BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

OAKWOOD LUTHERAN HOMES

Case ID: 440.0016
Case Type: A

AWARD NO. 7941

Appearances:

Nicholas E. Fairweather, Hawks Quindel, S.C., 409 East Main Street, Post Office Box 2155, Madison, Wisconsin, 53701-2155, appearing on behalf of SEIU Healthcare Wisconsin.

Jon E. Anderson, Godfrey & Kahn, S.C., One East Main Street, Suite 500, Post Office Box 2719, Madison, Wisconsin, 53701-2719, appearing on behalf of Oakwood Lutheran Homes.

ARBITRATION AWARD

SEIU Healthcare Wisconsin ("Union") and Oakwood Nursing Homes ("Employer") are parties to a collective bargaining agreement ("Agreement") in effect at times relevant to this dispute. The Agreement provides for final and binding arbitration of disputes arising thereunder. On November 11, 2016, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute regarding paid leave time. The filing requested that the Commission supply a list of Wisconsin Employment Relations Commission commissioners and staff members from which an arbitrator might be selected; and on March 22, 2017, the parties indicated that the undersigned had been selected from the list. A hearing, which was not transcribed, was held in Madison, Wisconsin, on May 4, 2017. The parties stipulated at hearing that there are no procedural matters at issue in the case. Each party submitted written post-hearing arguments on June 15, 2017, and on that date the record in this matter was closed.

Now, being fully advised in the premises, the undersigned makes and issues the following Award.

BACKGROUND

The Employer operates a facility that offers independent living quarters, assisted living quarters, memory care, and rehabilitation services for the elderly. The facility consists of two campuses known as Prairie Ridge and University Woods, each of which is divided into various departments. The Prairie Ridge Assisted Living Department, which is divided into three care units known as Meadows, Seasons, and Knoll, is staffed by approximately 50 Resident Assistants ("RAs"), three Supervisors, and one Nursing Manager.

The RAs working in the Prairie Ridge Assisted Living Department are members of a collective bargaining unit represented by the Union, and their wages, hours, and conditions of employment are covered by the Agreement. The Agreement also covers employees working in other departments on the Prairie Ridge campus, as well as employees working on the University Woods campus. In total, the bargaining unit consists of approximately 450 employees.

Among other things, the Agreement contains a provision establishing the accrual and usage of a paid-time-off ("PTO") benefit. It is undisputed that, for some period at least going back to 2001, two RAs per shift were permitted to use PTO in the Prairie Ridge Assisted Living Department. In 2016, however, the Employer began limiting the usage of PTO in that Department to only one RA per shift. The Employer contends that this change was based on a determination that too many shifts were being left open.[1] The Employer did not discuss the PTO change with the Union prior to implementation.

The Union alleges that the limitation of PTO usage to one RA at a time violates the express terms of the Agreement. Specifically, it contends that the refusal to permit two RAs to take PTO at the same time constitutes a violation of a blended reading of the PTO provision at Article 21 of the Agreement and the provision at Article 38 of the Agreement establishing that the parties will "work together" in providing service at and advancing the welfare of the Employer's care facilities. The Union also contends that the prior pattern in the Prairie Ridge Assisted Living Department of permitting two RAs to take PTO at one time established a binding past practice.

REVEVANT CONTRACTUAL PROVISIONS

ARTICLE 5 – MANAGMEENT RIGHTS

5.1 Scope. The parties recognize that this Agreement addresses the Employer-Staff member relationship existing between the Employer and its Staff members in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of Employer and Staff member. It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Employer and the direction of the work force including, by way of example and not by way of limitation,

[1] Because the Employer's care model dictates staffing that exceeds the applicable statutory minimum, these incidents of shifts not covered by an employee did not cause the Prairie Ridge Assisted Living Department to fall short of any such standard.

the right to select, hire and assign Staff members, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Employer, direct and assign work, determine work schedules, transfer Staff members between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Employer's goals and objectives are to be attained, and to discharge Staff members for just cause or relieve Staff members from duty for lack of work or other legitimate reasons are vested exclusively with the Employer, but this provision shall be construed to harmonize with and not to violate other provisions of this Agreement. It is further understood that all functions of management not specifically relinquished or limited in this Agreement shall remain vested in the Employer.

. . .

ARTICLE 21 – PAID TIME OFF ("PTO")

. . .

21.5 Scheduling of PTO. PTO shall be scheduled on a seniority basis in each department. Consecutive days off shall not exceed:

OAKWOOD SENIORITY	**DAYS OFF**
61st day of employment through 4 years	2 weeks
5 through 14 years	3 weeks
15+ years	4 weeks

Requests for PTO received according to the following quarterly schedule shall be considered based upon departmental seniority. The Employer will respond with approval/denial in writing by the Approval/Denial Deadline for the following quarter.

REQUEST WINDOW	**APPROVAL/DENIAL DEADLINE**	**QUARTER**
July 1 through October 1	October 16	January 1-March 31
October 1 through January 1	January 16	April 1-June 30
January 1 through April 1	April 16	July 1-September 30
April 1 through July 1	July 16	October 1-December 31

Requests for PTO received after the end of the request window shall be considered on a first-come, first-serve basis, based on department needs. In those cases where two (2) or more Staff members submit their requests at the same time and for staffing reasons all requests cannot be granted, departmental seniority shall prevail. The Employer will respond with approval/denial, in writing, within fifteen (15) calendar days.

All PTO requests will be submitted on the PTO request form.

In the event a PTO request is for a block of time that includes a "Hard to Schedule Day," the requested time, with the exception of the "HTSD" will be approved/denied within fifteen (15) calendar days. Proof of replacement for the "HTSD" must be provided prior to the time the schedule is posted. PTO request for a single "HTSD" will not be approved without proof of replacement for the "HTSD".

. . .

ARTICLE 38 – GENERAL PROVISIONS

. . .

38.2 Working Together. The Employer and Staff members agree to collectively work toward efficient, courteous and safe service to the facilities. They will at all times cooperate with each other in advancing the welfare of the facilities and the highest quality care reasonably possible to residents at all times.

. . .

ISSUE FOR HEARING

The Union and Employer entered a stipulation allowing the undersigned to frame the statement of the issue in the Award. The Union proposes the following statement of the issue:

> Did the employer violate the terms of the Collective Bargaining Agreement in 2016 when it unilaterally changed its practice of granting paid time off requests based on seniority? If so, what is the appropriate remedy?

The Employer proposed the following:

1. Did the Employer violate the labor agreement by denying certain employees the ability to schedule certain PTO days?

2. If so, what is the appropriate remedy?

Having considered the proposals of the parties, the following statement of the issue has been adopted:

> Did the Employer violate the Agreement or a binding past practice when, in 2016, it began routinely denying certain PTO requests? If so, what is the appropriate remedy?

DISCUSSION

There is little question here that under the express terms of the Agreement the Employer is permitted to exercise control over the number of employees using PTO at any given time. The most persuasive language on this point appears at Section 21.5 of the Agreement. From a general standpoint, the provision is written to recognize the Employer's authority to approve or deny PTO requests. Beyond that, the provision specifically anticipates that the Employer may need to limit the use of PTO to a single employee:

> In those cases where two (2) or more Staff members submit their requests at the same time and for staffing reasons all requests cannot be granted, departmental seniority shall prevail.

Satisfying the caveat built into this provision, the record in this matter contains evidence of the "staffing reasons" that led to the Employer's decision in 2016 to begin limiting the use of PTO. Specifically, the Employer identified staffing shortages in the form of shifts that were not being filled, a phenomenon the Employer attributed to various factors such as FMLA-based and other leaves of absence, high turnover rates, and a general recruitment problem in the caregiver workforce.

The Union argues that the Employer did not establish either a growing trend of open shifts prior to the change or a reduction in open shifts following the change. In fact, however, the Employer illustrated the point with a scatterplot that covers a period from August of 2015 through August of 2016. Albeit not an extremely long period, the timeframe makes sense in that it roughly lines up with the beginning of employment (and therefore direct experience) of the new Administrator of the Prairie Ridge Assisted Living Department who initiated the PTO usage change. The scatterplot also shows approximately 10 months of data from before the change and 2 months of data from after the change, depicting a trend-line that generally appears to support the Employer's claim.

The Union also points out that this document was only created for purposes of hearing in this matter. The Employer admitted this point, but the Prairie Ridge Administrator credibly testified that the data represented in the scatterplot was available in the form of pay period schedules and, more importantly, was taken into consideration in making the PTO decision. In short, there is no evidence on the record indicating that the Employer has contrived the staffing reasons behind the decision to make the change.

Finally, with respect to the express terms of the Agreement, the Union has articulated a theory that the PTO limitation violates a blended reading of the PTO provision and Section 38.2 of the Agreement, which states that the parties will "work together" in providing service at and advancing the welfare of the Employer's care facilities. The Union has argued that by not permitting two employees to take PTO at the same time, the Employer has failed to "work together" with the Union. In this case, however, such a broad provision is not an appropriate basis for hampering the Employer's ability to exercise the discretion expressly permitted under the Agreement regarding PTO approval.

Beyond the language of the Agreement, the question is whether the parties have established a past practice regarding PTO. To have a binding effect, it is well established that a practice must be unequivocal, clearly enunciated and acted upon, and reasonably ascertainable over a reasonable period as a fixed and established practice accepted by both parties. At hearing, the Union produced three RAs from the Prairie Ridge Assisted Living Department who testified that, for as long as they remember, two RAs have been allowed to take PTO leave at the same time. The employee with the most seniority among these three has worked for the Employer since 2001, establishing that the practice of allowing two RAs to take PTO at the same time reaches back to that year. Although the evidence also indicates that for some period preceding 2001 only one RA was permitted to use PTO leave at a time, a 15-year history since then is sufficiently long-standing to cover a "reasonable" period.

What is missing from the record, however, is a consistency that might suggest an unequivocal, clearly enunciated and acted upon, readily ascertainable, and mutually accepted practice relating to PTO approval and usage. As indicated, the Employer consists of two campuses and various departments within those campuses. The Agreement covers approximately 450 employees working across the Employer's operation. Although the three employee-witnesses presented by the Union testified that they recall two RAs always being allowed to take PTO leave at the same time—this was not only in the Prairie Ridge Assisted Living Department where they work now but also in other departments where they had worked before—the record shows current variation across the Employer's departments as to how PTO leave is being handled.

At Prairie Ridge, the Dining Department and the Health and Rehabilitation Department only permit one employee per shift to take PTO leave. The Facilities Services Department and the Life Enrichment Department permit PTO for two employees per shift. The Housekeeping Department usually limits PTO to one or two employees, but sometimes allows three. Each of these departments has employees represented by the Union and covered by the terms of the Agreement. Further, the RAs working in the University Woods Assisted Living Department, who are also covered by the Agreement, are limited in their PTO usage to one employee per shift.[2] This evidence of considerable variation in the pattern of PTO approval is consistent with the testimony of the Administrator of the Prairie Ridge Assisted Living Department, conveying his understanding that determinations as to how PTO will be approved are made at the departmental level.

[2] Admittedly, this is not an apples-to-apples comparison. Whereas the Prairie Ridge Assisted Living Department is segregated into three care units, the University Woods Assisted Living Department is segregated into two. The record suggests that the one-person-per-shift limitation applies across all three Prairie Ridge assisted living units combined, whereas one person per shift is permitted to use PTO leave in each of the two University Woods assisted living units. The record also suggests, however, that there are approximately 60 beds in the Prairie Ridge Assisted Living Department, as opposed to 100 beds in the University Woods Assisted Living Department. Assuming there is correlation between the number of beds and the number of employees in each department, the pools of employees impacted by the restriction are roughly similar. Therefore, these structural differences do not undermine the appropriateness of the comparison.

The intention here is not to indicate that a practice *must* be pervasive across an entire organizational structure before it can be recognized as binding. Rather it is to explain that in this case, because of the inconsistency and the lack of some other clear evidence, the Union has not been able to demonstrate mutual acceptance of a fixed practice of always permitting two Prairie Ridge Assisted Living Department RAs to take PTO at the same time. This is particularly true in light of the Agreement, which contemplates a limitation of PTO usage to one employee at a time. Given all of this, the record simply lacks sufficiently "strong proof", Elkouri & Elkouri, *HOW ARBITRATION WORKS*, 6TH EDITION AT PAGE 607, to support a conclusion that a binding past practice existed.

AWARD

The grievance is denied.

Signed at the City of Madison, Wisconsin, this 21st day of July, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

Danielle L. Carne, Arbitrator