

IN THE MATTER OF THE ARBITRATION BETWEEN  
=====

United Steelworkers, Local 9230,  
Union,

and

Lutheran Care Center Bridgeway Estates  
Employer.

**OPINION AND AWARD**

Grievance of USW, Local 9230  
(replacing LPN hours with non-  
bargaining unit employees)

FMCS Case No. 10-54073-3

---

ARBITRATOR: Janice K. Frankman, J.D.

DATE OF AWARD: August 6, 2010

HEARING SITE: Conference Room  
Country Suites  
209 16<sup>th</sup> Street Northeast  
Little Falls MN 56345

HEARING DATE: May 24, 2010

RECORD CLOSED: June 28, 2010

REPRESENTING THE UNION: John Rebrovich, Sub-District Director  
Curtis Reed, Staff Representative  
USW, District 11  
2929 University Avenue, SE  
Suite 150  
Minneapolis MN 55414

REPRESENTING THE EMPLOYER: Jeffrey Mutz, VP of Human Resources  
Health Dimensions Group  
4400 Baker Road, Suite 100  
Minneapolis MN 55343

## **JURISDICTION**

The hearing in this matter was held on May 24, 2010. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of FMCS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received from the Employer and the Union on June 25, and June 28, 2010, respectively when the record closed and the matter was taken under advisement.

## **ISSUE**

Whether Lutheran Care Center ("LCC", "Employer", "facility") violated the parties' Collective Bargaining Agreement when it assigned Registered Nurses ("RN") to the charge nurse position on evening shifts and if so, what is the appropriate remedy?

## **BACKGROUND AND SUMMARY OF THE EVIDENCE**

This Grievance arose in late September, 2009, when the Employer assigned an RN to the charge nurse position on the evening shift. The Employer had been assigning Licensed Practical Nurses ("LPN") to the evening charge nurse position since early 2004. At that time, the parties met and agreed to scheduling changes which included assignment of LPNs to the charge nurse position, reduction of the number of nursing assistants on the three shifts, lay-off of medical records personnel and a decision not to replace a housekeeper. The Union has brought this Grievance, seeking an award which returns lost work hours and increased pay for charge nurse work to the LPNs. It alleges contract violation for assigning bargaining unit work to non-bargaining unit employees, supported by past practice. This record does not include grievance documentation.

### The Facility: History of Reduced Census, Financial Difficulties and Low Quality of Service Ratings

The Lutheran Care Center became a licensed long-term care facility in 1986. It was initially licensed for 110 beds. Due to reduced census, the number of licensed beds was reduced to 84 in 2002, to 76 in 2005, and to 65 in 2009. The facility census continues to decline. It was 57 on the date of this hearing.

The facility has had serious financial difficulties resulting in the filing of Chapter 11 bankruptcy, month to month agreements with creditors, debt default and forbearance agreements. In the summer of 2007, U.S. Bank, a bondholder, required the facility to hire a management company to avoid foreclosure. Health Services Innovations was hired in September, 2007, and has recently been replaced by Health

Dimensions Group. Independent audits in 2008 and 2009, were reported as “a going concern” to LCC’s Board of Directors.

The facility has received low ratings, published nationally, following State Department of Health inspections and based upon nursing home required reporting relative to staffing and quality measures including aspects of residents’ health, physical functioning, mental status and general well-being. A “Nursing Home Compare” at Medicare.gov, the official federal government website for Medicare, provides detailed information about nursing homes. National and state averages in various categories provide comparison with individual nursing home data. There is a five star quality rating scheme, ranging from “Much Below Avg.”(one star) to “Much Above Avg.”(five stars), in which individual nursing homes are given an overall rating in the areas of health inspections, nursing home staffing and quality measures. In June, 2009, LCC’s quality of care rating was one star. A May 20, 2010, print-out of the website data reports its quality of care rating as three stars (“Average”). It reports LCC’s rating in the other two categories is one star. See, Union Exhibit 2.

Staffing: RN and LPN Job Descriptions and Duties; Nurse Supervisor, Director of Nursing and Assistant Director of Nursing

The parties’ Collective Bargaining Agreement (“Contract” “CBA”) includes LPNs and other positions set out in the Recognition provision and Wage Rate Schedule. RNs are not covered by the Contract. Job descriptions for LPN and RN positions are included in the Employer’s manuals. State Administrative Code provisions direct personnel requirements which impact utilization of both RNs and LPNs. This record includes facility job descriptions for Licensed Practical Nurse and an Addendum to LPN for Night Charge Duties and Requirements; and for Evening Supervisor and Nurse Manager, positions which require current State licensure as a Registered Nurse. The record does not include descriptions for the Director of Nursing and Assistant Director of Nursing, both of whom must be registered nurses.

The LPN job description is summarized as follows:

SUMMARY: Provides prescribed medical treatment, personal care services, and implements resident care as designated in care plans to ill, injured, convalescents and disabled persons by performing the following duties in accordance with facility policy and procedures.

Employer Exhibit 2

Essential Duties and Responsibilities are detailed with a *caveat* that other duties may be assigned. The Addendum for Night Charge Duties and Requirements expands the foregoing general LPN description. The duties and responsibilities describe interface with RNs and limitations with regard to authority. State Administrative Code provisions allow for counting LPN hours to satisfy nurse’s aide requirements. They also allow a home to request a variance to use an LPN to meet RN requirements.

RN positions are distinguished from LPN positions by the work an RN is authorized to perform and the supervisory authority he or she has. For example, RNs perform more complicated medical procedures than LPNs, are authorized to complete patient assessments and provide care plans and have oversight of work that LPNs perform in a monitoring mode. They may have supervisory authority including hiring, firing and disciplining of LPNs and others whose work they direct. The two RN position descriptions included in this record report to the Director of Nursing and are summarized as follows:

**NURSE MANAGER:** The Nurse Manager is responsible for directing and coordinating the nursing care on the assigned unit to assure 24 hours continuity of care. This includes providing supervision and management to staff to assist the residents to achieve their highest practicable level of functioning physically, emotionally and psychosocially.

Employer Exhibit 6

**EVENING SUPERVISOR:** The Evening Supervisor is part of a management team and acts on behalf of the Administration. Evening Supervisor is responsible for the overall function of the Evening shift.

Employer Exhibit 5

The Facility currently has a Director of Nursing and Assistant Director of Nursing. The current Director was hired by the facility in October, 2006. The Assistant Director was hired in June, 2009. There was an Evening Supervisor who was not replaced when he or she retired in early 2006. The Director's position is regarded to be a 24/7 responsibility. The Assistant Director works days and currently is responsible for completing all complex patient assessment forms (Minimum Data Set or "MDS") required by federal mandate. RNs work the day and evening shifts. LPNs work day, evening and night shifts. The charge position is assigned to an LPN on the night shift. An LPN may be assigned to the charge position on any shift where an RN is not available. An LPN working as charge nurse must communicate with an RN for direction and authorization in many instances.

#### Decision to Reduce Staff and Reassign Work Responsibility

In May, 2009, LCC management determined that staffing changes needed to be made in order to address the facility's financial challenges and low quality of care ratings. Work performed by staff at the three nursing stations, including an ancillary station, had been monitored. A consultant had been retained to provide information relative to staffing in similar facilities in the state. The three station configuration had existed since 1986 when the census was 110.

Considering census reduction to nearly one half the original number of licensed beds; the data provided by the consultant which suggested inappropriate staffing structure and confirmed conclusions management had reached; and concern with

quality of care issues, the decision was made to close the ancillary nursing station and to reorganize staff. The consultant presented data which suggested that the facility was overstaffing LPNs and understaffing RNs and that it appeared that more nursing assistants could be hired. A question was also raised relative to a comparatively high rate of pay for another service position. The result was a decision to lay-off LPN staff, to schedule more nursing assistants and to schedule as many RNs as possible for the day and evening shifts.

The Union contends it did not agree to the changes that were made and that it only received a letter advising that there would be LPN lay-offs and changes in administration. By contrast it claims that in 2004, Union and management met and worked out changes as a result of financial challenges, which included elimination of the RN evening shift position and assignment of an LPN to work evening charge.

The Employer identified specific dates when it met with Union representatives to discuss the changes which led to this Grievance and claims they were implemented in phases as requested by the Union. First, the ancillary nursing station was closed resulting in LPN lay-offs, and additional nursing assistants were scheduled. When a part-time night shift LPN resigned in July, the position was not staffed, leaving two LPNs including the charge nurse. The Union was advised that if the second night nurse could not come in, no one would be called. Finally, in late September, the evening shift charge position was assigned to an RN who worked with two LPNs. Other staffing changes made during the same time period included hiring of the Assistant Director of Nursing, creation of staggered shifts to maximize care at peak times and reduction of administrative and clerical staff in the areas of social services, recreation and activities and reception.

Management concluded that it would staff as many RNs as possible over the day and evening shifts to facilitate admission of a broader patient base including those requiring a higher level of care to increase revenue. Accordingly, it recognized that the completeness and accuracy of MDS reporting was essential to receiving higher reimbursement and higher quality of care ratings.

### Contract Provisions

The hearing record does not include the parties' Contracts effective between 2004, when LPNs were first assigned evening charge duty, to the date of the current CBA (Joint Exhibit 1, effective August 1, 2009) The decisions and changes addressed here were in the process of being made in the period beginning in late May, to late September, 2009. The current Contract was in effect when the specific change in contention occurred.

**Article I** of the CBA, recognizes the Union as the sole and exclusive bargaining representative of the LPNs and all services and maintenance employees, with respect to hours of employment and "other conditions of employment as agreed to in (the)

contract". Registered Nurses are expressly excluded from the Contract along with several other classifications of employees. See, Joint Exhibit 1 at page 3.

**Article VI** of the CBA addresses Working Conditions:

- A. The term "working conditions" as used in this Section means specific practices or customs which reflect detailed application of the subject within the scope of wages, hours of work, or other conditions of employment and includes local agreements, written or oral, on such matters. It is recognized that it is impracticable to set forth in this Agreement all of these working conditions, or to state specifically in this Agreement which of these matters should be changed or eliminated. The provisions set forth below provide general principles and procedures which explain the status of these matters and furnish necessary guideposts for the parties hereto and the impartial umpire. The provisions of this Section are not intended to prevent the management from continuing to make progress. Any arbitration arising hereunder shall be handled on a case-by-case basis on principles of reasonableness and equity.
1. It is recognized that an employee does not have the right to have a working condition established, in any given situation where such condition has not existed, during the term of this Agreement, or to have an existing local working condition changed or eliminated, except to the extent necessary to require the application of a specific provision of this Agreement.
  2. In no case shall working conditions be effective to deprive any employee of rights under this Agreement. Should any employee believe that a working condition is depriving him/her of the benefits of this Agreement, he/she shall have recourse to the grievance procedure and arbitration, if necessary, to require that the local working condition be changed or eliminated to provide the benefits established by this agreement.
  3. Should there be any working conditions in effect which provides benefits that are in excess of, or in addition to, the benefits established in this Agreement, they shall remain in effect for the term of this Agreement, except as they are changed or eliminated by mutual agreement or in accordance with subparagraph 4 below.
  4. The management shall have the right to change or eliminate any working condition if, as a result of action taken by management under Article IV hereof, the basis for the existence of the working condition is changed or eliminated, thereby

making it unnecessary to continue such working condition provided, however that when such a change or elimination is made by management, any affected employee shall have recourse to the grievance procedure and arbitration, if necessary, to have the management justify its action.

5. No working condition shall hereafter be established or agreed to which changes or modifies any of the provisions of this Agreement, except as it is approved in writing by an International Officer of the Union and the Employer Representative of the Home.
6. The settlement of a grievance prior to arbitration under the working conditions provisions of this subsection 2 shall not constitute a precedent in the settlement, of grievances in other situations in this area.
7. Every part shall as a matter of policy, encourage the prompt settlement of problems in this area by mutual agreement at the local level. (emphasis added)

Joint Exhibit 1 at pages 7 and 8

**Article XI** addresses Scheduling including a provision that refers to census declines and care factors:

5. . . . .In the event that resident census declines or other resident care factors show a need for schedule adjustments beyond 'A' days or adjustments of previously existing standardized blocks, a committee will be formed by the employer and union to make necessary schedule adjustments with all decisions by this committee as being final and not open to further grievance procedures.

Joint Exhibit 1 at page 17

**Article XX** provides that LPNs working charge will be paid an additional \$2 per hour and a shift differential of \$.40 for working between 6 p.m. and 6 a.m.

**Article IV** addresses management rights:

A. MANAGEMENT RIGHTS

The management and operation of this facility and the direction of the working forces, including but not limited to the right to direct, plan and control the Employer operations and activities; to establish reasonable policies, procedures and work rules; to determine the type and scope of services to be furnished to patients/residents and the nature of the facilities to be operated; to establish schedules of operation and to determine the methods, procedures and means of providing service to

residents; to determine the type, amount, occasion and use of the equipment machinery and supplies; to decide the number of employees to hire, recall, assign, transfer promote, demote, suspend for cause, discipline and discharge employees for cause; to lay off employees because of lack of work or for other legitimate reason; and to maintain discipline and efficiency among employees; to introduce new or improved operating methods and/or facilities, and to change existing operating methods and/or facilities; and to manage in the traditional manner, are vested exclusively in Employer, provided that, in the exercise of these prerogatives, the Employer shall not violate the specific provisions of this Agreement. (emphasis added)

Joint Exhibit 1 at page 6

**Article XXIV** includes a zipper clause:

- F. The entire Agreement between the parties as set forth in this written instrument, including Appendixes attached hereto, expresses all of the terms and conditions of employment which shall be applicable to the employees covered hereby during the term hereof. Any agreement reached between the Employer and the Union is binding upon all employees affected and cannot be changed by any individual.

Joint Exhibit 1 at page 31

## **OPINION AND FINDINGS**

It is appropriate to deny this Grievance. The Union has failed to sustain its ultimate burden of proof. It has failed to support a conclusion that the Employer violated the terms of the parties' CBA. The Employer has justified its actions as required by the express terms of the Contract. The apparent five year history of assigning LPNs to work charge on the evening shift does not constitute a past practice which precludes the Employer in this case from exercising its express management right to restructure the workplace and reorganize staffing including assignment of RNs to the evening charge position. There is no Contract provision, express or implied, which guarantees assignment of charge duties to LPNs. There is no ambiguity or void in the Contract which past practice clarifies or fills.

The many provisions of the CBA cited in support of the Union's case require an unnecessarily complex analysis of this case which ultimately turns on resolution of a very narrow issue. The facts of the case and extensive quotation of Contract provisions provided above will not be repeated. It is appropriate to highlight certain facts and address portions of the CBA in support of this Award.

### Contract Provisions

The CBA at Article VI includes unique "working conditions" provisions. It encourages an extraordinarily broad, non-traditional and unconventional definition of "terms and conditions" of employment. Analysis of this case is complicated by

inconsistent and contradictory provisions within Article VI, as well as when the Article is read together with provisions of other relevant Articles.

Article VI expressly anticipates establishment of “specific practices and customs” while rigidly requiring written approval of party representatives. It appears to expect and permit change then takes its away, calling into question the meaning of the zipper clause. It establishes policy which compels “prompt settlement of problems . . . by mutual agreement at the local level.” At the same time, it anticipates and ensures arbitral review of decisions such as those made by management in this case. Joint Exhibit 1 at pages 7 and 8.

Article VI both challenges and supports management rights. It provides a standard of review and consideration distinct from the customary jurisdictional provisions set out in the Article X Grievance provisions. It sets out guideposts for reviewing the facts of each case and prescribes standards for reaching a decision. It calls for handling the matter on a “case by case basis on principles of reasonableness and equity.” and it suggests a shifting burden of proof which requires the Employer to “justify its actions” leaving the ultimate burden of proof with the Union. Joint Exhibit 1 at pages 7 and 8.

There is no evidence to conclude that any provision of Article XI which addresses scheduling is relevant to resolution of this dispute. Only limited evidence and testimony was provided to address the manner in which staff had been or was being scheduled following decisions to restructure the workplace and reorganize the staff. There was no explanation of “A” days or “standardized block”. In short, there was insufficient evidence to support a conclusion that the requirements of paragraph A.5 had been violated or that paragraph A.4.c is applicable.

### The Parties’ Cases

Following thorough review of the record, the issue in this case was narrowed to the Union’s objection to the loss of additional pay for charge work on the evening shift, NOT to the loss of a position and loss of extra pay.<sup>1</sup> The Union did not object to lay-off of LPN staff, hiring of additional nurses aides or any other personnel or scheduling change, all of which were a part of the Employer’s master plan which was implemented in phases. The Union did not effectively refute employer evidence and testimony which supported lay-off of LPNs, including decisions to restructure the workplace by eliminating the ancillary station and to reorganize staffing to address negative quality of care ratings and account for data which supported a conclusion that the staffing ratio of RNs, LPNs and nurses aides was inappropriate.

The Union did not deny that there had been agreement to phase-in the changes at its request, and that assignment of an RN to the evening charge position rather than an LPN occurred during the last phase. It was only after the Employer assigned an RN

---

<sup>1</sup> This record does not include Grievance documentation. Consequently, the issues and positions of the parties were framed at the hearing through witness testimony and exhibits received into evidence.

to the evening charge position in late September, thereby changing the evening staffing, that the Union grieved on behalf of the bargaining unit. There is no evidence that it did not understand that the evening charge position, assigned to an LPN in the past, could be assigned to an RN. It was the only change following elimination of the ancillary station, for which evidence was presented, made on that shift.

The Union tied its case to an argument that LPN work was being performed by the evening charge RN. There is no evidence that the charge RN performs LPN work to the extent that it is exclusive to the LPN job description. The two LPNs who continue to be assigned to the evening shift pass medications, perform treatments and otherwise work at the direction of the RN. In addition, whenever an RN becomes unavailable to work the evening charge position, an LPN, based upon seniority, is assigned to the duty.

The Union seeks to oversimplify the changes through focus on numbers and not the underlying reasons which support them. It questions the Employer's judgment in assigning a "more expensive RN" to evening charge, ignoring the staggered shifts the Employer created in order to staff with RNs as much as possible within its budget. In effect, the Union refuses to distinguish between the work of LPNs and RNs or to recognize management's right to determine staffing assignments given the circumstances.<sup>2</sup>

### Past Practice and Management Rights

An enforceable past practice may be established where contract language is ambiguous and subject to interpretation, or a contract is silent and practice, in essence creates a contract term. Neither condition exists in this case. Moreover, both Contract language and the record made at hearing support the Employer's decision to assign RNs to evening charge duty, changing its earlier practice of assigning LPNs to that duty. Express contract provisions found in Articles IV and VI, quoted above at pages 6-8, support denial of this Grievance.

Article IV management rights provisions include language which specifically describes the action taken by management in this case. Article VI A. states, "The provisions of this Section are not intended to prevent the management from continuing to make progress." Even presuming that a "working condition" had been changed or eliminated, Article VI supports the Employer:

3. Should there be any working conditions (sic) in effect which provides benefits that are in excess of, or in addition to, the benefits established in this Agreement, they shall remain in effect for the term of this

---

<sup>2</sup> The issue here is clearly confused by the fact that LPNs may perform many tasks performed by RNs but in a different manner and with less authority, and that the law provides for a variance which permits a facility to cover otherwise required RN hours with LPN staff. Comparison of job descriptions and work performed by LPNs and RNs is detailed above at pages 3 and 4.

Agreement, except as they are changed or eliminated by mutual agreement or in accordance with subparagraph 4 below. (emphasis added)

4. The management shall have the right to change or eliminate any working condition if, as a result of action taken by management under Article IV hereof, the basis for the existence of the working condition is changed or eliminated, thereby making it unnecessary to continue such working condition provided, however that when such a change or elimination is made by management, any affected employee shall have recourse to the grievance procedure and arbitration, if necessary, to have the management justify its action.

Joint Exhibit 1 at pages 7 and 8

### **AWARD**

The Grievance is denied.

Dated: August 6, 2010

---

Janice K. Frankman, J.D.  
Arbitrator