

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MOUNDVIEW MEMORIAL HOSPITAL**

and

**LOCAL 150, SEIU, AFL-CIO**

Case 6

No. 65434

A-6196

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**Appearances:**

Mr. YingTao Ho, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of Local 150.

Mr. James R. Macy, Esq., Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, 54903-1278, on behalf of the Hospital.

**ARBITRATION AWARD**

The parties jointly selected Arbitrator Sharon A. Gallagher through the Wisconsin Employment Relations Commission to hear and resolve a dispute between them arising under the 2004-06 labor agreement concerning the proper amount of vacation pay due to Grievant Peg Heider upon reaching 10,400 hours of service. Hearing on the matter was scheduled and held on June 6, 2006, at Friendship, Wisconsin. A stenographic transcript of the proceedings was made and received by the Arbitrator on June 22, 2006. The parties thereafter filed their initial briefs by July 24, 2006, and then reply documents by August 7, 2006, whereupon the record was closed.

**ISSUES**

The parties were unable to stipulate to the issues before the Arbitrator. However, they agreed that the Arbitrator could frame the issues in this case based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues:

- 1) Was the Grievant entitled to a third week of vacation as soon as she accumulated 10,400 hours of service?
- 2) If so, what is the appropriate remedy?

The Hospital suggested the following issues:

- 3) Did the Employer violate Article 10 of the collective bargaining agreement when it allowed the Grievant to accrue and then use 3 weeks of vacation after 5 years (10,400 hours) of employment?
- 4) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument of the parties' suggested issues, the Arbitrator finds that the Union's issues reasonably state the controversy between the parties and they shall be determined herein.

### **RELEVANT CONTRACT PROVISIONS:**

#### **ARTICLE 3**

#### **Employee Definitions**

Section 1. Full-Time Employees. Full-time employees are those employees regularly scheduled to work forty (40) hours a week or eighty (80) hours in a pay period on a regularly scheduled basis. Full-time employees shall be entitled to full benefits as provided in this agreement.

Section 2. Part-Time Employees. Part-time employees are those employees regularly scheduled to work less than forty (40) hours per week or eighty (80) hours per pay period. Part-time employees shall receive pro-rated benefits as provided in this agreement. If work (sic) twenty (20) hours per week or more and averaged over preceding three (3) months.

Section 3. Temporary Employees. Temporary employees are those employees hired for a pre-determined period of time not to exceed one hundred and twenty (120) consecutive calendar days. These employees are informed at the time of hire that their employment is temporary and they are not entitled to employee benefits, do not accrue seniority, are terminated at the end of the temporary employment, and are not a part of the bargaining unit.

Section 4. Casual Employees. Casual employees are employees hired other than in the categories previously determined who are substitute or flexible scheduling employees. Such employees do not receive fringe benefits, do not accrue seniority, are hired on an as-needed basis, and are not a part of the bargaining unit.

**ARTICLE 5**  
**Seniority Layoff/Reduction in Force**

Section 1. Seniority is defined as an employee's length of continuous service gained by job classification with the hospital.

Section 2. The hospital will provide the union with a list of bargaining unit employees and their seniority dates every three (3) months commencing within thirty (30) days of the signing of this Agreement.

Section 3. A reduction in force and/or layoff shall be in the reverse order of seniority in the bargaining unit and job classification affected with casual, temporary and probationary employees to be laid off first. The hospital reserves the right to maintain an appropriate mix of full and part-time employees and to assure the level of competency of employees within a particular position or unit. In such cases, the reduction in force or layoff may not strictly follow the reverse order of seniority. In maintaining an appropriate mix of full and part-time employees the more senior employee shall have the right to bump a less senior employee without regard to full or part-time position. Recall from a reduction in force or layoff shall be in inverse order of reduction or layoff.

Section 4. Prior to using the layoff procedure described in Section 3, the employer shall first seek volunteers to accomplish the necessary reductions. Employer (sic) will also advise the union at the same time as the employee, generally two (2) weeks in advance of any layoffs, reductions in hours or other reductions in force and will meet with the union representative to discuss the effect.

Section 5. Seniority shall cease for the following reasons:

- A. Failure to report to work for a period of three (3) days without notifying employee's supervisor.
- B. Quitting.
- C. Discharge for just cause.
- D. Continuous layoff for nine (9) months.
- E. Failure to return to work within seven (7) days after expiration of a leave of absence.
- F. Failure to return to work within seven (7) days after receipt of recall notice sent by registered mail to the employee at his/her last known address.
- G. Is on any type of leave for more than one year.

**ARTICLE 10**  
**Vacations**

**Section 1.** All full-time employees who have six (6) months (1040 hours) of seniority are entitled to receive one (1) week of vacation, with forty (40) hours of pay. When they have an additional six (6) months (2080 hours) of seniority, they are entitled to receive an additional week of vacation with forty (40) hours pay. Thereafter they will be entitled to a two (2) week vacation each year until they reach five (5) years of seniority.

**Section 2.** All full-time employees who have five (5) or more years of seniority are entitled to receive three (3) weeks of vacation with one hundred and twenty (120) hours of pay.

**Section 3.** All full-time employees who have ten (10) or more years of seniority are entitled to four (4) weeks vacation with one hundred and sixty (160) hours pay.

**Section 4.** More senior employees shall have preference in choosing vacation dates. Requests for times of vacation must be made sufficiently far in advance so that the department work schedules may be timely prepared. Vacation times must be approved by the department head. When the departmental vacation schedule has been completed and posted for one week, an employee desiring to change his/her scheduled vacation time(s) may not exercise seniority preference to compel a less senior employee to change his/her scheduled time of vacation.

**Section 5.** Employees may receive their vacation pay on the last day worked before vacation. They must request their vacation check by the last payday before vacation. Part-time employees are entitled to vacations as set forth above where they have accrued the equivalent number of years of seniority. For computation of vacation, seniority(sic) a "year" will be 2080 hours worked, with paid vacations and paid holidays counted as time worked. Pay per week of vacation will be based on the average number of hours per pay period worked during the preceding year.

**Section 6.** Vacations must be taken in the 12 months following the time earned, if at all possible. If requested vacation is denied by the employer the employee has the option of receiving pay for the vacation hours requested or to reschedule said vacation hours at a later time, if possible. Vacation hours paid in lieu of taking vacation shall be paid at regular time, not overtime.

**Section 7.** All employees who have earned three (3) or more weeks vacation may request up to three (3) consecutive weeks of vacation at one time which may be granted subject to administrative approval.

**Section 8.** Employees if granted personal or vacation time off will be allowed to use said time off without being required to find his/her own replacement.

## **ARTICLE 20** **Management Rights**

Except where otherwise provided in this agreement, the hospital has the sole and exclusive right to determine the number of employees to be employed, the duties of each and the manner, nature and place of their work, whether or not any of the work will be contracted out, and all other matters pertaining to the management and operation of the hospital including but not limited to the direction of all operations in the Hospital, establishment of reasonable work rules, the discipline of employees pursuant to Article 6, the assignment and transfer of employees, the determination of the number and classification of employees needed to provide services, the right to establish reasonable schedules of work, the right to hire, promote, schedule and assign employees, the right to lay off employees, the right to maintain efficient operations, take whatever action is necessary to comply with state or federal law, to introduce new or improved methods or facilities, to change existing methods, or facilities, to determine the means, methods and personnel by which operations are to be conducted and to take whatever action is necessary to carry out the function of the Hospital in cases of emergency. This section shall not be used for the purpose of destroying the bargaining unit.

### **RELEVANT POLICY PROVISIONS**

#### **Policy Statement:**

Moundview Memorial Hospital & Clinics provides a vacation, holiday and personal day program which employees can use at their discretion for vacation, holidays, illness, personal business and other time away from work. Advance notice and prior approval by the employee's manager is required.

#### **Corporate Compliance:**

This policy will adhere to all applicable rules and regulations as set forth by Federal and State regulatory agencies as well as all hospital administrative policies.

#### **General Information:**

Following the policy is necessary to provide:

- Flexibility for employees to utilize paid time off to their best advantage (with advance notice and their manager's approval, vacation and personal days can be used to cover time off for business matters, medical and dental appointments, holidays, etc.);
- The hospital with the necessary control to maintain its function at an effective staffing level; and
- Employee with needed time away from their duties.

**Implementation/Procedure:**

**PROCEDURE**

- 1) All regular employees with a permanent FTE status are eligible. Limited term, casual and temporary employees are not eligible.
- 2) Accrual begins at date of hire, but employees are not eligible to use accrued hours until completing three (3) months of employment. (This may vary dependent upon union contracts.)
- 3) Employees terminating employment prior to three (3) months will be paid for accrued hours of vacation or personal time. Unused balances will be paid at termination of employment of three (3) months or greater.
- 4) Employees terminating employment without two-weeks written notification (four-weeks for Managers) of their termination will not be paid for their accrued hours upon termination.
- 5) Vacation and personal time is accrued on regular worked hours, education, orientation, overtime, ambulance transfers, and paid time off. It is not accrued for on-call time, "cashed out" hours or unpaid leave time. You cannot accrue on more than 80 hours per pay period.
- 6) Vacations are scheduled with your supervisor and/or department manager and every effort will be made to accommodate your plans; seniority date will be a deciding factor.
- 7) Depending upon your employment status and your length of continuous employment, you will begin to accrue vacation each year beginning on your seniority date. Your vacation is earned or accrued on the basis of the number of regular hours you work, scheduled overtime hours, and worked on-call hours (but not to exceed 2,080 in a calendar year), including benefit time such as vacation, paid holidays and paid sick time, and is calculated each pay period. Vacation time does not accrue for on-call hours, non-scheduled overtime hours, and during leaves of absence.
- 8) The following chart shows:
  - a) The amount of vacation you accrue for each hour that you work (or for any paid time off);
  - b) The number of vacation hours earned for each 80 hours paid and assuming you were a full time employee working 2,080 hours in a year;
  - c) The amount of vacation accrued or earned.

Length of Hospital Service	Accrual Per Hour Worked	Full Time Per Pay Period	Per 2,080 hours
1-4 years	.03846 hour	3.08 hours	80 hours = 10 days
5-9 years	.05769 hour	4.62 hours	120 hours = 15 days
10 or more years	.07692 hour	6.15 hours	160 hours = 20 days

- 9) Part time employees receive vacation benefits pro-rated. Temporary and casual employees do not earn or accrue paid vacation.

- 10) Please note the following general rules concerning vacations:
- a) With Administrative approval, earned vacation may be taken during the first year of employment (12 consecutive months).
  - b) Vacation may be taken in units of one or more weeks, or in units of one or more days, in pre-arranged agreement with your supervisor or department manager and subject to departmental staffing policies.
  - c) An employee may not combine two years of vacation accrual into one extended vacation without approval. All vacation time must be used before the end of the year following that in which it was earned or it will be forfeited except under unusual approved circumstances. An exception for pay in lieu of vacation must be requested by your supervisor and be approved by the Administrator.
  - d) The use of accrued vacation time is also permitted.
  - e) Holidays, which fall within your vacation period, are counted as holidays.
  - f) All eligible employees who have accrued vacation and who have worked at least three (3) months shall be granted their accrued vacation pay upon termination in good standing. However, employees discharged or terminated “not in good standing” are not considered eligible and will forfeit payment of accrued vacation.
  - g) Vacation or personal hours must be used any time an hourly employee is off work during scheduled work time or when they have not worked their normal scheduled work hours in a given pay period. This applies to any situation in which the employee requests four (4) hours or more off from a regularly (sic) scheduled shift. (i.e. – asks to go home early in order to attend a (sic) appointment). This does not apply if the leave is designated as FMLA, Worker’s Comp, Jury Duty or Bereavement Leave.
  - h) Exclusions to the policy include:
    - i) Times of low census/activity where management makes a determination to have someone stay home or leave early from a scheduled shift.
    - ii) When an employee has worked above their FTE of record and is not needed for further scheduled shifts or partial shifts.

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### **BACKGROUND**

The Hospital employs approximately 30 licensed LPN’s, three to five of which are full-time while the remaining 25 are part-time LPN’s. Grievant Peg Heider began working for the Hospital as a full-time RN (80 hours per two week pay period) in September of 2000 and she continued to work full-time until May, 2002 when her schedule was reduced to 0.9 (72 hours per pay period). The Hospital does not give employees any documentation showing the total

number of hours they have worked for the Hospital since their hire and it does not give employees any notification when they become eligible for additional vacation based upon their total hours worked, although employee pay stubs show the amount of vacation each employee has available to use, up-dated on their anniversary date of hire. The only way employees can get information regarding their total hours worked is by asking the Hospital business office for this information. The Union has never received any information from the Hospital regarding individual employee's vacation entitlement (current or future) and the Hospital's vacation policy has never been the subject of negotiations between the parties.

The Hospital uses the total number of hours worked by each employee and their anniversary date of hire to determine how much vacation an employee is entitled to receive each year; vacation accrual begins on the employee's date of hire; under the effective agreement, new employees can use up to 1 week of vacation after they have worked 3 months and tenured employees can use vacation each year as they earn it. Employees can borrow vacation from future years but they must use banked vacation first (earned in the previous 12 months period) or its is lost by the employee's next anniversary date.

It is undisputed that full-time employees receive a second week of vacation at the beginning of their second year of employment as soon as they have worked at least 2080 hours; full-time employees who work less than full-time in any year (i.e., 2080 hours) get pro-rated vacation based on the number of hours they work in that year. It is also undisputed that part-time employees are eligible for (pro-rated) 2 weeks' vacation after they have worked 2080 total hours. Although the Hospital asserted that employees must work 2080 hours in the prior year and reach 10,400 total hours worked before they can receive 3 weeks' vacation, Hospital witness Munger admitted that if an employee worked 2080 hours and thereby earned 2 weeks' vacation in their first year, they would get 80 hours of vacation no matter how many hours they worked in their second year of employment (Tr.98-99), although if that employee worked less than 2080 hours in year 2, that might affect the amount of vacation they received in year 3 (unless the employee worked overtime up to 2080).<sup>1</sup> Munger stated that neither he nor any other Hospital manager told any Union representative that the Hospital required employees to reach 12,480 hours of work during their 6<sup>th</sup> year of employment in order to receive 3 weeks' vacation (Tr.100). The Hospital has always allowed employees to use their vacation in advance of their earning that vacation and it has allowed employees to borrow and use future vacation time the Hospital had not yet credited to their accounts.

The employee orientation program which the Hospital conducts covers vacation eligibility on a checklist, as follows:

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<sup>1</sup> Employees who work more than 2080 hours do not receive credit for any time worked beyond 2080 for vacation purposes.



Vacation – (Eligibility calculated on hours of service) **Pro-rated for less than full time** – 40 hours after 1040 hours – and when you have an additional six (6) months of seniority (2080 hrs) you are entitled to receive an additional week of vacation with (40) hours of pay. Thereafter will be entitled to a two (2) week vacation each year. – Additional time allowed at five years/10 years.

. . .

Also, the language of Article 10 has remained substantively the same since at least the 1980's; only one change thereto has been made – new employees previously had to wait 6 months to use one week of vacation and now they can use 1 week of vacation after completing 3 months of employment. Prior to this case, no grievances were filed by unit employees concerning vacation entitlement. The Union has proposed (in its most recent negotiations with the Hospital) to include total hours worked on employee pay stubs.

### FACTS

In 2005, Grievant Heider had no idea how many total hours she had worked at the Hospital but she thought she was close to the 10,400 hours required for 3 weeks' vacation. In September, 2005 after her anniversary date of hire, Heider went to the Hospital's business office after she received 2 weeks' vacation listed on her pay stub for the year to inquire regarding why she had not received 3 weeks' vacation. Accounting employee Mary Jo Klaus told Heider she was not entitled to 3 weeks' vacation. Heider stated that she felt she was entitled to 3 weeks vacation because she had worked at the Hospital for 5 years. Klaus<sup>2</sup> explained her understanding of the vacation policy, which Heider admitted she did not fully understand. Later, Heider went back to Klaus and asked for her total hours worked, believing she had met the 10,400 hour requirement and Heider requested to them receive three weeks vacation because she believed the Union contract required this.<sup>3</sup>

The Hospital denied her request and Heider filed the instant grievance on October 18, 2005 seeking credit for 3 weeks vacation as of Heider's 5<sup>th</sup> year anniversary date. The Hospital's 3<sup>rd</sup> Step answer read as follows:

After investigation and review of this issue I have decided to deny your grievance, finding that there has been no violation of the bargaining agreement. My decision includes but is not limited to:

1. Pursuant to the contract language as written (as requested by you in your grievance) you would not be eligible for the increased vacation hours. Article 10, section 2 states, "All full-time employees who have five (5) or more years of seniority are entitled to receive three (3) weeks of vacation with one hundred and twenty (120) hours or pay". As you are not a full-time employee as defined in the contract you would not be eligible for the increased vacation hours.

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2 Klaus did not testify herein.

3 As of November 12, 2005, Heider had worked 10,666.75 hours at the Hospital.

2. The historical application of vacation for all employees is to begin the accrual of additional vacation hours once staff have (5) or more years of seniority and ten (10) or more years of seniority. If we change from our past to meet your expectations, it would be a hardship or a take-away to most of our employees.

The Union then brought the case forward to arbitration.

### **POSITIONS OF THE PARTIES:**

#### **Union:**

The Union argued that in its view, Grievant Heider was entitled to receive three weeks of vacation as soon as she reached 10,400 hours of service which she had earned by her work during her first five years of employment. As the Hospital has never notified employees or the Union of employees' total hours worked, neither could be said to have had knowledge of the Hospital's past administration of Article 10, Section 5, for part-time employees, requiring them to borrow the third week from the 7<sup>th</sup> year of employment and to work an additional 2080 hours in the 6<sup>th</sup> year. The Union noted that Article 10, Section 2, makes entitlement to a third week of vacation dependent only upon reaching 10,400 hours of employment and that nothing in Article 10 or the Vacation Policy addresses borrowing vacation weeks or states any further requirements to receive the third week of vacation. Therefore, the Hospital's actions toward Heider, on their face, violated the clear language of Article 10 and also violated the clear, contractual assurance that part-time employees would be provided the same vacation benefit as full-time employees based upon years of seniority.

The Union further argued that the alleged past practice submitted by the Hospital is unenforceable against the Union as it is contrary to the clear language of Article 10. In addition, the Union urged that it was entirely unaware of the practice as were Local 150 – represented employees, noting that no employees brought any vacation complaints to the Union prior to the instant case. Furthermore, the Vacation Policy does not support the Hospital's past practice or show that the Union employees were thereby notified of the practice as the Policy fails to indicate how much vacation an employee is entitled to if they have between 8,320 and 10,400 hours of employment. In any event, the Hospital's Vacation Policy, a unilaterally promulgated policy, cannot be binding where as here, it is contrary to clear contract language.

Based upon the above, the Union urged that Heider was entitled to receive 118.36 pro-rated hours of vacation as soon as she reached 10,400 hours of employment (or an additional 38.36 hours) for 2005-06.

**Hospital:**

The Hospital argued that the relevant contract language and the supporting 20-year past practice require that the grievance be denied and dismissed. The Hospital noted that during the approximately 20 years since Article 10 and its Vacation Policy have existed and remained unchanged in relevant part, the Union has never filed a grievance regarding how the Hospital has consistently granted part-time employees a third week of vacation. On this point the Hospital urged that “there is nothing to be interpreted or subject to differing interpretation,” (ER Brief, p. 9), citing WERC Arbitrator Burns’ June 2006, Award in City of Fitchburg, Dec. No. MA-13201. Here, the Hospital contended that three weeks of vacation “begins to accrue and that accrued amount then begins to be eligible for use upon completion of the fifth year of employment. The language does not say and cannot be reasonable interpreted to mean that the grievant has access to the full three weeks of vacation immediately upon the completing of five years of employment” (ER Br.p.10). The Hospital observed that Union witness Shaw confirmed that this has been the Hospital’s practice (Tr. 62-63) and past practice evidence supported the Hospital’s interpretation of the language of Article 10.

But even if the Arbitrator finds Article 10 to be ambiguous, the Hospital argued that its past practice should control the case. The Union’s acquiescence in the Hospital’s vacation practice of applying the vacation language/policy across several contracts, without grieving or otherwise objecting the Hospital argued, constitutes acceptance of the practice. Therefore, the Hospital urged that the grievance be denied and dismissed entirely.

**Replies****Union:**

In its Reply Brief, the Union argued that as the contract clearly states that full-time employees unconditionally “receive” three weeks vacation as soon as they have worked 10,400 hours (not that they will begin to earn three weeks vacation if they complete 693 hours in their 6<sup>th</sup> year of employment and seek to use the third week), part-time employees must be granted the benefit under the contract language. As the contract uses the verb phrase “entitled to receive” and there is no rate of accrual language covering from four to five years’ seniority, this means that employees who have 10,400 hours of seniority must be credited with three weeks vacation in their vacation accounts at the beginning of their 6<sup>th</sup> year of employment.

The Union then argued that the City of Fitchburg case cited by the Hospital is distinguishable on its facts and by means of the distinctly different contract language addressed in the Fitchburg case. In regard to the Hospital’s past practice argument, where, as here, the Union had no knowledge or notice of the practice and it never agreed to a practice (so clearly in violation of the labor agreement) whereby employees would only begin to earn three weeks vacation beginning in their 6<sup>th</sup> year of employment, the Hospital failed to prove a valid past practice existed. In any event, the Arbitrator cannot enforce the practice as it is contrary to the clear language of Article 10, Section 2. Therefore, the Union urged the Arbitrator to sustain the grievance and make Grievant Heider whole.

**Hospital:**

The Hospital urged that employees' entitlement to three weeks vacation is neither unconditional nor automatic if the clear language of Article 10 is applied. The Hospital noted that its argument that the language is clear and not subject to interpretation is supported by the Union's failure to grieve the Hospital's application thereof over many years. The Hospital argued that a recent Award by WERC Arbitrator Burns in City of Fitchburg, MA-13201 (6/28/06), was on point for this case where the language in Fitchburg clearly stated that three weeks of vacation begins to accrue and that accrued amount begins to be eligible for use only upon completion of the 5<sup>th</sup> year of employment.

The Hospital then disputed the Union's assertion that it has required Heider as a part-time employee to accumulate more service time than full-time employees before becoming eligible for three weeks vacation. In this regard, the Hospital quoted from CFO Munger's testimony regarding Hospital Exhibits 3 and 4, which showed that Heider was treated the same as other similarly situated employees such as Carol Timmerman.

Finally, the Hospital argued that its past practice is consistent with and supports the clear language of Article 10, noting that the Hospital never argued that its practice amended or filled in gaps in the clear language of Article 10; and that the Hospital's Vacation Policy pre-dates the parties' labor agreement, requiring a conclusion that the parties intended the practice to become a part of the labor agreement. Here, the Hospital contended that the Union cannot plead ignorance of the practice and expect to prevail as "every single employee over the years, without exception, has received their additions to vacation as administered by the Hospital in this case . . . without challenge and without grievance" (ER Reply p. 8). The fact that total hours worked were not stated on employee pay stubs does not mean employees were unaware of the Hospital's interpretations of its Vacation Policy. Employees could and did ask for their total hours and they were given them, demonstrating the Hospital's practice. In these circumstances, the Union's claimed ignorance of the 20-year practice was not supported by the record. Therefore, the Hospital urged denial and dismissal of the grievance.

**Further Documents received**

On August 10, 2006 and on August 15, 2006, the Union and the Hospital (respectively) filed further letter briefs in this case taking issue with assertions/statements made by the other party in their Reply Brief. As the parties did not agree to submission of such post-Reply documents, in fairness, neither has been considered herein.

## DISCUSSION

The record herein clearly showed that Heider has regularly worked as a part-time unit employee for more than 20 hours per week since her move to part-time status and until her illness in early June, 2005. There is also no question that Heider's June, 2005, illness was bona fide as defined in the labor agreement. Finally, the parties do not dispute that unit employees have regularly been allowed to borrow from their vacation accounts in each year (after completing their first three months of service with the Hospital) and that employees are not told when they reach 10,400 hours' service and they do not receive any documentation of their total number of service hours either annually or otherwise.

Therefore, the initial question that must be answered herein is whether or not the Article 10 provisions relating to part-time employees are clear and unambiguous, leaving no room for alternate interpretations. On this point, I believe that the relevant language of Article 10 is clear and unambiguous. In this regard, I note that Section 5 states that "part-time employees are entitled to vacations as set forth above where they have accrued the same number of years of seniority" as full-time employees. The use of the verb "entitle" is significant. The ordinary meaning of that verb is as follows:

1. to give (a person or thing) a title, right or claim to something; furnish with grounds for laying claim. The Random House Dictionary of the English Language (College Ed., 1968) p. 441.

Thus, the reference to benefits "as set forth above" can only refer to the full-time benefits described in Sections 1 and 2. And the sole, express condition that part-time employees must meet in order to have the right to receive the same vacation benefits as full-time employees is that they must have worked 10,400 hours, or five years of full-time seniority, and nothing more. The fact that there are no additional stated requirements for part-time employees to have the right to full-time vacation benefits, such as to the number of hours they must work in any particular year, demonstrates that the Hospital's requirement that part-time employees work a full 2080 hours in their 6<sup>th</sup> year of employment after amassing the required 10,400 hours of seniority to be entitled to three weeks' (pro-rated) vacation, is unsupported by any language in the labor agreement.

Furthermore, a close analysis of the Hospital's Vacation Policy also fails to demonstrate that part-time employees are required thereby to do more than work 10,400 hours for the Hospital in order to be entitled to receive three weeks' pro-rated vacation. In this regard, I note that paragraph 2 of the "Procedure Section" of the Policy specifically states that accrual and/or eligibility for use of vacation, "may vary dependent upon union contracts." In addition, the table of benefits contained in the Policy also clearly states that employees who have "1-4 years" of Hospital service are to receive "10 days" vacation, and those who have "5-9 years" of Hospital service are to receive "15 days" vacation. Although it is clear that the Policy provides for part-time employees' vacation to be pro-rated based upon hours worked in the relevant time period, again, there is no reference in the Policy to any requirement that part-time employees work a specific number of hours in their 6<sup>th</sup> year of employment in order to receive 15 pro-rated days of vacation.

Finally, the Hospital's employee orientation checklist does not call for a different conclusion. That checklist speaks only of proration for less than full-time employees and it does not specifically address when a part-time employee becomes entitled to receive three weeks' vacation, except that it states that "additional (vacation) time (will be) allowed at five years...." In my view, this language--the use of the phrase "at five years"-- supports the Union's arguments herein that all that is required is for part-time employees to have amassed 10,400 hours of service to have the right to receive three weeks' pro-rated vacation.

The Hospital has argued that its evidence of past practice supports its assertions regarding the clear and unambiguous meaning of Article 10. As the above analysis shows that I have rejected the Hospital's interpretation of the language of Article 10, the Hospital's past practice evidence is also rejected in its entirety. It is significant that Hospital Manager Mulder admitted herein that he never notified the Union of the Hospital's interpretation of Article 10 concerning part-time employees; and that the record failed to show that any other part-time employees had ever complained about their vacation benefits prior to Heider's grievance. The insertion into this record of part-time employee Timmerman's vacation history (without calling her as a witness and without listing her total hours worked, ER Exh. 4), along with that of Heider, was insufficient to show that over many years all part-time employees were consistently required to work 12,480 hours before they were allowed to take three weeks' pro-rated vacation as the Hospital claimed. Given the Hospital's policy of allowing employees to borrow from their vacation accounts in advance (after working three months) and the fact that the Hospital never gave unit employees or the Union a running total of employees' hours of service or any notification when such employees became entitled to additional vacation, it is understandable that part-time unit employees could become confused concerning their entitlement to vacation benefits. In these circumstances, therefore, the record evidence in this case simply did not prove that the Union knew or should have known of the Hospital's (erroneous) interpretation of Article 10 and its Vacation Policy prior to Heider's grievance. And the Hospital's argument regarding the Union's acquiescence in the alleged practice must also be and hereby is also specifically rejected.

The Hospital cited as controlling a prior case, City of Fitchburg, Dec. No. MA-13201, issued by WERC Arbitrator Burns in June, 2006. In my view, the contract language and the facts of that case were distinctly different from those herein and therefore I find that the Fitchburg Award is inapposite.

Finally, had the parties intended that part-time employees would "begin to accrue" and then "begin to be eligible" to use three weeks of vacation only after they had completed 12,480 hours of service or 6 full years of service (as the Hospital asserted in its Initial Brief), the parties could have easily stated this requirement in their contract. They did not do so. Rather, the parties clearly stated without requiring more, that completion of 10,400 hours of service would entitle part-time employees to three weeks' pro-rated vacation. This is what Heider had a right to receive upon her completion of 10,400 hours of service and this is what the Hospital must give her.

**AWARD**<sup>4</sup>

The Grievant was entitled to receive a third week of pro-rated vacation as soon as she accumulated 10,400 hours of service. Therefore, the grievance is sustained and the Hospital is ordered to make Heider whole.

Dated at Oshkosh, Wisconsin, this 8<sup>th</sup> day of September, 2006.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator

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4 I will retain jurisdiction over the remedy only for 60 days after the date of this Award, should the parties have difficulty in this area.