

**James R. Meier**  
Chairperson  
**A. Henry Hempe**  
Commissioner  
**Paul A. Hahn**  
Commissioner



**Mailing Address:**  
18 South Thornton Avenue  
P. O. Box 7870  
Madison, WI 53707-7870  
Telephone: (608) 266-1381  
Fax: (608) 266-6930

**State of Wisconsin  
Wisconsin Employment Relations Commission**

December 9, 1999

Mr. Greg Hansen  
St. Mary's Hospital  
407 East 3<sup>rd</sup> Street  
Duluth, MN 55805

Mr. James Mattson  
Staff Representative  
Wisconsin Council 40, AFSCME, AFL-CIO  
1701 East Seventh Street  
Superior, WI 54880

Re: St. Mary's Hospital  
Case 4 No. 57416 A-5756

Gentlemen:

I write to confirm the bench award issued at your request after the hearing.

The facts are uncontraverted. For at least ten years the Dietary Department has paid straight time to employes who respond to a call to come to work early on a day for which they were otherwise scheduled. There is no evidence that the employer ever threatened discipline to force an employe in early without the higher rate of pay, or disciplined an employe who could not come in early and, in fact, paid two hours call-in pay to one employe who insisted on it before she would come in early.

A union officer was among the employes who have come in early and accepted straight time pay without grieving.

In the Environmental Department, the practice has been the opposite. When an employe has been called and requested to come in early, on a day when the employe is already scheduled to work, the responding employe has received two hours pay in addition to pay for the hours worked. And so it can be said that in the Dietary Department a practice has developed wherein employes who voluntarily accede to the employer's request to come in early on the same day they are already scheduled, do so for straight time pay.

The issue is whether the employer violated Sec. 25.03 of the contract when it failed to pay two employes, the grievants, two hours of pay at straight time in addition to pay for the number of hours worked for a day in each case when they responded to a call to work early.

Mr. Greg Hansen  
Mr. James Mattson  
December 9, 1999  
Page two

The employer's position is that the contract is ambiguous and that in light of the long and well known past practice in the Dietary Department, there has not been a violation of the contract.

The union's position is that the contract is clear on its face and as evidenced by the practice in the Environmental Department and, therefore, the Employer has violated 25.03 of the contract.

After consideration of the evidence and your arguments, I held that 25.03 of the contract is susceptible to more than one interpretation and is therefore ambiguous. (For instance, in addition to the differing practices in Dietary and Environmental Services, yet another "application" of the second sentence of sec. 25.03 might be a call to work at the end of the work day, after the shift is over). I further found that the practice in the Dietary Department met all of the criteria of past practice. It was long term; occurring regularly in the Dietary Department for as long as anyone remembered and for at least ten years. It was widely known and accepted in that even a union officer who was part of the negotiating committee, accepted straight pay when responding to a request for early work. It was well established and essentially uniform in the Dietary Department, the practice in Dietary conflicts with the practice in Environmental, and where there are conflicting practices it has been held that there is no controlling practice. However, it is also true that practices may develop which are more responsive to different shifts and I would think, different departments.

So separate practices may develop in different departments; here the voluntary acceptance of a request to come in early at straight time pay, versus the application of sec. 25.03 in the same circumstances in the Environmental Department. Therefore, in light of the extensive past practice in Dietary, I found no violation of 25.03 of the contract where employees of the Dietary Department have voluntarily responded to a request to come in early and have not been paid two hours call in pay pursuant to sec. 25.03 of the contract.

Very truly yours,

James R. Meier  
Arbitrator

JRM/rb  
5987