

STATE OF WISCONSIN

STATE PERSONNEL BOARD

\* \* \* \* \*  
 \* \* \* \* \*  
 MICHAEL J. CORDES,  
                                 Appellant,  
 v.  
 WILBUR J. SCHMIDT, Secretary  
 Department of Health and Social Services,  
                                 Respondent.  
 \* \* \* \* \*

OFFICIAL

OPINION  
AND  
ORDER

Case No. 31

Before: AHRENS, Chairman; BRECHER, SERPE and JULIAN

OPINION

We find the following facts, which are not in dispute.

Michael J. Cordes, the Appellant, has been employed by the Respondent at the Central Wisconsin Colony and Training School in Madison, Wisconsin for approximately four years. The School is a facility for the treatment and care of profoundly and severely retarded children and young adults. Appellant's duties as an institutional aide consisted of meeting the basic physical and emotional needs of residents, including feeding, dressing, attention and companionship. Most of the residents, many of whom weigh over one hundred pounds, are non-ambulant; and, therefore, on occasion must be carried bodily by the aides.

The School requires that employes must perform overtime work, if directed to do so. The Appellant testified that during his first couple days on the job, he met with the head nurse, who explained to him that he would be required to work overtime and the procedure that was used to determine which employe must perform overtime work. The collective bargaining agreement covering the Appellant's position, in effect at the time of his alleged misconduct, contains the following provision.

ARTICLE VI

WORK SCHEDULES

Section 3.

In the overtime assignment process employes shall be permitted to decline overtime work; however, the Employer shall

have the right to require the performance of overtime work, including requiring employes to remain at work after conclusion of their shift until relief is available. When all employes in the work unit who normally perform the work involved decline an opportunity for overtime work, the Employer shall require the performance of the overtime work on each occasion in reverse seniority order, beginning with the employe with the least seniority.

When an employe at the School calls in sick or is unexplainedly absent, the nurse in charge immediately must procure a replacement employe to maintain minimum levels of resident care. She determines if an employe on the "float force" is available to replace the absent employe and if one isn't, directs an employe on the shift just ending to stay on duty until an employe can be called in for overtime to replace him or her. She telephones all employes assigned to the unit, in this case numbering approximately fifty, starting with the most senior employe who has not waived his or her right to be called. Then, if all of the employes either cannot be reached or indicate they are sick, or are passed over either because they are already at work or worked overtime the day before, she starts calling all of the employes again, including those who waived their right to overtime, to make involuntary overtime assignments. The least senior employe is called first and then she proceeds up the seniority list until she has directed an employe to come to work to augment the work force on duty. When the involuntary overtime replacement arrives at work, the employe held over from the last shift is released.

On May 16, 1971, the Appellant was called for involuntary overtime and refused to report to work, because he had made plans for other things on that date. On May 21, the Superintendent of the School sent Appellant a letter warning him that future refusals would lead to disciplinary action.

On October 21, 1972, which was a Saturday and a work day at the School, three employes failed to report and "floats" were unavailable. The head nurse held over three employes and commenced the overtime assignment procedure. No volunteers could be obtained and, therefore, she commenced the assignment of involuntary overtime. When she telephoned Appellant and directed him to come to work, he said he was sleeping. She asked him to clarify his statement, in reply to which, he said he was not coming to work. She then told him that his refusal would mean she would have to write a recommendation for disciplinary action, to which he replied, "Do as you must do." Appellant testified at the hearing that he had been out late the night before and that he didn't feel he could perform his duties adequately in the condition he was in. He testified further that he knew disciplinary action would follow his refusal to go to work. He refused a similar direction to come to work for involuntary overtime the following day.

The Department's Work Rules contain a provision, under "Explanation", which is as follows:

Work rules are defined as and limited to rules promulgated by the Department within its discretion which regulate the personal conduct of employes during the hours of their employment.

Under "Work Rules", it is provided:

All employes of the Department are prohibited from committing any of the following acts:

1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

Appellant argues that he did not refuse any assignment during his hours of employment. No question exists that the Appellant was neither

scheduled for work nor at work on October 21, when he was telephoned at his home and refused to indicate he was coming to work. He was not on pay status then. Appellant points out that the collective bargaining agreement in Article IX, Section 1, provides as follows:

ARTICLE IX  
APPLICATION AND INTERPRETATION  
OF WORK RULES

83 Section 1. For purposes of this Article, work rules are defined as and limited to: Rules promulgated by the Employer within his discretion which regulate the personal conduct of employes during the hours of their employment.

The contractual language is the same as that contained in the work rule itself. On the other hand, the Respondent argues that the Appellant was advised about involuntary overtime when he commenced his employment and was well aware during the ensuing years that employes might be required to come to work to work overtime hours at times when they were not scheduled for duty.

The Appellant's refusal to carry out the verbal direction of the head nurse occurred when he failed to report on the job for his overtime assignment. After the head nurse had advised him he was needed at the School by reason of the absence of other employes, his hours of employment commenced upon the lapse of whatever period of time was reasonably necessary for him to get to work. When he did not report for work, he had at that time refused "to carry out" the direction of the head nurse. At the time he advised the head nurse he wasn't coming, he was stating his intention of not carrying out her direction. We conclude that the Appellant violated Work Rule Number One of the Department relative to refusing to carry out a verbal direction to report for overtime work.

The Appellant challenges the reasonableness of the Work Rule, which relates to insubordination and dereliction of duty. What Appellant is really challenging is the procedure used, and requirement itself, that employes be subject to call for involuntary overtime. The facts adduced at the hearing show that on October 22 the head nurse telephoned approximately twenty employes to offer them the overtime work, and thirty-five more before she could find three at home to order to work. Four employes reported they were too sick to report to work. Appellant argues that the system is unfair since if employes lied by saying they were ill, they would be excused from overtime, but if they openly refuse to report for overtime, discipline is imposed. Appellant points out that another method by which some employes avoid being called for overtime is simply to not answer their telephones. On the other hand, the Respondent argues that the overtime assignment procedure is provided for in the collective bargaining agreement between the School and the Union representing the Appellant, and other employes, and that Appellant was not disciplined for telling the truth, but for failing to report for work. The procedure used to assign overtime work has been determined in collective bargaining. The need for overtime is a management decision controlled in large measure by the number of residents and the nature of the services provided for their care and treatment and the amount of money appropriated by the Legislature for that purpose. It is management's decision to utilize overtime, rather than hire more employes, and the matter of its assignment is the subject of collective bargaining. We conclude that the work rule on refusing to carry out an assignment is reasonable and may be used to implement the assignment of involuntary overtime.

The Board feels that the management of the School is derelict if it does not establish some procedures to verify whether employes who claim that they are unavailable for overtime due to illness, are in fact ill, and those who do not respond to telephone calls to their residence, are in fact away. This does not necessarily mean every call would be investigated, but in the very least some monitoring by appropriate supervisory personnel would appear necessary to eliminate the kind of abuses which motivated the Appellant to act as he did in this case.

ORDER

IT IS ORDERED that the <sup>suspension</sup>~~discharge~~ is sustained.

Dated Feb. 3, 1974

STATE PERSONNEL BOARD

BY

William Ahrens  
William Ahrens, Chairman