

**State of New Hampshire**

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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INTERNATIONAL CHEMICAL WORKERS	:	
UNION COUNCIL, LOCAL 1046C	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. M-0738:2
	:	
MERRIMACK COUNTY NURSING HOME	:	DECISION NO. 2000-043
	:	
Respondent	:	

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APPEARANCES

Representing ICWU Council, Local 1046C:

John B. Mendolusky, ICWUC/UFCW Local 1046C

Representing Merrimack County Nursing Home:

Renny Perry, Consultant

Also appearing:

Bruce DiBartolo, ICWUC/UFCW Local 1046C  
Mary Heath, Merrimack County Nursing Home  
Tom Matzke, Merrimack County Nursing Home  
Gail Deguise, Merrimack County Nursing Home  
Sally Gale, ICWUC/UFCW Local 1046C  
Karen Hunt, UFCW 1046C  
Shari Tinkham, UFCW/ICWUC 1046C  
Kathleen Bateson, Merrimack County Nursing Home  
Sara A. Lewko, Merrimack County Nursing Home

BACKGROUND

The International Chemical Workers Union Council, Local 1046C ("Union") filed unfair labor practice (ULP) charges on January 31, 2000 against Merrimack County Nursing Home ("County") alleging violations of RSA 273-A:5 I (a), (b), (c), (e), (g), (h) and (i) resulting from breach of contract, unilateral changes to contractually

agreed to hours of work, refusal to bargain and failure to bargain in good faith, interference with contract administration by interfering with the grievance process, direct dealing and an improper discharge. The County filed its answer on February 15, 2000 after which this matter was twice set for hearing and continued at the request of the parties. (Decision No. 2000-030, March 23, 2000.) The ULP was finally heard by the PELRB on May 11, 2000. At the commencement of that hearing, the parties stipulated that all outstanding issues had been resolved with the exception of the hours of work issue which went forward to hearing.

#### FINDINGS OF FACT

1. Merrimack County, by and as a consequence of operating the Merrimack County Nursing Home (MCNH), is a "public employer" within the meaning of RSA 273-A:1 X.
2. The International Chemical Workers Union Council/ UFCW Local 1046C is the duly certified bargaining agent for all full-time regular and part-time regular employees at MCNH in the positions of Registered Nurse, Licensed Practical Nurse, Certified Nursing Assistant, Social Worker, Certified Occupational Therapy Assistant, Occupational Therapy Aide, Beautician, Barber, Activities Aide I and II, Admissions Secretary, Transportation Assistant/Courier, Unit Clerk, Unit Aide, Sterilization Technician, Resident Assistant, Pharmacy Assistant and Pharmacy Technician, as referenced in the PELRB certification dated June 18, 1997.
3. The County and the Union are parties to a collective bargaining agreement signed June 4, 1999 with a stated expiration date of March 31, 2002. Two pertinent portions of that agreement are Article II, Management Rights, and Article XII (A), Overtime. They read:

#### MANAGEMENT RIGHTS

Except as specifically limited or abridged by the terms of this Agreement, the management of the Merrimack County Nursing Home in all its phases and details shall remain vested exclusively in the County and its designated agents. The County and its agents shall have jurisdiction over all matters concerning the management of the Merrimack County Nursing Home including, but limited to: the exercise of all of the

rights, responsibilities and prerogatives that are inherent in the Employer or its agents by virtue of any statutes [sic] and/or ordinances, as well as all rights, responsibilities and prerogatives relating to, including, but not limited to, the direction of the work force, the establishment of rules and regulations, the right to hire, supervise, discipline or discharge, relieving employees from duty, the right to decide classifications, the right to abolish positions, the right to determine schedules of work, the right to determine the methods, processes and manner of performing work and the general control of all of the operations of the Nursing Home in all its phases and details as well as all rights retained by virtue of, including, but not limited to, New Hampshire RSA Chapter 273-A, and any other provision(s) of the Revised Status Annotated or other laws. It is agreed that these enumerations of management rights shall not be deemed to exclude other management rights not specifically herein enumerated. It is further specifically agreed that this Article and the exercise of any management rights shall not be subject to any grievance proceeding as hereinafter set forth.

#### HOURS OF WORK and OVERTIME

- A. The of work for bargaining unit personnel, shall generally be 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m. or 11:00 p.m. to 7:00 a.m. The hours of work for bargaining unit personnel shall be governed by nursing home policy pertaining to shift coverage and assignments.
4. The Union is complaining that there is lack of adherence to the three stated shifts found in Article XII A of the CBA. Bruce DiBartolo, a CNA and member of the negotiating committee, testified that the Article XII A language was the product of a management proposal (County Exhibit No. 1), that no shift overlap was shown or stated and that references to exceptions to the stated shifts were considered to mean an 8 to 4 or 6 to 2 shift. Prior to the implementation of a policy change on or about August 4, 1999 (County Exhibit No. 3) which required "off-going licensed personnel [to] remain on the unit to provide resident care while report is given," the practice was for personnel to punch in between seven minutes before the hour and seven minutes after the hour in order to accomplish change-over and the giving and taking of reports. Now, employees are required to stay on the unit until

released by an RN or LPN. Employees are paid for a 37 1/2 hour work week, normally distributed across five 7 1/2 hour shifts with an additional half hour per shift being dedicated to lunch which is furnished without fee but which is not paid time. DiBartolo's past experience was that he used to be able to leave his unit between the top of the hour and seven minutes past the hour. With the new changes and reporting standards, more particularly referenced in County Exhibit No. 3, he now generally is not able to leave the unit until ten to thirty minutes after the hour. DiBartolo is making no claim that he is not being paid for the incremental time he is required to remain at the work site after the end of his scheduled shift, i.e., he knew he was being paid for the extra time but was unsure if it was at straight time or overtime rates.

5. Karen Hunt, a CNA and a employee since 1987, testified that she is now required to stay longer than seven minutes after the hour, but, when she does, she is paid accordingly. Formerly, when the first replacement CNAs would report for a duty shift, they would "trip" the hall and discuss the condition of residents with the off-going CNAs who would then be free to leave. Now, the off-going CNAs cannot leave until every scheduled on-coming CNA is on duty and takes report. Hunt usually is able to leave between 15 and 20 minutes after her shift (11 to 7) is scheduled to end. If the report process is accomplished particularly promptly, she may get to lave seven to eight minutes after the hour.
  
6. Shari Tinkham is an LPN and president of the local. She testified from her experience in negotiations that she understood the second sentence of Article XII A to mean that the County would not negotiate, or have to negotiate, the number of employees per shift. Her experience with the "old" procedures, before County Exhibit No. 3, was that one CNA would brief one or two on-coming CNAs about patient status and those briefed CBAs would pass the information to the remainder of the CNAs when they arrived. Now a nurse briefs on-coming CNAs and nurses, then the CNAs "trip" the unit, and, finally a nurse dismisses the personnel coming off shift and leaving the premises. As the result of this change, Tinkham does not see CNAs leaving shift until 7:30 to 7:40 a.m.

7. Sarah Lewko is the Human Resources Coordinator for Merrimack County and was a member of the negotiating team for the last CBA. She reviewed the Union's bargaining proposal (County Exhibit No. 2) which called for a "normal work day" to be defined to "consist of 8 consecutive hours with a 1/2 hour paid lunch period." The language ultimately agreed upon is as appears in Finding No. 3 because the County experienced concern at using the term "normal work day" because the practice had consistently been for a 7 1/2 hour work day with a half hour provided, but not paid, lunch break, thus making time on the unit total eight hours per day, also as reflected in Finding No. 3. The County counter-proposed with County Exhibit No. 1, using the word "generally" to connote a degree of flexibility vested in the County relative to scheduling needs. She confirmed that shift differentials are paid to employees who are held over into a following shift. Hold-over pay is generally at straight time because overtime is not usually triggered under Article XII B.
8. Gail Deguise, an RN, has been employed at MCNH for 25 years and currently is Director of Nurses. She explained that MCNH was surveyed and cited for 13 deficiencies in April of 1999 by the Bureau of Health Facilities. This triggered the staff memo of May 6, 1999 relative to mandatory floor rounds and related responsibilities. It explained that these procedures were reinstated to improve staff/shift communications. (County Exhibit No. 3, page 1.) This was followed by another memo on August 4, 1999 to "tighten up" communication at all three levels, i.e., CNAs, LPNs and RNs, and to improve both observations and reports by a mandated "fifteen minute overlap" which required dual shift personnel to be on duty to provide resident care while reports are given, to wit:

Policy:

To allow adequate time between shifts to report pertinent information relative to resident care, that serves to ensure care has been completed on each shift and has been accepted by on-coming licensed personnel.

Procedure:

Shift report will be given to all on-coming licensed personnel by off-going charge nurse on each MCNH unit.

All other off-going licensed personnel will remain on the unit to provide resident care while report is given.

Following completion of report, off-going and on-coming charge nurses, as well as off-going and on-coming CNAs will trip the unit to sign off and to receive responsibly [sic] of resident care, to maintain integrity and provide continuity of resident care.

There will be fifteen minute overlap of time at the end of each shift, to allow for provisions of previously described intershift reporting mechanism. In circumstances identified by charge nurses, the off-going staff will be mandated to remain on the unit all reporting is completed.

Licensed staff will be appropriately compensated for the additional time as MCNH policy and current union contract requires.

County Exhibit No. 3, page 2.

Deguisse said that overlap coverage not only facilitated the reporting process but also provided additional personnel for resident observation, in response to a discrepancy relating to falling incidents. She described change-of-shift and reporting "overlaps" as being "common to the nursing industry."

9. Thomas Matzke is the MCNH Administrator. He testified about the consequences of failing to correct cited deficiencies and the increased detail devoted to reporting requirements. In particular, he said there is a need for far more detailed reports on a wider range of ailments, primarily generated by an increase in longevity. "Pain management" and drug reports are emerging issues. Taken together, these developments have increased the time required to exchange vital patient/resident information from shift to shift.

#### DECISION AND ORDER

The Union would have us find that the County has breached the letter of the "hours of work" provisions of the contract by what is unquestionably a modification and extension of hours at the work site as the result of increased reporting, inter-shift communications and patient care requirements. It is undisputed that bargaining unit members are staying beyond the shift time stated in Article XII A of

the CBA. The issue, then, is whether this requirement, recently imposed by the County as evidenced by County Exhibit No. 3, is violative of the CBA or RSA 273-A:5 I. We think it is not.

First, the County's actions are protected by statute. "Terms and conditions of employment" as envisioned by RSA 273-A clearly contemplate the inclusion of "wages and hours of work." Appeal of State of New Hampshire 138 NH 716, 722 (1994) and Berlin Education Association, 125 NH 779, 883-884 (1984). This should not be confused, however, with the "managerial policy" exclusion found at RSA 273-A:1 XI which gives to public employers the right to determine their organizational structure, to determine the number and direction of their employees and to continue public control of governmental functions." The County, as an entity of government in the "business" of operating a nursing home, was obligated to do so responsibly, within the confines of duly promulgated regulations, and to render an acceptable level of care, consistent with "industry standards," in caring and providing for patients in a residential setting. From all evidence presented to us, the County was engaged in reaching and attaining these standards when it updated reporting and observation requirements to satisfy both patient care and cited deficiencies reported by the Bureau of Health Facilities. This is synonymous with maintaining its "control of governmental functions," namely, the running of MCNH.

We next look to whether the County contracted away or relinquished any rights vis-à-vis the operation of MCNH when it signed the CBA. We find that it did not. First, there is undisputed history as to why the County made a counter-proposal to the Union's hours of work proposal. (County Ex. No. 2.) It needed flexibility to use more than only the shifts listed in Article XII A of the CBA. We see those shift hours, given the contract language, as being a base or a guide to regular, but not necessarily all, shifts. Alterations should not be made to these shifts which would adversely impact the compensation of bargaining unit members. That has not occurred.

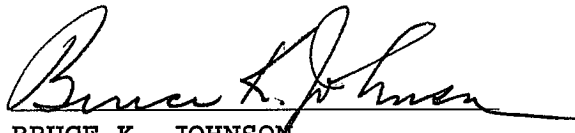
Upon closer scrutiny and the testimony presented by Union witnesses, it appears that the gravamen of their complaint is not the shifts but, rather, the holdovers required by the new reporting and observation requirements of County Ex. No. 3. That seems to be protected by the second sentence of Article XII A which ties hours of work to nursing home policy. Our assessment of County Ex. No. 3, especially page 2, is that it was promulgated for the purpose of addressing an exigency in the operation, safety and regulation (i.e., correction of deficiencies) of MCNH, not to modify hours of work or to subvert the provisions of the CBA. For that matter, the parties have agreed upon overtime language at Article XII B; therefore, the possibility of overtime or extended shifts must have been within the contemplation of the parties when they negotiated and executed the

CBA. Likewise, the employees have not been disadvantaged when required to stay to complete the reporting process; they have been appropriately compensated, whether it be under a straight time or over-time.

Finally, the County has reserved certain rights under Article II of the CBA (Finding No. 3). Among them are (1) the right to establish rules and regulations, (2) the right to exercise inherent responsibilities and prerogatives conferred by statute or ordinance and (3) the right to determine the methods, processes and manner of performing work and the general control of all the operations of MCNH. For these reasons, collectively and individually, the ULP is DISMISSED.

So ordered.

Signed this 25th day of May, 2000.

  
BRUCE K. JOHNSON  
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding.  
Members Richard W. Roulx and E. Vincent Hall present and voting