests for specific units will be honored in order to maintain continuity of care. Licensed Practical Nurses shall be scheduled for off-duty every other weekend (voluntary switches of

weekend duty shall not result in overtime). Any time worked in excess of eight (8) hours per day or forty (40) hours per week shall be paid for as provided for in 9.08.

(e) All Other Badger Prairie Health Care Center Employees. Employees not referred to in (a) through (d) above shall have a regular schedule of eight (8) hours per day, forty (40) hours per week and any time worked in addition to the regular schedule shall be paid for as provided in 9.08.

(f) Notwithstanding the foregoing, the Employer and the Union agree that the employer may schedule employees of the Badger Prairie Health Care Center to work a shift of eight (8) hours in a span not to exceed eight and one-half (8-½) hours. The span shall include a one-half (½) hour unpaid lunch period.

* * *

9.08 Overtime Rate. The overtime rate of pay shall be one and one-half (1-½) times the hourly rate of pay (including longevity pay) for each employee covered by the terms of this Agreement. Employees who work overtime, may upon mutual agreement between the employee and department head, receive compensatory time off for such work in lieu of cash payment. Compensatory time off shall accrue at the rate of one and one-half (1-½) hours for each overtime hour worked but shall not exceed fifty (50) hours payable as seventy-five (75) hours of compensatory time, at any time. Employees who have accrued seventy-five (75) hours of compensatory time may earn additional compensatory time during the payroll year when their accrual is reduced below seventy-five (75) hours. Such accrued compensatory leave time shall be taken at a mutually agreeable time. On the last pay period of the payroll year all compensatory leave accrued during that payroll year which was not taken as compensatory leave shall be paid out in cash, except that at the employee's discretion, employees may carryover up to seventy-five (75) compensatory hours (fifty [50] hours payable as seventy-five [75]).

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ARTICLE X
Paid Holidays

10.01 The following are determined to be holidays:

(1) January 1st
(2) Martin Luther King Jr. (third Monday in January)
(3) Memorial Day (last Monday in May)
(4) July 4th
(5) First Monday in September (Labor Day)
(6) Fourth Thursday of November (Thanksgiving Day)
(7) Day first following Thanksgiving Day
(8) December 24
(9) December 25
(10) December 31
(11) Thirty-two (32) additional hours with such hours or fraction thereof to be selected by the employee subject to advance department head approval.

10.02 Holidays on Days Off. Whenever any of said holidays shall fall on Sunday, the succeeding Monday shall be the holiday. If said holidays fall on a Saturday, or on a regular scheduled day of work or a regularly scheduled day off, the employee affected shall be granted a compensatory day off with pay; such compensatory time off to be selected by the employee subject to approval of the department head.

10.03 Holiday Carry Over. When holiday credits are not used within the payroll year in which they are earned they may be carried over but must be used by the last day of the succeeding payroll year or they shall be lost.

10.04 Holidays Worked. In the event that an employee shall be required to work on a holiday, he/she will receive time and one-half (1-½) pay in addition to compensatory time off for all hours worked on the holiday.

10.05. Fixed Holidays Falling on Sundays. In the event that a fixed holiday falls on a Sunday, employees required to work on such Sunday shall receive time and one-half (1-½) pay for such hours worked.

ARTICLE XI
Annual Vacations

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11.03 Selection of Vacation.

(a) Each Dane County department head shall designate vacation periods for employees within his/her department according to classification or types of job of employees. Such vacation periods as are designated shall be sufficient to allow all employees to select their vacations. Employees shall be allowed to select their vacations from the designated period according to their seniority with the County.

(b) It is the policy of the parties to this Agreement to encourage employees to use all vacation credits annually. No employee having properly selected his/her vacation according to his/her seniority shall be denied such vacation. If, however, because of labor shortages or work requirements, an employee shall be persuaded to delay his/her vacation, it shall remain to the employee's credit. If an employee does not select a vacation during the designated period and it appears evident that vacation credits will be carried into the following calendar year, the department head may assign the employee to a vacation period. When all vacation credits are not used during years in which they are earned, such remaining vacation credits as employees may have, shall be carried forward for each employee into the following year and used by the last day of the payroll year or shall be transferred to the Vacation Bank, if possible. If all or a portion of such transfer is not permitted under the terms of this contract that portion shall be lost. Employees shall be notified of approved or denied requests for vacation of forty (40) consecutive work hours or more within fifteen (15) days of the date of the request.

(c) Employees shall be encouraged to use vacations in sustained periods of one (1) or more weeks, thereby deriving what is commonly accepted as the greatest value from the vacation. In the event that an employee shall wish to use vacations in small increments this provision shall not be a bar to such use. Such smaller increments of vacation credit use shall be allowed with department head approval where such use does not interfere with the normal use of vacation credit by other employees or adversely affect departmental operation.

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ARTICLE XVII
Miscellaneous

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> 17.03 Existing Benefits. So long as the services of the bargaining unit are continued by the County, the Employer agrees to bargain collectively with the Union over wages, hours and conditions of employment, existing benefits (including, but not limited to coffee breaks, car allowance and/or mileage payments), or other amenities not mentioned herein, but established by practice with the knowledge and tacit consent of the Employer, for the life of this Agreement, prior to effectuating any changes in the foregoing. Existing benefits and other amenities shall be primarily related to wages, hours and conditions of employment. If the parties bargain to impasse over any matter covered in this Section, the Union or the Employer shall have the right to petition for mediation/arbitration pursuant to the procedures contained in Section 111.70 of the Wisconsin Statutes as determined by the Wisconsin Employment Relations Commission.

BACKGROUND AND FACTS

This case encompasses four grievances, all of which arise out of a change to the work schedule for Recreation Therapy Aides and the Assistant Aide in the Recreation Therapy Department (hereinafter "RT Department" or "RT") at the Badger Prairie Health Care Center (hereinafter "BPHCC"). The first grievance, signed by all five members of the RT Department and dated July 11, 2013, alleged that the County, by increasing the staffing on weekends for RT Department employees, violated the labor agreement and past practice. In a second grievance dated July 23, 2013, the Union maintained that the County unlawfully added holidays to the RT work schedule. Grievance number three, filed on July 24, 2013, challenged the County's minimum staffing change. The final grievance was filed by Janeen Riese on October 7, 2013, and asserted that the County's scheduling practice relative to the increased weekend work violated the overtime provisions of the labor agreement.

The County operates BPHCC which is a 120 bed nursing home for residents with behavioral and mental health needs. BPHCC is comprised of six buildings, each of which contains two households, thus totaling twelve households. At all times relevant herein, the RT Department included the Department Head Jeff Lyons; four Recreation Therapists, and one regular part-time Assistant Aide. Each RT Therapist maintained a caseload of between 25 and 33 residents and was obligated to record four quarterly reports that documented the residents' involvement in recreation therapy programs. The Director of BPHCC is Steve Handrich.

Like all nursing homes, BPHCC is subject to inspection every nine to fifteen months by the State of Wisconsin to determine whether the facility is in compliance with state and federal regulations governing nursing homes. An inspection, otherwise known as a "Survey," was completed on June 6, 2013, at which time the BPHCC administrator was verbally informed of the results. In a letter dated June 18, 2013, BPHCC was formally notified that it was deficient in numerous areas and was ordered to submit a plan of correction by July 6, 2013. Relevant to this

case, the June 2013 Survey identified the RT Department as deficient inasmuch as it did not provide an ongoing program of activities based on resident interest. In response to the RT Department deficiency, Lyons determined that certain changes would occur with the RT work schedule. The new schedule continued the assignment of RT staff to specific units during the Monday through Friday workweek, but increased RT staffing from one to two on Saturdays and added a RT shift on Sundays. Lyons did not consult with the Union before making this decision.

On June 28, 2013, Lyons met with the RT Department staff. The RT staff expected to "brainstorm" how to address the RT deficiency identified in the Survey. Instead, Lyons informed the staff that the schedule would change and, further, he reviewed the specifics of those changes, including the addition of another shift on Saturdays and the addition of a shift on Sundays. Lyons further informed RT staff that time off would be limited to two staff members per day and, in order to provide coverage for all holidays (except Christmas Eve, Christmas, and Thanksgiving), RT staff would be assigned to work three holidays per year.

During that June 28, 2013 meeting, Lyons prepared and distributed a weekend schedule starting with the first weekend in August. Because Lyons was advised to provide the staff with 30 days' notice, he informed the staff that he would be working the weekends in July if other RT staff did not volunteer. The schedule distributed on June 28, 2013, went through the last weekend in October 2013, and assigned specific RT staff additional weekend shifts.

Although the RT staff specifically communicated their opposition to the additional weekend and holiday work, on July 17, 2013, a second weekend schedule was prepared by the RT staff for coverage through September 1, 2013. On August 12, 2013, Lyons invited RT staff to assist in determining the September 2013 weekend schedule, but they elected to not participate reiterating that they were opposed to the additional work hours and deferring to the grievance procedure. On September 10, 2013, Lyons again attempted to meet with RT staff to set the weekend schedule, but some RT staff members left before the conclusion of the meeting, causing Lyons to communicate to staff that he did not intend to make any modifications to the weekend rotation set to start in October 2013. From October 2013 through the date of hearing, the weekend work schedule has been modified numerous times.

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

DISCUSSION

I address first the procedural challenge posed by the County at hearing. The County argued that because the grievances did not specifically name the Assistant Aide, she therefore was not a grievant for purposes of a decision and remedy. Neither the County nor the Union addressed this issue in their briefs or reply briefs. In looking to the four grievances, three identify the RT Department as the "[e]mployee's name" and the fourth was specific to a situation involving Recreation Therapy Aide Janeen Riese. The only Assistant Aide employed at the time the grievances were filed was Erica Lee, and Lee signed the July 11, 2013 grievance relating to the addition of holidays to the work schedule. Given that the grievances were filed on behalf of

the RT Department, that the Assistant Aide is part of the RT Department, and that Lee signed one of the grievances, I conclude that the grievances were filed on behalf of all regular full-time and part-time employees of the RT Department affected by the changes to the scheduling of work, including Lee.

Moving to the substantive issues, the Union argues that the County violated the collective bargaining agreement when it added weekend and holiday shifts to the RT Department work schedule, when it mandated that employees take time off during the workweek when they worked weekend shifts, and when it prohibited employees from using non-emergency leave for weekend shifts. Since all four of the grievances arise out of the County's modification to the work schedule, that is where I will start.

At the outset, let me address the Union's position that the County did not have a "sound business reason" to modify the RT Department work schedule. I do not agree with the Union. The BPHCC was subject to a Survey which resulted in findings of deficiency, one of which was relative to the provision of recreation services to its residents. The County did not seek out this negative rating and, once BPHCC was identified as deficient, the County was obligated to take immediate remedial action.

Grievance Nos. 1 and 2 – Work Schedule

In Article IX – Hours of Work & Overtime Compensation, the parties delineated different work schedule sections for the various different positions represented by the bargaining unit. Section 9.01 addresses clerical and office workers; Sections 9.02(a) and (b) applies to BPHCC employees who work a regular rotation and those that float; Section 9.02(c) is the schedule for Certified Nursing Attendants; Section 9.02(d) is the schedule for Licensed Practical Nurses; and Section 9.02(e) applies to all other employees. The parties do not dispute that the Recreation Therapy Aides and the Activity Assistant are covered by Section 9.02(e) which provides:

> Employees not referred to in (a) through (d) above shall have a regular schedule of eight (8) hours per day, forty (40) hours per week and any time worked in addition to the regular schedule shall be paid for as provided in 9.08.

The first clause grants full-time Recreation Therapy Aides and the Activity Assistant a schedule that includes five (5) eight (8) hour days totaling forty (40) hours per week. This language is broad. It does not limit the workdays to Monday through Friday as the parties' negotiated for clerical and office workers in Section 9.01; it does not include "shall be scheduled for off-duty every other weekend" as contained in Section 9.02(d); and it does not mandate set rotating days off with every other weekend guaranteed off as spelled out in Sections 9.02(c)2(a) and (b).

The doctrine of *expressio unius est exclusio alterius* is applicable. This doctrine provides that:

> If one subject is specifically named, or if several subjects of a larger class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded. This was expressed in the Latin maxim *expressio unius est exclusio alterius*. (Citing Corbin on Contracts, Sec. 552.)
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> The above principle fits in with the general idea that a written contract is presumed to embody the whole agreement of the parties, and terms or obligations that the parties did not include should be deemed to be deliberately excluded. This is part of the philosophy that to the greatest extent possible, the words that the parties themselves have used should govern, and legal obligations should be limited to contract language. Of course, controversies involving the interpretation of collective bargaining agreements are subject to the same rules of construction that govern other contracts.
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> Certainly the "expressio unius" concept can be valuable in interpreting collective bargaining agreements. In bargaining a typical labor agreement, the parties consider a wide variety of subjects – e.g. rates of pay, seniority, vacation, insurance plans, and pensions – each of which may be handled on the basis of rules that the employer and union establish. When a dispute arises over issues like eligibility for, or the scope of, a benefit, the contract interpreter must try to reconstruct the bargaining or determine the intent of the parties.
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> If, in such a case, the parties have adopted what appears to be a set of governing rules, it appears reasonable to assume that the set is complete, and any rule not mentioned was not intended to be included. For example, if a series of eligibility requirements for a pension benefit is stated in a pension plan, it will be difficult for the employer to argue that any other eligibility requirement exists. Similarly, if the parties have drafted what purports to be a complete list of fringe benefits, the union would be hard put to demonstrate that a benefit not mentioned is an obligation of the employer.

Hoover Universal, Inc., 77 LA 107, 112 (Lipson, 3/6/81)

The County and the Union negotiated language in Article IX which specifically limited the hours of work for some bargaining unit members to solely weekdays and alternating weekends. The parties declined to specifically limit the workdays and weekends in

Section 9.02(e) and, therefore, consistent with *expression unius*, the parties did not intend to limit the workweek or weekend work obligations for RT Department staff members.

The Union argues that the County is limited by the language of Section 9.02(e) and that, since Section 9.02(e) does not affirmatively grant the County the right to make changes to the schedule, it has exceeded its authority by scheduling staff to work weekends. While I concur with the Union that Section 9.02(e) does not specifically state that the County has the right to make changes to the RT work schedule, it does not forbid modifications. As articulated by Arbitrator Marlin Volz in *Detroit News*, 68 LA 51, 52-53 (Volz, 1977):

> [I]t must be recognized that a collective-bargaining agreement generally is not to be viewed as a grant of authority to the employer; rather, it is to be regarded as a restraint upon the authority which it would have in the absence of agreement. Therefore, as a general proposition, the burden is on the Union to point to some contractual restraint limiting the Company in doing what it did .... [T]he scheduling of work is a function of management except as limited by contract.

And, further:

> It is a well recognized arbitral principle that the Collective Bargaining Agreement imposes limitations on the employer's otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies at the foundation of modern arbitration practice.

Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2002), p.638 citations omitted.

Article II, Management Rights, provides that the County has "[t]he rights to plan, direct and control the operation of the work force ..." and, further, "to introduce new or improved methods of operation … ." Recognizing that the management rights clause grants the County the right to make changes to the work schedule and, in the absence of express constraints in Section 9.02(e) relative to the County adding weekend shifts for Recreation Therapy Aides and the Assistant Aide, I find that the County did not exceed its authority in violation of Section 9.02(e) when it added weekend shifts to the RT Department work schedule.

I move next to the County's expectation that RT staff will provide recreation services on all holidays except Christmas Eve, Christmas and Thanksgiving. Article X lists eleven paid holidays along with 32 hours of employee-selected paid time. Section 10.04 specifically addresses holidays worked and provides that an employee who works on a holiday will receive time and one-half pay in addition to compensatory time off for all hours worked**.** It is clear that the parties envisioned that represented employees would work holidays, and they bargained an added financial incentive for those who worked a holiday.

As previously addressed, Section 9.02(e) does not specifically limit when the County may schedule RT staff. The RT Department employees have historically worked holidays, albeit three per year. The change in staffing relative to holidays results in all staff working at least one additional holiday and the least senior employees working two additional holidays. Lyons' determination that additional recreation coverage was necessary on holidays follows the Survey and, as such, the County was well within its authority to add a holiday to the RT Department work schedule.

This is a contract interpretation case and the contact language is not ambiguous. It does not forbid or limit the County from scheduling RT staff for weekend or holiday work. As a result, it is unnecessary to resort to extrinsic evidence to ascertain the parties' intended meaning. The Union argues that past practice and bargaining history support "the restriction of work on weekends and the payment of overtime for such work." The Union further posits that the "decades-long schedule of the regular staff" for the RT Department constitutes a binding past practice which the County must continue. While unnecessary, even when extrinsic evidence is considered, it does not make the Union's case.

Strong proof is required when determining if a binding past practice exists. Elkouri & Elkouri, *How Arbitration Works*, 2nd Ed. (2002), p.607. To be binding, a past practice "must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." *Id*. at 608. In *St. Regis Paper Co*., 51 LA 1103 (Solomon, 12/31/68), Arbitrator Lewis E. Solomon denied the union's claim that the schedule change from six (6) days on and two (2) days off to five (5) days, Monday through Friday violated the labor agreement since it had been in place since the plant construction four years earlier. Arbitrator Solomon, in addressing the past practice versus management rights issue, cited the learned Richard Mittenthal on past practice:

> The Union seems to say that if a given course of conduct qualifies as a practice, it must automatically be considered a binding condition of employment. *That is not so. For a practice, to be enforceable, must be supported by the mutual agreement of the parties.* Its binding quality is due not to the fact that it is a past practice *but rather to the agreement on which it is based.* Yet, there are many practices which are not the result of joint determination at all. Umpire Harry Shulman in a Ford Motor Company – 6 UAW case 19LA237 explained the point in these words:
>
> > A practice thus based on mutual agreement may be subject to change only by mutual agreement … . But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such

> cases there is no thought of obligation or commitment for the future. Such practices are merely present ways of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. *Being the product* of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion ... . *But there is no requirement* of mutual agreement as a condition precedent to a change of practice of this character. (Italic in original.)

Mittenthal continues:

> Thus, there are different kinds of practices. Only those which are supported by mutual agreement may be regarded as a binding condition of employment.

Id. at 1107.

The record evidence establishes that prior to the Survey, RT Department employees worked Monday through Friday and rotated, depending on the number of employees in the RT Department, for staffing on Saturdays since at least the early 1990s. For example, if there were five RT Department employees, then each staff member was scheduled for every fifth weekend. Because of the regular rotation, the RT staff generally knew in advance all of the Saturdays they would be assigned to work for a given year. This schedule was posted and both the Union and the County were fully aware of its content. While it is true that the schedule was unequivocal and relied on by both the County and the Union, there is no evidence to indicate that this schedule was the result of a mutual agreement. Rather, the schedule was created by the County and the employees found it agreeable. Lacking mutuality, the pre-June 28, 2013 RT work schedule was not a binding past practice.

The Union argues that there is an undisputed practice limiting weekend work to one RT Saturday shift. The Union's past practice argument is nuanced. Rather than asserting that the parties have a binding past practice of RT staff not working weekends, specifically Saturdays, the Union argues that there is a binding past practice of scheduling only one RT staff member to Saturday work. RT staff worked on weekends, albeit only on Saturdays, before the Survey. On the one hand, the Union is arguing that the County cannot schedule on Saturdays while also simultaneously admitting that RT staff have agreed to Saturday work, but that they hadn’t agreed to two RT staff shifts**.** This argument fails.

I reach the same conclusion relative to the County's assignment of holidays. The County assigned staff to work three of the eleven identified holidays. There is no evidence to indicate that this was negotiated but, rather, it was a decision made by the County that the Union did not oppose. This is not a binding past practice and, as a result, the County is not prohibited from increasing the number of holidays which it expects RT Department staff to work.

I move to the Union's claim that a prior grievance supports its position. In 2007, the Union filed a grievance challenging multiple unrelated issues, including the increase in hours for the shift on Saturdays, the addition of a picnic holiday, minimum staffing, the percentage breakdown for programming/preparation and assessment/documentation for RT staff, and the supervisor doing bargaining unit work. With specific regard to RT staff working on Saturdays and holidays, the County maintained that "Saturday and holiday programming is a work expectation" while the Union requested overtime for the additional Saturday assignment. Ex.6, pp.6-9. Procedurally, the County denied the grievance at steps one and two, but the grievance was neither settled nor arbitrated. Instead, the parties sent the grievance to a labor/management committee and, over the course of seven months, that committee attempted to resolve the parties' differences. The filing and ultimate abandonment of the 2007 grievance, with both sides maintaining the same positions that they are arguing in this case, serves only as evidence that this case is ripe for a decision.

The Union next points to the language of Section 17.03 and argues that the County was obligated to bargain the schedule change with the Union. Section 17.03 obligates the County to bargain with the Union "over wages, hours and conditions of employment, existing benefits …, or other amenities not mentioned herein ..." but which have been "... established by practice and with the knowledge and tacit consent of the Employer ... ." The parties bargained Section 9.02(e) and determined the hours of work for the RT staff. A binding past practice does not exist and, as such, there is no agreement reached with the "knowledge and tacit consent" of the parties that requires immediate collective bargaining. Section 17.03 does not apply.

As to the Union's assertion that there were other viable ways to make changes to the RT Department schedule that would satisfy the need for expanded recreation services, the County is not obligated to implement changes desired by the bargaining unit. Rather, the County is at liberty to take reasonable and just action to meet business needs so long as those actions are not in conflict with specific terms and conditions of the bargaining unit and are neither arbitrary nor capricious. Having said that, cooperative problem solving rarely generates conflict and often times leads to a more productive result.

Grievance No. 3 – Minimum Staffing

The Union argues that the County's decision to increase the number of staff required to work on a given day violates the collective bargaining agreement. It further maintains that the County should allow the use of vacation time on newly scheduled weekend days.

The evidence establishes that prior to the new schedule the County had allowed three employees off on the same day, but that, once the new schedule was implemented, staff were informed that minimum staffing had increased thereby reducing the maximum number of staff off on a given day from three to two. The County offered no evidence to explain this change. In looking to the schedules submitted by the County, on numerous dates, the County approved staff

leave/absences that resulted in more than two staff off on the same date.[1] The Union seems to argue that the County cannot make this change to the maximum number of staff allowed off. The Union is in error. Minimum staffing decisions, lacking limiting language elsewhere in the labor agreement, are vested with management, specifically the management rights clause which provides that it has the right to "plan, direct, and control the operation of the work force" and to "determine the size and composition of the work force." While this right is tempered, the Union did not offer any instances in which RT staff had been denied leave time.

With regard to vacation leave, the parties negotiated Article XI which addresses how vacation leave is requested and used. Under Section 11.03(a), the department head is vested with the authority to designate "vacation periods" and then employees select vacation according to seniority. Neither the County nor the Union offered any evidence as to when or if there is a "designated period." Therefore, seniority and the remaining provisions of the article serve as the only constraints.

Following implementation of the new schedule, there were two rounds of vacation selection. For the first round, based on seniority, RT staff requested one full week of vacation time and identified which two of the seven holidays they wanted to work. In the second round**,** RT staff made partial week vacation requests. There is no evidence to indicate that RT staff were denied previously requested vacation time and, in notes prepared following the July 10, 2013 RT staff meeting, Lyons explained:

> Redoing Vacation Calendar with new weekend schedule on it this week. Feel free to ask for new days off for working weekends. Jeff will email all staff with current days off requested for working the old rotation of Saturdays. *Until told different all, already requested days off for Sat starting in Aug for the rest of the year will be changed to vacation days*. If you want to cancel and (sic) of these days please email me when you get the email.

(Italics added for emphasis).

Janeen Riese testified that if she was scheduled to work on a Saturday or Sunday, she was not allowed to either request vacation or any other form of leave, except emergency sick leave, for those dates. Tr.41-42. Erica Lee testified that she requested Saturday, March 1 "off" and that it was denied, but it appears from the work schedule (County Ex.19) that Lee did not work March 1, 2014. No other evidence was offered showing RT staff members requested and were denied vacation on a weekend date. While a blanket denial of all requests for use of leave on scheduled weekend workdays is efficient in terms of scheduling and finances, the RT staff are entitled to select their vacation based on seniority and then in smaller increments when use "does

[1] The calendars were reviewed for the purpose of identifying dates in which it appears that greater than two staff were approved for unanticipated leave (excluding Jeff Lyons), holidays, sick leave, and extended medical. Dates in 2013 include January 11, April 5, April 12, May 3, May 24, June 28, July 3, July 5, July 26, August 12-16, August 20, August 30, and September 2. Dates in 2014 include January 13, January 20, February 20, February 21, and April 18.

not interfere with the normal use of vacation credit by other employees or adversely affect departmental operation." Ultimately, the County cannot have it both ways – either the employees' workweek is Monday through Sunday or it isn't. Having said that, there is insufficient evidence in the record to conclude that the County violated the labor agreement by denying RT staff vacation leave.

Grievance No. 4 – Denial of Overtime

The fourth grievance was filed by Janeen Riese, and it asserts that the County was engaging in a practice of modifying the employees' work schedules to avoid paying overtime. Section 9.02(e) clearly states that overtime is to be paid when additional time is worked beyond the regular schedule. Thus, if RT staff worked beyond their regular schedule and were not paid overtime then it is owed.

Section 9.02(e) states that the employees "shall have a regular schedule of eight (8) hours per day, forty (40) hours per week … ." All full-time RT Department employees are scheduled to work five (5) eight (8) hour days totaling forty (40) hours of compensable time. Lyons testified that it is a requirement for RT staff to take a day off during the workweek if they work a weekend day. While the Union maintains this is nothing more than a work order to avoid the payment of overtime, the evidence is not conclusive. RT staff have been assigned to work on Saturdays since before 2007 and, when they did so, they took a weekday off during that workweek. While this is certainly a benefit to the County inasmuch as it did not pay overtime to the RT staff member for the weekend work hours, it was also a benefit extended to the RT staff member.

Limiting overtime costs is a necessary and reasonable objective of management, but when doing so it cannot violate the terms and conditions of the labor agreement. This is not a situation where the schedule change was temporary, lacked a legitimate business reason, or was an inducement for Union compromise. Rather, the County has expected RT staff to work Saturdays for quite some time, as has been the process of the employee autonomously "flexing" his or her schedule and selecting a day off during the workweek.

Neither the Union nor Riese offered any dates in which Riese worked in excess of eight hours per day or forty hours per week and the County failed to provide overtime compensation. The evidence does not support a finding that Riese was denied overtime compensation.

AWARD

No, the Employer did not violate the collective bargaining agreement when it implemented changes to the RT Department schedule in July 2013 and ongoing. The grievances are dismissed.

Dated at Rhinelander, Wisconsin, this 26th day of January 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot, Arbitrator