

In Re the Arbitration of:

WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
Union,)

and)

STATE OF WASHINGTON,)
Employer.)
_____)

AAA No. 75 390 00387 11

Chris Smith, et al.

OPINION AND AWARD

Date of Award: August 13, 2012

Arbitrator
Carol J. Teather
Attorney at Law
5278 N.E. See Forever Lane
Poulsbo, Washington 98370
Tel: (206) 660-6359

OPINION OF THE ARBITRATOR

Introduction

This case involves a consolidation of twenty-five grievances filed on May 10, 2011, with each grievance containing the signatures of a number of grievants. Jt. Ex. 2. The grievants are all employed at Lakeland Village, a 24/7 residential institution of the Washington State Department of Social and Health Services (DSHS). They are Attendant Counselors (AC) 1, 2, or 3s, with two or three being Licensed Practical Nurses (LPNs). The consolidated grievance concerns the Personal Leave Day (PLD) provided in Article 17, Section 17.8 of the 2009-2011 Collective Bargaining Agreement By and Between the State of Washington and Washington Federation of State Employees (CBA). Jt. Ex. 1. The nature of the grievance was stated as: “Some employees that require a backfill have been granted their PLD, while some have not.” Jt. Ex. 2. The Articles and Section(s) of the CBA alleged to have been violated, misapplied, and/or misinterpreted are Articles 17.8, 35, 38 and 50. The remedy requested is to grant all ACs and LPNs their PLD within the fiscal year, allow ACs and LPNs to donate their PLD within the fiscal year, and make all grievants whole. *Id.* The parties were unable to resolve their dispute during the initial steps of the grievance procedure and the matter was brought to arbitration pursuant to the Grievance Procedure in Article 29 of the CBA. The arbitrator was selected under the rules and procedures of the American Arbitration Association.

A hearing was held on May 31, 2012, at the Attorney General’s Office, 1116 W. Riverside Avenue, Spokane, Washington. The Washington Federation of State Employees (WFSE) or (the Union) was represented by Christopher J. Coker of the law firm, Younglove & Coker, and the State of Washington (the Employer) or (the State) was represented by Assistant Attorney General Patricia A. Thompson. At the hearing, the testimony of witnesses was taken under oath and the parties submitted documentary evidence. An official transcript of the hearing

was made by court reporter. The parties submitted post-hearing briefs which were received by the arbitrator on July 13, 2012.

List of Exhibits¹

- Jt. Ex.1 - Collective Bargaining Agreement By and Between The State of Washington and Washington Federation of State Employees, July 1, 2009 through June 30, 2011
- Jt. Ex. 2 - Consolidated Grievance
- Jt. Ex. 3 - Acting Superintendent's Response to Grievance dated 5/19/2011
- Jt. Ex. 4 - Secretary Level Step 2 Response to Grievance dated 6/22/2011
- U Ex. 5 - Lee Malinda's 6/9/2011 request for a PLD
- U Ex. 6 - April 2011 email exchange between Bill Payne and Diane Kilgore regarding LPN2 Patty Stark's meeting
- U Ex. 7 - April 2011 email exchange regarding granting Patty Stark a PLD
- U Ex. 8 - Memo to Jill Collins from Frank Tavares regarding PLD
- Em. Ex. 9 - Negotiation documents on Article 17.8, September 2008
- Em. Ex. 10 - Negotiation notes on PLD, Article 17.8, 8/12/ through 9/12/2008
- Em. Ex. 11 - April 2009 proposals and tentative agreement on Article 17.8, PLD
- Em. Ex. 12 - Notes of negotiations on Article 17 on 3/12/2009 and 4/2/2009
- Em. Ex. 13 - 2009-2011 Costs of Labor Contracts Negotiated by LRO

List of Witnesses

For the Union: Sherri-Ann Burke, Labor Advocate for WFSE; Scott Robins, AC 2; Chris Smith, AC 3; Aletha Malinda, AC 1; Diane Womack, Custodian.

For the Employer: Diane Leigh, Director of the State's Labor Relations Office; Frank Tavares, Acting Program Team Director for the Intermediate Care Facility; Diane Kilgore, Acting Superintendent; Randy Withrow, Labor Relations Specialist.

Issues

The parties could not agree on a statement of the issues to be decided, therefore, I have formulated the issue as follows: Did the Employer violate, misapply, or misinterpret Article 17.8 and/or Articles 35, 38, and 50 when it denied the grievants' requests for a PLD? If so, what is the appropriate remedy?

¹ All of the exhibits (Exs.) were admitted into evidence. "Jt" refers to a Joint Exhibit, "U" a Union exhibit, and "Em." an Employer exhibit.

Relevant Provisions of the CBA

Article 17.8 Personal Leave

- A. An employee may choose one (1) workday as a personal leave day each fiscal year during the life of this Agreement if the employee has been continuously employed for more than four (4) months. School year employees who work at the School for the Deaf or at the School for the Blind may not use their personal leave during a school closure.
- B. The Employer will release the employee from work on the day selected for personal leave if:
 - 1. The employee has given at least fourteen (14) calendar days' written notice to his or her supervisor. However, the supervisor has the discretion to allow a shorter notice period.
 - 2. The number of employees selecting a particular day off does not prevent the agency from providing continued public service.
 - 3. For positions requiring backfill or relief, the release from duty will not cause an increase in agency costs due to the need to provide coverage for the employee's absence.
- C. Personal Leave may not be carried over from one fiscal year to the next.
- D. Part-time and on-call employees who are employed during the month in which the personal leave day is taken will be compensated for the personal leave day in an amount proportionate to the time in pay status during the month to that required for full-time employment.
- E. Upon request an employee will be approved to use part or all of his or her personal leave day for:
 - 1. The care of family members as required by the Family Care Act, WAC 296-130;
 - 2. Leave as required by the Military Family Leave Act, RCW 49.77 and in accordance with Article 18.13; or
 - 3. Leave as required by the Domestic Violence Leave Act, RCW 49.76.
- F. This provision will expire on June 30, 2011.

Relevant Facts

Lakeland Village employs about 540 people, including about 70 on-call staff and 280 to 300 attendant counselors (AC) 1-3. Tr. 154. The individuals who reside at Lakeland are known as clients and have a range of intellectual disabilities, physical disabilities, mental development disabilities, mental illness and behavior problems, and any kind of mixture or combination of these. Tr. 110-113. The direct, hands-on care of the clients can involve grooming, bathing, feeding, repositioning, transportation, medications and health needs. Tr. 28, 113-116. The two groups of people who care for the clients 24 hours a day, 7 days a week, are the ACs who provide the direct care and the nursing staff who provide the medications and medical treatment. Tr. 114.

Currently, there are approximately 218 clients at Lakeland Village. They live in 17 cottages that are arranged in various configurations to provide a home environment which can house anywhere from 12 to 15 people. Tr. 115-116, 121. Each cottage is overseen by an AC manager (ACM) with 24 hour supervision of that particular home. There is also a shift charge on each shift who is typically an AC 3, but can be an AC 2, and then there are various numbers of AC 1s based on the needs of the cottage. Tr. 116-119. There is a basic general minimum for health safety staffing determined by the severity of the disabilities of the people being cared for, but staffing needs can change on any given day and on any given shift based on circumstances and what is occurring at the facility. Tr. 28, 119. Currently, there is a half-cottage with one individual in it who is being cared for by two staff per shift. Tr. 120. These ACs, however, are not considered part of the global staffing of the cottage. Tr. 118.

Staffing for the cottages is done by Residential Service Coordinators (RSC) who examine the global staffing for the facility for a given day and a given shift. They shift (float) ACs around depending on the needs of the various cottages. Tr. 29, 121-122. Yet, at any given time up to one hour before their

shift, employees call in saying they cannot come to work because of an emergency or illness or something, which can cause the staffing to fall below the health safety minimums and require that an on-call or backfill person be called in to provide coverage. This increases the agency's costs. Tr. 122.

In addition to permanent clients, Lakeland Village has both short stay and long-term stay respites which can affect scheduling by creating a need to increase staffing for a time. These can be planned or emergency respites. A planned respite is the placement of a client in order to give a caregiver a rest, or because of a family emergency or a planned transition to a different living environment. Emergency respites are usually on short notice and can be for various reasons. Tr. 123-124.

Lakeland Village is divided into two Program Area Teams (PATs). One is the Intermediate Care Facility/Individuals with Disabilities. (ICF/ID) and the other is the nursing facility. Tr. 108. Requests for a PLD are approved or disapproved by Acting Superintendent Diane Kilgore for WFSE members who report directly to her and members who report to other people such as PAT directors and nursing supervisors get their PLD requests approved or disapproved by them. Tr. 158-159. Frank Tavares is the Acting Program Area Team Director for the ICF/ID and he rules on PLD requests from that unit. Ward Tappero approves or disapproves requests for a PLD from the nursing facility. Tr. 108, 125.

ACs, some LPNS (depending on their particular duties that day) and certain kitchen staff at Lakeland Village are backfill positions. Tr. 11, 27, 60. Other positions, such as psychologists, habilitation plan administrators, attendant counselor managers, doctors, business office staff, adult program staff, and housekeepers are not backfill positions. Tr. 126, 160. Persons holding positions not requiring backfill have been approved for a PLD. *Id.*

It is undisputed that, with one exception,² no AC at Lakeland Village has been granted a PLD.

Discussion

Collective Bargaining Agreement Negotiations

The Union contends the plain language of the CBA creates a rebuttable presumption that employees covered by the CBA will receive a PLD during each fiscal year. According to the Union, it is clear from the plain language of Article 17.8 that it was never intended to preclude employees in positions requiring backfill or relief from receiving a PLD. The Union points out that Article 17.8(B) states that the “Employer will release the employee from work on the day selected for personal leave if” certain conditions are met. One of the conditions is that for positions requiring backfill or relief, the release from duty must not cause an increase in agency costs due to the need to provide coverage for the employee’s absence. Article 17.8(B)(3).

The Union does not dispute the plain language of the contract or its intent. What the Union claims is that the Employer has misinterpreted and misapplied the language of Article 17.8(B)(3) to preclude every AC at Lakeland Village from taking a PLD at any time during the term of the CBA. The Union argues that the Employer’s summary denial of every request by an AC at Lakeland Village for a PLD based on increased agency costs violates the Employer’s duty of good faith and fair dealing. Yet, the evidence does not support the Union’s contentions.

The record reflects that while negotiating the 2009-2011 CBA, the parties reached tentative agreement on a provision providing a PLD in September 2009. Tr. 86-87; Em. Ex. 9, p. 4. During the course of negotiations for this provision the chief negotiator for the State, Diane Leigh, mentioned there were costs associated with such a provision, including backfill costs for those positions requiring relief. Em. Ex. 10, pp. 7, 8, 11, 12. Subsequently, the contract

² One individual AC, who was on extended personal leave, was given a PLD for humanitarian reasons. Tr. 161-162; Jt. Exs. 3, p. 3, and 4, pp.4 and 5. The Union has not contested this action.

containing the PLD provision was deemed not economically feasible so the parties went back to the bargaining table for another session in March of 2009. Tr. 22-23, 88-89.

During the March 2009 second session of bargaining on the 2009-2011 contract, the Union proposed the language contained in Article 17.8(B)(3) to address the issue of cost. Tr. 90-91; Em. Ex. 11, p. 16. Ms. Leigh testified that in proposing this language the Union negotiator told them they understood there was a group of employees who may not be able to have a PLD. Tr. 91. Her testimony in this regard, is supported by notes of the March 12, 2009, negotiations on Article 17 which reflect that the chief negotiator for the Union, Steve Kreisberg, made the following statements:

Subsection added language that release of leave for these employees would not increase costs to an agency. If have to backfill a position, then would be a basis for not releasing the employee. Add to existing language. The need to backfill was what was concerning in the past.³

Em. Ex. 12, p. 5. The language of Article 17.8(B)(3) proposed by the Union is the language contained in the final agreement with the addition of the words “or relief” proposed by the State following the words “For positions requiring backfill” at the beginning of subsection (B)(3) of Article 17.8 in the final contract. Tr. 95; Em. Ex. 11, p.4; Jt. Ex. 1, p. 53. Thus, the Union was clearly aware that employees in positions requiring backfill or relief would not be able to get a PLD if it required paying an extra person to cover for the employee’s absence.⁴

The Employer, on the other hand, was aware that denying a request for a PLD that did not cost the facility or institution any money would be inconsistent with the language of the contract. The Director of the Labor Relations Office (LRO) for the State, Diane Leigh, testified that requests for a PLD must be

³ Ms. Leigh testified that the notes of the session are accurate. Tr. 94. The record contains no evidence to the contrary.

⁴ Sherri-Ann Burke, a Labor Advocate for WFSE who participated in negotiations for the 2009-2011 CBA, testified that they recognized some individuals might not be able to have a PLD, but there was not a blanket assumption that it would not work in any institution or facility. Tr. 24, 25.

examined on a case by case basis and that she provided training to trainers from every State agency on the granting of a PLD. Tr. 99-102.

The evidence does not establish the grievants' requests for a PLD were summarily denied without consideration of them on a case by case basis..

According to the Union, the supervisors and managers at Lakeland Village did not analyze and consider PLD requests from individual ACs on a case by case basis in violation of the Employer's duty of good faith and fair dealing. The Union contends that instead they simply denied the requests on a presumption of understaffing requiring backfill.

In support of its position, the Union presented the testimony of Scott Robins, an AC 2 at Lakeland Village, Chris Smith, an AC 3 at Lakeland Village, Aletha Malinda, an AC 1 at Lakeland Village, and Diane Womack, a Custodian at Eastern State Hospital. These employees, however, had no knowledge of scheduling or how Lakeland Village made its staffing determinations facility wide. Furthermore, they provided no specific evidence showing that the granting of a particular AC's request for a PLD would not increase Lakeland Village's costs.

Mr. Robins testified that if a cottage is overstaffed, the extra people will "float" to another cottage in need of additional staffing. Tr. 28-29. He described instances where his cottage was overstaffed and people were floated to other cottages. He also testified that on Memorial Day of 2012 there was enough staff in his cottage to allow one individual to go home. Tr. 30. Yet, he also admitted that this did not often occur, but claimed it was not abnormal for such a thing to happen. Tr. 31. He gave no evidence showing that an AC was denied a PLD for a day when the facility had staff in excess of the minimum safety staffing agency-wide and there were floaters available to cover for the absent employee.

Mr. Robins had requested a PLD for a day in the middle of his vacation because it was already a scheduled time off, but the request was denied with a rubber stamp stating "Leave Denied Due To: CBA 17.8 B3, Backfill Required. Ward Tappero." Tr. 32; U. Ex. 5. He also received an email from "Ward" stating

that his request for a PLD was denied, but not giving him any other reason for leave denial. Tr. 32-33. There is no evidence showing that Mr. Robins' position was not backfilled while he was on vacation or that the taking of a PLD during this time would not necessitate a backfill or relief and increase the facility's costs.

Based on his discussions with several LPNs, Mr. Robins testified that they got a PLD. Tr. 34. Yet, he gave no specifics regarding the circumstances under which these LPNs received their PLDs. He also pointed to a situation where an LPN received a PLD after her request was initially denied and a grievance was filed. Tr. 34-35; U Exs. 6, 7. A review of emails concerning this grievance shows that it was resolved on the basis of a supervisor finding an acceptable date for the LPN to take a PLD. *Id.* As this date was different from the PLD date the employee originally requested, the evidence does not establish that the denial of the original request was inconsistent with the terms of the CBA. Furthermore, the fact that the supervisor worked to find a date on which a PLD could be approved for the employee is more indicative of good faith compliance with the terms of Article 17.8 than bad faith and unfair dealing.

Mr. Robins is not involved in scheduling employees, a task that is done by a RSC.

Chris Smith, an AC 3 at Lakeland Village, testified that a lot of Lakeland Village employees have friends at Eastern State Hospital who are in positions that require backfill but who, nevertheless, got to take a PLD within their vacation time. According to Mr. Smith, this was a concern for some of his fellow employees. Tr. 47. Yet, he provided no specifics concerning the circumstances under which these PLDs were granted which might have cast some light on the legitimacy of his coworkers' concerns.

Mr. Smith also indicated that he was aware of approximately 70 requests for a PLD that were submitted by another AC 3, and that all of them were denied with the stamp of Ward Tappero described above. Tr. 48-49. There is no credible

evidence, however, showing the denials were not legitimate or that Mr. Tappero did not give each request careful consideration. .

Mr. Smith testified that if a cottage is overstaffed, employees are either floated or stay put in their assigned cottage if staffing is good facility wide. Tr. 52. Mr. Smith also testified that vacations are governed by a different CBA provision, Article 11, and admitted that when an employee takes a vacation the institution must backfill behind him. Tr. 54.

Aletha Malinda, an AC 1 at Lakeland Village, testified that if there are enough staff in her cottage on a particular day, she or one of her coworkers floats to another cottage to perform duties in that cottage. Tr. 57-58. She also testified that there are no permanent floating positions at Lakeland Village and some of the circumstances requiring a floater are sick calls, vacations, and appointments which bring the staffing level down. Tr. 58. According to Ms. Malinda, she floats about two days a week and that this is a common situation. Tr. 58-59. Ms. Malinda also stated that through discussions with people from other residential rehabilitation centers, she learned they had gotten PLDs for their direct care staff. Tr. 60. She further stated that LPNs, kitchen staff, and ACs at Lakeland Village require backfill and relief, and to her knowledge LPNs and kitchen staff get their PLDs. Tr. 60-61. .

Ms. Malinda is not involved in scheduling at Lakeland Village and did not indicate a knowledge of what is happening campus-wide in terms of why people are floated or not floated. Tr. 62.

Diane Womack is a Custodian at Eastern State Hospital. She testified that her position requires backfill or relief, meaning that if she is not at work someone covers her position so that what she is responsible for cleaning gets cleaned. Tr. 64. She has received a PLD, each year of the contract. Tr. 65-66. She also stated that when someone requests a PLD with their vacation days, it is denied. Ms. Womack does not have anything to do with the direct care staff, although she does work for them. She is not involved in determining schedules and has no

knowledge of how staffing is determined at Eastern State Hospital. She testified that when she is not at work, a floater can come in and take her position. Tr. 68. As her absence was facilitated by a floater taking over her duties, Ms. Womack's receipt of a PLD did not increase the agency's costs.

A Mental Health Technician (MHT) is a person who provides safety and security for the patients. Tr. 69. An MHT position requires relief, and Ms. Womack indicated that she is aware of several MHTs that got a PLD and several that did not. Tr. 69. She did not provide any specifics regarding the circumstances of these PLD awards so her testimony does nothing to show how Eastern State Hospital is administering Article 17.8.

I find the evidence presented by the Union shows it is possible for a PLD request made by an AC or LPN to be approved without causing an increase in cost to the facility, if the staffing level of the facility is sufficiently above the safety minimum to allow for an employee to float to the AC's or LPN's position and perform the duties while the requesting employee is off work on a PLD. I further find, however, that this evidence does not establish that this was the case with respect to the PLD requests of any or all of the AC grievants or that Mr. Tavares or Mr. Ward did not consider the grievants' requests on a case by case basis but summarily denied them on the basis that they held a position requiring backfill or relief.

Frank Tavares, the Acting Program Area Team Director for the ICF/ID was advised of the new provision in the CBA providing for a PLD as well as its caveats, and told that he must follow the caveats in granting a PLD. Tr. 126. He was told that he must consider each individual request for a PLD on a case by case basis and take into consideration the contract rules. Mr. Tavares understood he had some leeway with the rule requiring 14 days notice but there was no leeway regarding cost to the facility. He was clearly told that he could not grant a PLD if it was going to add a cost to the facility. Tr. 127-128.

Mr. Tavares described the process he used upon receiving a PLD request. He stated that he did not categorically deny all requests for PLDs without thinking about them at all. Tr. 133. He would initially write the date he received a PLD request on the requesting document because he frequently did not receive such a request on the day it was dated. In connection with PLD requests from direct care staff (ACs), Mr. Tavares would talk to the RSC for whatever shift the person was on and review the schedule book to determine if staffing levels on the day requested for a PLD would be above minimum and thereby allow him to give the employee the day off without additional facility costs. Tr. 129, 133. Based on the staffing information he received, Mr. Tavares would approve or disapprove the PLD request. Mr. Tavares testified that, unfortunately, there was never an occasion where the staffing in the facility was going to be above minimum on the day requested so that he could provide the PLD. On each PLD request he received, Mr. Tavares made a handwritten comment on whether he approved it or not. If the request was being denied, he usually wrote one of the following three statements on the requesting document: (1) Due to the cost, increased cost to the RHC, (2) less than 14 days notice and due to the increased cost to the facility, or (3) "unable to determine" due to the advanced date of the request. Mr. Tavares stated that some PLD requests came in with such an advanced date that he was unable to determine through the RSC what the facility's staffing would be on the day being requested. Tr. 128-129.

On one particular denial of a PLD request, Mr. Tavares felt the need to advise the employee that some changes were being worked on that might improve staffing in the near future, and which could allow for some PLDs to be granted. He also informed the employee that if she reissued her request around mid August, he would be happy to review it at that time. U. Ex. 8; Tr. 129-131. He did not know if the employee ever made another request later on. Tr. 132.

Mr. Tavares testified that although the facility did increase the AC staffing, unfortunately this did not make it possible to give AC staff PLDs. What happened

was that as the AC staffing increased, there were more unscheduled leave call-ins. This meant bringing people in to cover absent employees' positions, if the number of unscheduled leaves brought the facility staffing level below the health safety minimum. Tr. 131-132.

Mr. Tavares was asked if the other PAT director, Ward Tappero, used the same procedure he did in connection with PLD requests. Mr. Tavares replied that to the best of his knowledge this was their directive from the superintendent, so he believed this was what Mr. Ward would be following. Tr. 134.

I found Mr. Tavares to be a very credible witness. Furthermore, his testimony, his actions and his advice to the one employee regarding resubmitting her request indicate a concern for employees and a desire to grant any PLD request that conforms with the requirements of Article 17.8B. I find Mr. Tavares considered PLD requests on a case by case basis and did not summarily deny any request simply because the employee was in a position that required backfill or relief. Rather, he carefully checked the staffing levels to see if any backfill or relief would be required, as floating an excess employee into the position would not result in an increased cost to the facility and would allow him to grant a PLD request.

The nursing facility supervisor, Ward Tappero did not testify. He did, however, give the management presentation at the Step 1 grievance meeting on May 13, 2011. According to the memorandum of the meeting, Ward Tappero stated that he and Mr. Tavares carefully reviewed requests for a PLD in consultation with the contract language. He pointed out that positions such as ACs and LPNs needed backfill or relief coverage and are not easily approved for a PLD. He stated that PLD requests are reviewed to determine if there is a cost to allowing the employee the time off, and if there is the leave request is not approved. Jt. Ex. 3, p. 3. There is nothing in the memorandum about checking staffing levels in order to determine if a backup would be necessary, but it was not prepared by Mr. Ward and it is only a brief summary of the management

presentation, not a verbatim transcript, and may not reflect all that Mr. Ward had said. Thus, I do not find this evidence sufficient for a determination that Mr. Ward summarily denied PLD requests from ACs because the position requires backfill or relief without checking to see if backfill or relief would be necessary based on staffing levels.

Similarly, although Mr. Ward's use of a rubber stamp to give his reason for not approving a PLD request could indicate lack of consideration and summary decision, it could also indicate a desire or need for efficiency. As there is no direct evidence reflecting Mr. Ward's actual thoughts, inclinations or process in deciding PLD requests, and in view of the evidence showing he received the same training on PLDs as Mr. Travares, I cannot find that he summarily disapproved AC requests for PLDs based on the employee's position rather than considering each request on a case by case basis.

Ms. Kilgore definitively stated that each person's request for a PLD is looked at individually. She stated that if an employee brought in a request for a PLD today, or called in two hours in advance and asked how it looked for taking a PLD that day, and if management officials knew the staffing was good, they would approve the leave.⁵ Tr. 171.

Although the record reflects that other institutions have approved PLD requests from direct care staff, the evidence does not show that the circumstances surrounding the approvals were similar to those surrounding the denials of any or all of the grievants' requests.

The evidence does not establish the Employer automatically excluded the AC class of employees from taking a PLD. The evidence also does not establish the Employer's interpretation and implementation of Article 17.8 of the CBA was in error or that it violated a duty of good faith and fair dealing.

⁵ This has never been done with attendant counselors. Tr. 171. Yet, there is no evidence that an AC ever requested a PLD on such short notice.

The requests for PLDs were properly denied on the basis of increased cost to the facility.

The Acting Superintendent at Lakeland Village, Diane Kilgore, testified that she and others received training on the 2009-2011 CBA from Human Resources and that one of the major changes in the contract was the PLD provision. She stated that her basic understanding of when a PLD could be given or not given was that the language of the contract must be followed. The number of employees requesting the day off could not have a negative impact on the business need or the business operations of the facility. The employee needed to submit his/her request for a PLD fourteen days in advance of the date requested, and the awarding of the PLD must not increase the facility's costs. Tr. 152. Ms. Kilgore also testified that right away it was apparent that it would be difficult for the facility to honor all requests for a PLD.

Ms. Kilgore explained that backfill are positions that they define more as "posts." There are a number of posts needed each day either in direct care or in nursing, and that is a ratio of an employee to clients or residents. They have a certain number of posts both for direct care and for nursing, and there is a minimum number of employees they work very hard to have on duty every shift, every day. Because Lakeland Village as a whole has needs, an employee may have to be floated or temporarily moved from one area to another area to meet the day's staffing needs. Tr. 153.

Despite the fact that staff over the health safety minimums in one cottage may be floated to other cottages to fill a post at no increased cost to the facility, on any given day backfill people are hired because of the need for additional staff facility wide.. Tr. 141. There are sick call-ins or community medical appointments that drive up the number of ACs needed, and, according to Ms. Kilgore, it seems like on almost every shift they have to bring in on-call staff to reach the safe minimum number. Tr. 163-164.

The facility is not understaffed, if all of the employees scheduled to work on any given day come to work. There also would be occasions in a given cottage where the staffing is above minimum. The problem is that non-scheduled leave, over which the facility has no control, occurs all the time and pulls the facility-wide staffing level below the point where there is extra staff and even below the minimum safety level. Tr. 143. In addition to unscheduled leave, there is employee vacation time and other types of leave.

Vacation leave is different from a PLD in that employees are entitled to use the vacation leave they have accrued regardless of cost to the agency. *See* CBA Article 11, Jt. Ex. 1, pp. 36-38; Tr. 135. If staffing is above minimums on a day an employee is on vacation, an individual would be floated to cover for the absence. If staffing is at the minimum safety level or below, the position of the person on vacation would be backfilled by mandatory overtime or hiring an intermittent. Tr. 135-136. Thus, a PLD taken during a vacation period could well increase the facility's costs.

During training, clear directions were given on the use of a PLD during scheduled vacation time. Ms. Kilgore stated that they were advised that vacation days could be looked at for a PLD, but only if there was no cost in covering or bringing in an intermittent behind the employee on vacation. Ms. Kilgore further stated that for most vacations that are given at Lakeland to attendant counselors and nurses, the facility pays for coverage which is the main reason that PLDs are not permitted during vacation time. Tr. 162, 165.

Mr. Tavares testified that with respect to all of the AC leave slips requesting a PLD submitted to him, when he examined the staffing levels he found that giving the AC the requested day off would increase the facility's costs because of the need to provide backfill or relief. Tr. 145. There is no credible evidence to the contrary.

In her Step 1 response to the consolidated grievance, Ms. Kilgore acknowledged that in order to meet the requirement of not causing an increase in

costs, most employee's in the AC and LPN positions have not been awarded the PLD. The only ones given a PLD were on reassignment to a position or post which did not require backfill. Jt. Ex. 3, p. 3.

When asked if an LPN is a backfill or relief position, Mr. Tavares indicated that it could be, depending on the post the LPN is in. He stated that LPNs are a little different in the way they do their staffing. On any given day, an LPN may issue medications or administer medications. Yet, they also have what they call "paper days," a non-medication post, and on these days they are not in a required backfill post. Tr. 146-147. Mr. Tavares has not been involved in approving or disapproving an LPN request for a PLD. Tr. 148.

Ms. Kilgore testified that some LPNs are able to use the PLD because there are a certain number of medication posts for which a minimum number of nurses are needed, and there are also nurses scheduled to be available to do unplanned medical treatments or health interventions, as well as attend planning meetings for clients and do some of their assessments. Therefore, especially on Tuesdays, Wednesdays and Thursdays, there are more nurses on duty than the minimum number of medication posts so the two nursing supervisors have some flexibility in helping an LPN find a PLD that does not entail additional cost. Tr. 162-163; U. Exs 6, 7. Yet, there does not appear to be any such flexibility with respect to the AC positions, due to the number of ACs, the number of direct care posts, the number of AC vacations coupled with the number of AC sick calls that are received. Tr. 163.

Ms. Kilgore testified that Lakeland Village is not denying PLD requests because ACs are calling sick. Rather, ACs are not being given a PLD because it would entail the payment of overtime. Tr. 170. Ms. Kilgore also testified that the facility does not overstaff ACs in advance. For example, although there may be 75 ACs scheduled to work tomorrow and only 70 are needed, it is also known that from what has occurred in the past there are going to be more than five sick calls. Tr. 167. Therefore, to give a bargaining unit member a PLD for that day would

require the hiring of an on-call or intermittent person to backfill the position of the employee who was given the day off at an increased cost in violation of Article 17.8(B)(3)..

The Union pointed out that in management's presentation at Step 2 of the Grievance procedure, Acting Superintendent Kilgore provided information showing that the number of employees on shift at the start of the day in certain parts of the facility exceeded the amount actually needed to staff. *See* Jt. Ex. 4, p. 4. The Union also pointed out that Randy Withrow, a Labor Relations Specialist for the Department of Social and Health Services, confirmed that the starting number of employees exceeded the amount actually needed to staff.

Mr. Withrow testified that he served as the Secretary's designee at Step 2 and authored the response and the language referenced by the Union. Tr. 175-176. He further testified that by the referenced language he simply meant that if everyone who was scheduled to work showed up, the facility was not understaffed. Tr. 178. Yet, as discussed above, this is seldom the case due to unscheduled leave call-ins. As a rather startling example, Mr. Withrow testified regarding one weekend during which they had 51 call-ins and had to replace 51 employees wrecking havoc with the overtime budget. Tr. 178.

The record contains no definitive evidence showing that on any specific date or dates requested by one or more of the grievants for a PLD, there was sufficient staffing at Lakeland Village for the request to be approved without the facility incurring additional costs for backfill or relief and yet the request was denied. Under these circumstances, and in view of the lack of evidence establishing that PLD requests of ACs and LPNs at Lakeland Village were being summarily denied based on a presumption that approval would result in increased cost, the evidence showing that staffing levels at Lakeland Village were consistently adversely affected by unscheduled leave call-ins resulting in the need for backfill and relief, I find no violation of the language or spirit of Article 17.8 of the CBA by the Employer.

Articles 35, 38 or 50 of the CBA.

Although the grievance alleges the Employer violated Articles 35, 38, and 50 of the CBA by its actions in denying every request for a PLD by the AC class of employees and a few LPNs, the Union appears to have dropped these claims as they were not addressed or argued at hearing or in the Union's post-hearing brief.

Conclusion

It is not surprising that the grievants felt their requests for a PLD were summarily denied without careful consideration, thought or analysis. Although numerous requests for a PLD were submitted by attendant counselors at Lakeland Village, only one was granted, and that was only under very special circumstances. Furthermore, the requests submitted to Ward Tappero were denied with an impersonal rubber stamp. Additionally, the grievants were aware of employees in other state institutions who had received a PLD and it was not unusual for a cottage or cottages at Lakeland Village to be staffed in excess of the minimum and the excess employees floated to another cottage. Thus, there did not appear to be an acute staffing issue which would prevent approval of at least a few of the AC requests for a PLD. Under these circumstances, it is difficult for employees to understand why their requests for a PLD are being denied.

Nevertheless, the unrebutted testimony of Frank Tavares establishes that he does not automatically deny a PLD request from an AC but carefully considers each request to see if he can give the employee the day off without cost to the facility. He checks with the appropriate RSC and reviews the schedule book to see if staffing for the day requested would be above minimum. Yet, according to Mr. Travares' unrebutted testimony, which was supported by evidence of the number of unscheduled leave call-ins and other matters affecting staffing levels, there was never an occasion where a PLD request from an AC could be approved without additional cost to the facility.

The evidence does not establish the Employer acted in bad faith, misinterpreted, misapplied or violated the CBA, specifically Article 17.8, by

denying Personal Leave Days to Attendant Counselors and two or three LPNs at Lakeland Village during the term of the 2009-2011 CBA.

AWARD

The Grievance is DENIED..

Date: August 13, 2012

Carol J. Teather
Arbitrator