

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MILWAUKEE COUNTY**  
and  
**WISCONSIN FEDERATION OF NURSES AND  
HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO**

Case 557  
No. 65077  
MA-13113

(LAP Day Denial Grievance)

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**Appearances:**

**Attorney Timothy R. Schoewe**, Deputy Corporation Counsel, Milwaukee County, 901 North 9<sup>th</sup> Street, Room 303, Milwaukee, Wisconsin 53233, on behalf of Milwaukee County.

**Ms. Linda Federighe**, personally, and **Attorney Jeffrey P. Sweetland**, Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of Linda Federighe and Local 5001.

**ARBITRATION AWARD**

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Linda Federighe, who is referred to below as Federighe or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on April 27, 2006 at the Milwaukee County Courthouse, Milwaukee, Wisconsin. No transcript was prepared. A briefing schedule was established. The Parties filed briefs and reply briefs and the record was closed on June 26, 2006.

**ISSUES**

The County proposed that the issues be stated as:

Did Milwaukee County violate Sec. 2.27(c) of the Memorandum of Agreement when it denied Linda Federighe an LAP day on May 6, 2005?

If so, what is the appropriate remedy?

The Union proposed that the issues be stated as:

Did Milwaukee County violate Sec. 2.27(1)(b) and (c) of the Memorandum of Agreement when it denied Linda Federighe LAP on May 6, 2005?

If so, what is the appropriate remedy?

The issues as stated by the Union are selected as those which more closely reflect the record in the case.

### **RELEVANT CONTRACT PROVISIONS**

#### **1.05 MANAGEMENT RIGHTS**

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. . . . But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Federation. . . .

#### **2.19 CERTIFICATION PAYMENT**

(1) Eligible nurses must be active as of January 1, of each year. Eligible nurses interested in receiving the \$600 certification payment (\$300 certification payment beginning January 1, 2002) shall present evidence of such certification no later than January 31<sup>st</sup> of each year Eligibility requires:

- (a) written proof of specialty certification prior to beginning of differential payment.
- (b) maintenance of certification.
- (c) certification applies to the area of practice. If no certification is available for an area of practice, a general nursing practice certification will be recognized.

(2) Nurses will not be unreasonably denied time off toward seminar/continuing education courses required to obtain/maintain certification.

- (3) Approved certifying agencies shall include:
  - American Heart Association – excluding basic CPR or Equivalent
  - American Nurses Association
  - National Specialty; Nursing Organizations
  - Infection Control

If organizations other than the above are found to provide certification, the parties will meet to consider their inclusion on the list.

(4) The payment shall be made within four pay periods of the filing date noted above.

(5) Procedures concerning the application of the certification payment process shall be adopted at each nurse practice committee. Where no Nurse Practice Committee is in place, procedures will be agreed upon between the union and the department head.

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## 2.27 SEMINAR/CERTIFICATION FEE AND TUITION REIMBURSEMENT

### (1) Seminar Leave and Reimbursement.

(a) The County agrees to provide annual seminar/certification fee reimbursement funds of \$70,000 to be used for the payment of seminar/certification registration fees such reimbursement within the limits of the annual fund shall be approved up to a maximum of \$450 per year per employee plus \$300 for certification and may only be utilized with the prior approval of the appointing authority. On an annual basis, pool nurses will be eligible for seminar reimbursement upon completion of 500 hours of work per 12-month period.

(b) When an employe is authorized to attend a seminar, irrespective of the manner of reimbursement, the employe shall be permitted to attend during the employe's normally scheduled work hours. In the event the employe is scheduled for p.m.'s or nights, the employe's schedule shall be modified to permit attendance during the day. However, attendance at seminars on regularly scheduled off days shall not be compensated.

Employes attending seminars will be credited with paid leave during their scheduled shift for that day, but will be expected to return to duty if two or more hours can be completed on the shift for that day.

The term "authorized" shall mean permission of or direction by the Director of Nursing, their designee or the department head.

(c) Permission to attend seminars shall not be unreasonably withheld. When requests for the same LAP time for a seminar cannot be granted, first consideration will be given to those who have not previously been granted LAP days during the calendar year; next consideration shall be given to those who are members of the organization sponsoring the seminar or conference and if these factors are equal, seniority shall be used.

(d) Nurse Practitioners shall be eligible for up to \$2,000 per year from the Seminar Reimbursement Fund as reimbursement for costs incurred to maintain their practitioner certification in addition to monies available to them from the Seminar Reimbursement Fund for credit classes. Payment shall be made in accordance with guidelines on file in the Department of Labor Relations.

(2) Tuition Reimbursement

(a) The County agrees to provide annual tuition reimbursement funds of \$30,000. Such reimbursement may be approved up to \$2,000 per year per employe. Eligibility for such reimbursement shall be established after 6 months of employment with Milwaukee County. Tuition reimbursement shall be granted in accordance with the guidelines on file with the Training Division of the Department of Human Resources.

4.02 GRIEVANCE PROCEDURE

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(11) At each successive step of the grievance procedure, the subject matter treated and the grievance disposition shall be limited to those issues arising out of the original grievance as filed.

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**BACKGROUND AND FACTS**

Grievant is a Registered Nurse I who works at the Milwaukee County House of Corrections providing correctional nursing services. She had been certified in mental health for several years, but not since 2004. She does not presently have any certifications on file.

Grievant attended a Professional Issues Conference sponsored by the Federation of Nurses and Health Professionals (FNHP), which is the health care division of the American Federation of Teachers. FNHP is accredited by the American Nurses Credentialing Center (ANCC) to provide continuing education in nursing. ANCC is the accrediting body of the American Nurses Association (ANA). The conference was held on May 6, 2005 and contained seminar sessions which counted for up to 7.5 Continuing Education Credits (CEU). Each of the sessions qualified for CEUs. Some of the credits, if not all, would count towards certain nursing certifications. However, Grievant did not use any of the credits for certifications.

In order to award CEUs, the conference seminar sessions all met certain credentialing standards or guidelines approved by ANCC. Julie Jorgensen, a 22 year County employe as a Registered Nurse or Nurse Practitioner, is a Nurse Planner for FNHP. She reviewed and approved the seminars for ANCC accreditation. Among these standards or guidelines is a course outline prepared on an Educational Design Documentation Form with one or more learner objectives or behavioral objectives which contain measurable or observable objectives for the content, among other things. Program content must match the topic. The presenters must submit a Biographical Data Form to demonstrate the professional education or expertise that qualifies the instructor to teach on the topic. A Workshop Evaluation Form is also required to ask how well the presenter and program met the behavioral objectives. All such materials must be presented to the Nurse Planner, in this case Jorgensen, who approved for credit each session of the May 6<sup>th</sup> conference. In her opinion all of the topics related to the practice of nursing. The amount of CEU is tied to the contact time of the conference sessions. Besides the seminar sessions, the conference included registration, lunch, plenary sessions and breaks. Attendance records are kept and a certificate of attendance for CEU contact hours is provided.

Grievant submitted a written request dated April 4, 2005 to Director of Nursing, Monica Pope-Wright, to go to the conference as a LAP day. LAP days are leave of absence days with pay under Sec. 2.27 of the collective bargaining agreement between the Union and the County. With the request Grievant submitted a flyer describing the conference and its sessions, and noted that CEUs will be given for the conference. A few days later the Director of Nursing made a written reply as follows:

CUE's are not a requirement for your license in the State of Wisconsin. The content for this workshop is specific to union business and does not pertain to your job as RN I or patient care. May use a union day Not LAP.(emphasis supplied)

Grievant attended the conference and went to the sessions described in the flyers as:

### **Challenges Facing Healthcare Workers**

*Mary MacDonald, Director, AFT Healthcare*

Healthcare costs are out of control. Today's nurses and healthcare professionals are forced to do more with less. In this session participants will learn how changes in the federal budget impact the delivery of care in their institutions. The session will also cover the latest research on the relationship of nurse staffing to patient care outcomes. Mary MacDonald, Director of AFT Healthcare will conduct this workshop.

### **Healthcare Workers & the Laws that Protect Them**

*Attorney Rebecca Salawdeh*

In this session, Attorney Rebecca Salawdeh will discuss the Americans with Disabilities Act (ADA) which requires employers to make reasonable accommodation for disabled workers. She will also discuss how Wisconsin's "whistle-blower" law protects healthcare workers who make good faith complaints about their workplace.

### **Bioterrorism Preparedness**

*Dennis Tomczyk, Director of Hospital Bioterrorism, Wisconsin Division of Public Health*

This session will identify new and unique challenges facing healthcare workers that derive from a mass casualty incident. Dennis Tomczyk, Wisconsin Division of Public Health's Director of Hospital Bioterrorism Preparedness, will help you to understand the application of the ethical principle "do the greatest good for the greatest number" as standards of care are adjusted in a mass casualty incident.

### **Privatization of Public Services**

*Nancy Van Meter, Deputy Director, AFT Office of the President*

Our public institutions are under attack. How do we protect and preserve them from short-sighted governments attempting to save money by privatizing public services? Nancy Van Meter, AFT Deputy Director, will help you understand the damaging effects of privatization and how to effectively advocate for preservation of vital public services.

### **Energizing and Mobilizing Members**

*Jennifer Henry, AFT Vermont*

Member involvement is the backbone of any strong organization. Learn how to re-energize yourself and your co-workers. Jennifer Henry, United Professions of Vermont-AFT, will present a new and exciting plan to energize members to get involved in the process of improving conditions at your workplace.

The program content, as described in each of the Educational Design Documentation Forms, did match the topics.

After attending the conference Grievant filed a grievance alleging the denial of the LAP request was a violation of section 2.27 (c) of the MOA and all other applicable sections of the contract, civil service rules, past practice or law. At the step two hearing and written decision of June 15, 2005, the issues of denial of the LAP day as a violation of Sec. 2.27(c) and Sec. 1.05 were discussed, along with the subject matter of the sessions offered, their relationship to nursing or union issues, and the receipt of 7.5 CEUs by Grievant. At that level the County concluded that the program content was not related to Grievant's job as a RN related to patient care. The grievance appeal hearing and written decision of August 16, 2005 considered the subject matter of the sessions and their relationship to nursing, personal or union issues. That written decision summarized the number and percentage of minutes the County was in the area of nursing, 22%, with other areas involving personal, union, breaks and meals. (The Union contends there are some mathematical errors in the way the County counted the minutes. However, it is noted that for at least one of those matters, attending one full 75 minutes session would be the same as attending three 25 minute sessions, content notwithstanding) There does not appear to be any reference in that written decision about CEUs.

Whether any of the time should properly qualify for CEUs or who certified the CEUs has not been an issue in the grievance process, although the request does reference CEUs and a reference to the certifying entity was included in the step two materials.

At least one other union member, Jacobs, attended the same conference. There was some dispute as to whether that member should have been allowed a LAP day for that. She was granted a LAP day which was later rescinded and then reinstated. That matter was resolved in the grievance process. The record in this case was not well developed on that matter and a copy of any final resolution on that matter (decisional, settlement or otherwise) was not made part of this record. No other requests for a LAP day have been shown to have been denied due to the content of the program or sessions.

### **POSITIONS OF THE PARTIES**

#### **Union**

In summary, the Union argues that section 2.27(1)(b) of the MOA provides that employees may attend seminars during their working hours when authorized by the Director of Nursing., and that under subsection (c), permission to attend seminars shall not be unreasonably withheld. This is leave with pay. The Director allowed Grievant to take the day off for the seminar, but denied the request to be paid as a LAP day. Under subsection (b), if attending the seminar with approval it will be credited with paid leave. Paid leave automatically flows from a grant of permission to attend the seminar. In any event, the denial of paid leave was unreasonable. Arbitral precedent requires application of four criteria under a “not unreasonably withheld” standard, and the County’s denial does not meet that standard. There was no announcement or advancement of a standard that a paid leave decision would be based on job-relatedness. Others, specifically Jorgensen, had never had a request for LAP denied or questioned based on course content. This request was denied because the program dealt with union business even though the conference qualified for up to 7.5 CEUs. This is arbitrary. Jacobs went to the same conference and eventually was provided LAP. Jacobs’s previous denial was only to prevent Grievant from citing past practice. Nothing in the MOA supports attending an accredited seminar without pay if it is in some way union-related. Absence solely for union business is without pay under sec. 2.19, but that is at the request of the Union and sec. 2.16 does not address accredited seminars that happen to be associated with Union activity. Other sections of the MOA deal with seminars and certifications. Besides Sec. 2.27, Sec. 2.19 provides a \$300 certification bonus and nurses will not be unreasonably denied time off toward seminar/continuing education courses required to obtain/maintain certification. ANA, of which ANCC is the accrediting arm, is as approved certified agency.

The Union argues that the standard is if the seminar or program is accredited by a recognized accrediting agency to provide continuing education credits toward certification what would qualify employees for certification pay under Sec. 2.19, the employee is entitled to a LAP day to attend the seminar or program. Here, Grievant got the accredited CEUs for the conference and not pursuing certification does not effect her entitlement to a LAP day. The seminar need not meet any job-relatedness standard. ANCC certification is sufficient to assure the necessary job-relatedness for purposes of Secs. 2.19 and 2.27 is the standard.

The Union also argues that Union sponsorship of the conference is of no moment. The MOA does not place any disadvantaged burden on the Union. The Management Rights clause under Sec. 1.05 prevents discriminating against any employee for the purpose of discrediting or weakening the Union. Singling out a continuing education program for denial of LAP simply because the Union was its sponsor penalizes the employees, contrary to the MOA.

The Union maintains that the County was not sandbagged by including ANCC credentialing as part of its evidence. The County knew from the outset the conference involved CEU units. The flyer provided to the Director of Nursing included that. The denial did not question the provision of CEUs or the identity of the credentialing organization. The second step hearing also contained reference in the Grievant's materials to CEUs and accreditation. That information was in plain view of the County's representatives. The County rubber stamped the Director's contention that the program content was not related to Grievant's job. The County has not controverted the credentialing evidence. The County's consideration of the nature of the seminar offerings was unreasonable because it was based on an incorrect interpretation of the MOA. Nothing in the MOA allows for denial of an otherwise qualifying program because it was more union-related than job-related. Jorgensen was not aware of any denial in 22 years based on course content. Every presentation at the conference was relevant to the nursing profession. Interest to the Union is irrelevant. Finally, Grievant did suffer harm by not getting a LAP day. By requiring her to draw from a Union bank of days under Sec. 2.16(2) the County was shifting the burden to the Union for the ultimate obligation to pay her. Whether or not Grievant suffered any actual economic loss the Union suffered one as a result of diminishment of its bank of hours.

### County

In summary, the County argues that attendance at seminars is not automatic. The contract specifically allows discretion to be exercised by management and approval was not unreasonably withheld. After a thoughtful analysis of the seminars, it did not at all advance the cause of nursing at the Jail or House of Corrections. LAP days are tied to seminars and certifications and Grievant held no certifications. No evidence refuted management's analysis of the seminar underpinnings. The conference was a Union meeting at which only one portion dealt with nursing and Grievant did not attend that portion.

The County also argues that a grievance cannot be amended from step to step of the process and for the first time at the arbitration hearing the Union presented a union representative to argue that since the union certified its own seminar the County should pay, even though it bore no relationship to Grievant's job responsibilities. The Union offered the analysis that a heretofore-unknown body had five years ago named the union as a body to put on seminars. There is no evidence that the seminar was certified by anyone save the union's own representative. The contract bars such amending of the grievance process and the sandbagging of a part. If genuine this issue should have been offered when the grievance was initiated so management could investigate it. And, no evidence was offered showing the grievant suffered any harm, as is her burden.



The County argues that if attendance were automatic the parties to the agreement would not have specifically authorized management representatives to exercise discretion. Sound analysis was offered as to why this particular seminar did not contribute to the organization's goals. This was not rebutted.

### DISCUSSION

Grievant requested a leave of absence with pay, a LAP day, to attend the conference and supplied to the Director of Nursing a flyer explaining the seminar content, including CEU eligibility. After reviewing the flyer permission for a LAP day was denied on the basis that CEUs are not a requirement for Grievant's license and, further, the content of the workshops is specific to union business and does not pertain to Grievant's job as RNI or to patient care. She was given permission to attend as a union day. Grievant contends that this is a violation of the Memorandum of Agreement sec. 2.27(1)(b) because once Grievant was authorized to attend the conference she was entitled to be credited with paid leave. She also argues that the denial or withholding of permission to attend under the LAP provisions was unreasonable. The County argues attendance at seminars is not automatic and the contract specifically allows discretion to be exercised by management. The County argues that approval was not unreasonably withheld after a thoughtful analysis of the seminar found it did not advance the cause of nursing care at the Jail or House of Corrections.

The Parties have devoted some time and attention at the hearing and briefing of this case as to the accreditation and CEU eligibility of the various sessions. However, in this case these matters are not controlling. The issues to be decided turn on the language of the MOA. The denial was not made on the basis that the CEUs available at the conference were not valid or that the accrediting agency was not authorized to award CEUs. This award assumes the CEUs are valid and the ANCC, the accrediting arm of the ANA, properly analyzed and credited the sessions put on by the FNHP, a division of the Union's parent organization.

Sec. 2.27(1) deals with seminar leave and reimbursement. This is the section that provides, in certain cases, for authorized leave with pay. It provides in part:

(b) When an employe is authorized to attend a seminar, irrespective of the manner of reimbursement, the employe shall be permitted to attend during the employe's normally scheduled working hours. In the event the employe is scheduled for p.m.'s or nights, the employe's schedule shall be modified to permit attendance during the day. However, attendance at seminars on regularly scheduled off days shall not be compensated.

Employes attending seminars will be credited with paid leave during their scheduled shift for that day, but will be expected to return to duty if two or more hours of work can be completed on the shift for that day.

The term "authorized" shall mean permission of or direction by the Director of Nursing, their designee or the department head.

Grievant contends this language means that the Director of Nursing can decide whether or not to let an employe take the time off to attend a seminar, but it does not give the Director authority to decide whether or not the employee's attendance will be a LAP day. Rather, according to Grievant, Subsection (b) says it will be.

Here, it is clear that the Director of Nursing's denial was for a request for a LAP day. Permission for leave, or time off, was not given under the provisions of sec. 2.27(b). The written denial stated, in part: "May use a union day NOT LAP." (emphasis supplied). The MOA contains another provision, Sec. 2.16, which allows a Union to request time for Federation business. The status of that permission is not at issue in this case. Leaves of absence are available under the MOA for any number of reasons, a union day being one of them. Leave with pay for attendance at a seminar is governed by sec. 2.27(b) and (c). Leave under that section is not automatic. Leave under that section must be authorized, which means permission or direction by the Director of Nursing. The requirement of authorization by the Director operates as a condition on the contract right for a LAP day. Permission for any other type of leave, such as a union day at an accredited seminar, does not automatically entitle the Grievant to a LAP day without the authorization or permission of the Director under sec. 2.27.

Grievant points out that she received 7.5 ANCC accredited CEUs for attending the conference, all of which counted toward certification for purposes of sec. 2.19. She argues that if the seminar or program is accredited by a recognized accrediting agency to provide continuing education credits toward certification that would qualify employees for certification pay under 2.19, the employe is entitled to a LAP day to attend the seminar or program. Sec. 2.19(2) provides "Nurses will not be unreasonably denied time off toward seminar/continuing education courses required to obtain/maintain certification". However, sec. 2.19 does not address payment or leave with pay while attending such seminar or course. Although it would appear leave or permission to attend a seminar or certification under 2.19 can be requested under sec. 2.27, a paid leave, or a LAP day, is still subject to the authorization contained in Sec. 2.27. Attending a seminar that qualifies for certification (whether certification is applied for or not by the attendee) does not automatically entitle Grievant to a LAP day.

Another reason why the authorization of a LAP day is not automatic is because that would eliminate the provisions in sec. 2.27 which require authorization, meaning permission or direction, and the requirement that permission to attend seminars shall not be unreasonably withheld. If LAP days were automatic then these provisions would be meaningless. Contract interpretation and application cannot render provisions meaningless.

LAP days must be authorized, which means they must be with permission or direction of management. Sec. 2.27(c) provides that permission to attend seminars shall not be unreasonably withheld. Grievant argues the permission was unreasonably withheld. She advocates that when an employer is subject to a "not unreasonably withhold" standard when it denies a request for a particular benefit, arbitrators apply a number of criteria:

1. Did the employer adhere to a reasonable standard that did not conflict with the contract and defined when the request would meet approval?
2. Did the employer publish the standard to employees before applying it?
3. Did the employer provide employees an opportunity to submit full and complete information to support the request?
4. Did the employer provide a fair and objective review of requests, including application of the standard in a consistent and nondiscriminatory manner?

Citing *State of Oregon*, 107 LA 138, 144 (Downing, 1996); *City of Detroit*, 104 LA 603, 607-08 (Brown, 1995). Grievant particularly points to the Director of Nursing's reasoning that the content of the sessions does not pertain to your job as RNI or patient care, is a job-relatedness standard that was applied to Grievant's request in violation of the above four criteria. The undersigned declines to adopt the four criteria set out in the cited cases. In both of those cases the law enforcement officer who sought tuition or educational reimbursements that were denied by management did so under written policies and contractual provisions which contained a "job-relatedness" provision in the policy or contract clause. Such is not the case here. The facts are different.

All the MOA requires is that permission shall not be unreasonably withheld. The employer retains discretion to grant permission, but must not withhold it unreasonably. No other standard is set by the MOA.

The question next becomes, did the county unreasonably withhold permission when it reasoned that the sessions were not job or patient care related. Sec. 2.27(c) grants in the County the discretion to give or withhold permission, but also puts on the County the obligation to provide a suitable reason for withholding. It is clearly within management's prerogative to maintain the efficient and orderly operation of the Department. It need not grant every request, whether CEUs are available or not, and whether the program is valuable or not. Here, the denial of Grievant's request came after an examination of the content of the sessions and a consideration of the Department's needs as to RNI qualifications and patient care. In considering the two, the County came to the conclusion that it was not job or patient care related. Rather, the County concluded it was union related. The denial was not because of the union relationship. The denial was because the sessions, in the County's view, did not relate to nursing and patient care. How much a seminar subject related to a County job is a reasonable and intuitive inquiry to make. This is a reason of the Director of Nursing who reviewed the program information and is presumably knowledgeable as to the needs of the nursing staff and needs of patient care. It was not a withholding of permission for no reason at all. It was not a denial based upon the fact that it was a union sponsored event, that it dealt with union issues, or union animus. There has been no showing that the denial was the result of discrimination against the Union. The reasoning was based upon what the subject matter of the sessions was and how they related, or not, to the needs of the job in the Department. Under the MOA the County is entitled to exercise that discretion. It had a reasonable basis to make its decision based upon information supplied to it by Grievant. It made a studied, reasoned decision.

To be sure, there can be a difference of opinion as to whether, or how much, the session content related to Grievant's RNI job and patient care within the Department. The undersigned has no doubt that matters of privatization and organization can effect the delivery of health care and nursing services within a governmental department of corrections, as do federal budgets, nurse staffing, accommodations for disabled workers and whistle blower protections. Jorgenson and Grievant were able to articulate such reasons. But, the political and organizational components of those topics cannot be ignored. The County is not required to ignore the substance of the topics. The County is entitled to consider this in determining how well the sessions related to nursing and patient needs. Although *City of Detroit* is not being applied in this case, certain observations therein are worthy of some paraphrasing. All education will broadly improve an individual. However, job-relatedness considerations require the showing of a stronger tie to one's current job than just a further education on any subject. Here, the MOA allows, indeed requires, the County to make the determination as to how strong is the tie between what the sessions covered and the job or patient care needs.

Grievant contends that the County has never denied, in 22 years, permission for a seminar based upon content. But, that does not mean that content has not been looked at or considered by the County. In as much as Grievant feels this is a past practice and should be followed here, there has been no showing that any past practice has eliminated the County's contractual right to authorize LAP days. The contract is not silent or ambiguous on the point. There has not been a showing that the Parties have accepted a practice that content will not be considered, that this is unequivocal, that this has been clearly enunciated and acted upon, or what the scope may be. These are all common considerations in determining whether there is a past practice that will be binding on a party. See, *How Arbitration Works*, Elkouri & Elkouri, Sixth Ed. pp. 607-610. Similarly, the matter of Jacobs getting a LAP day was not developed at the hearing enough to demonstrate what was involved in that decision and much of the record was hearsay. The Jacobs matter does not establish a past practice.

The MOA provides for the exercise of discretion by the County in granting a LAP day and the Grievant has not demonstrated an unreasonable withholding of permission for a LAP day.

The County has argued that the matter of accreditation and CEU status is a change in the subject of the grievance, and thus a violation of sec. 4.02 of the MOA. It is not. The subject of the grievance has always been the denial of a LAP day for Grievant's request. The evidence and proof of that has apparently been more developed as the case proceeded through the grievance and arbitration procedure, but the subject matter has remained the same. As noted above, the status of accreditation or available CEUs is not determinative of how the County made its decision. Those matters are taken as established from the beginning. The director of Nursing did not challenge the validity of the CEUs. She noted that CEUs are not a requirement for Grievant's license. In as much as Grievant did not show the denial was an unreasonable withholding, and the record demonstrates the County did not unreasonably withhold permission, the County's argument on sec. 4.02 is misplaced and does not affect the result.

Accordingly, based upon the evidence and arguments in this case, I issue the following

**AWARD**

The grievance is denied. The County did not violate sec. 2.27(1)(b) and (c) of the Memorandum of Agreement when it denied Linda Federighe LAP on May 6, 2005. Because there was no violation no remedy is made.

Dated at Madison, Wisconsin, this 5<sup>th</sup> day of October, 2006.

Paul Gordon /s/

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Paul Gordon, Arbitrator