

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SPOONER HEALTH SYSTEM EMPLOYEES, LOCAL #2425,  
AFFILIATED WITH THE WISCONSIN COUNCIL OF MUNICIPAL EMPLOYEES  
AND THE AMERICAN FEDERATION OF STATE, COUNTY  
AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**SPOONER HEALTH SYSTEM**

Case 23  
No. 67675  
A-6317

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**Appearances:**

**Steve Hartmann**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for Spooner Health System Employees, Local #2425, affiliated with the Wisconsin Council of Municipal Employees and the American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Stephen L. Weld**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Spooner Health System, which is referred to below as the Employer.

**ARBITRATION AWARD**

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to resolve a grievance filed on behalf of Marie Gauger, who is referred to below as the Grievant. Hearing was held on May 22, 2008, in Spooner, Wisconsin. The parties stipulated the factual background, submitted their arguments at hearing and requested an expedited decision, issued in writing.

**ISSUES**

The parties stipulated the record as a whole, but left the formal statement of the issues for the issuance of this decision. I read the record to pose the following issues:

Did the Employer violate the collective bargaining agreement by its placement or payment of the Grievant for on-call or stand-by hours falling within her normal work schedule?

If so, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 3 – CLASSIFICATION OF EMPLOYEES**

Section 3.01: Full-time Employee. A full-time employee is considered to be one who is regularly scheduled to work eighty (80) hours in any fourteen (14) day period. Said employee is expected to fulfill the requirements of a full-time position unless justifiable reasons are given for their inability to do so during any particular pay period. Full-time employees will receive full fringe benefits allowed under this Agreement, subject to any restrictions otherwise contained in this contract.

Section 3.02: Part-time Employee. A part-time employee is considered to be one who is regularly scheduled to work less than eighty (80) hours in any fourteen (14) day pay period. Part time employees who are regularly scheduled to work more than twenty-seven (27) hours but less than eighty (80) hours in any fourteen (14) day pay cycle will receive fringe benefits allowed under this agreement on a prorated basis, subject to any restrictions otherwise contained in this contract.

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#### **ARTICLE 4 – WORKDAY AND PAY PERIODS**

Section 4.01: The workday for full-time employees should consist of at least eight (8) hours in each day. . . .

Section 4.02: The work period for full-time employees shall consist of eighty (80) hours in every fourteen (14) day pay period. . . .

Section 4.05: Reporting Time Pay. An employee who reports to work on his/her regularly scheduled shift shall be paid a minimum of two (2) hours pay, or the actual number of hours worked, whichever is greater.

A. Employees who report to work outside of their regularly scheduled shift shall be paid a minimum of two (2) hours pay, or the actual number of hours worked, whichever is greater. . . .

In the event a scheduled employee is told to not report or told to not complete their shift, said scheduled employee may be placed in an on-call status. In the event two or more employees are told to not report or to not complete their shift and only one needs to be placed in an on-call status, the more senior employee shall be given the choice of accepting the on-call status. In the event the more senior employee chooses to not be on-call, the least senior employee shall be placed on on-call. . . .

Section 4.06: Stand-by Duty Pay. Employees who are assigned to stand-by duty will be paid \$1.25 per hour for being on call. However, standby pay will not be paid for the time period the employee actually works. Hours worked by the standby employee shall be paid pursuant to Section 4.05A. . . .

. . .

**ARTICLE 16 – GRIEVANCE PROCEDURE**

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Section 16.01: Should a difference arise between the Employer and an employee, or between the Employer and employees, as represented by the Union, as to the meaning and application of this Agreement, or as to any questions relating to wages, hours or working conditions, they shall be settled promptly under the provisions of this article by the following means:

. . .

- F. The decision of the arbitrator shall be final and binding on both parties to this Agreement. The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement . . .

**BACKGROUND**

The grievance form, dated October 16, 2007, states the factual background thus:

(The Grievant) is scheduled 80 hrs. Monday – Friday. She is scheduled on call hours every other weekend + evenings which are considered her time off.

The grievance form alleges the Employer violated Section 3.01 or, “Any other provisions that may apply.” As the requested remedy, the form states that the Grievant “will accept on call for her fair share, once a month on weekends.”

The Grievant is a Certified Operating Room Technician (CORT), and has worked for the Employer for roughly thirty years. She is the only CORT in the bargaining unit. Her position description summarizes her duties thus:

Assists in nursing care and preparation on surgical patient by performance of routine and delegated duties according to standards and policies of the hospital and department. Performs scrub duties and related procedures. Performs housekeeping duties as necessary and assists in maintenance of all supplies. Provides assistance in emergency procedures as well as elective and scheduled cases. Assists in preparation, transportation, and supervision of patients. Maintains education in surgical, operating room, and related aspects of nursing care. Works on call for emergency procedures. Works as needed in the emergency room.

Registered Nurses (RNs) also staff the Operating and Emergency Rooms, but are members of a different bargaining unit. The Employer normally schedules the Grievant to work an eight hour day, starting at 7:00 a.m. on Monday through Friday.

There is no dispute that the Grievant is a valued member of the Employer's surgical teams. In many ways, that is the source of the problem prompting the grievance. The Employer has experienced varying levels of demand for its facilities for surgical procedures. From December of 2006 through the present, demand has declined somewhat. As a result, the Employer has placed the Grievant in on-call status for varying portions of virtually every pay cycle during that period. She has sometimes been informed prior to the start of her shift not to report in, and has been told to leave a scheduled shift early where the Employer determines there are no duties available. If she is told not to report for, or to leave, a scheduled shift, she receives standby pay under Section 4.06. For those cases in which she is called into work from stand-by status, she receives pay under Section 4.05, which turns on the number of hours of work required by the call in. There is no dispute either that the Employer would like to staff her for a full eight hour shift or that its failure to do so is driven by demand for the operating rooms. As the grievance highlights, her on-call status is complicated by the fact that Staff RNs who work in operating rooms have different licensure. Although the parties differ on their evaluation of this point, the Employer perceives RNs to be easier to assign to patient care duties than the Grievant, who has no licensure beyond CORT. Because she is the only CORT available for on-call status within the operating room, she has no effective ability through her seniority to spread the burden of on-call status. The Employer pays her benefits, including health insurance, afforded to full-time employees.

There is no bargaining history or past practice to assist in addressing the Grievant's dilemma. The parties recently concluded a lengthy and difficult round of negotiations. There is no dispute that the economics of the Employer's nursing care facility and the economics of health insurance played a significant role in those negotiations.

From the Union's perspective, the grievance questions contract interpretation and equity. Existing agreement provisions were not negotiated with the issue posed by the grievance in mind and show the strain of being applied in a situation they were not intended to cover. Because of her unique skills, the Grievant has no unit member to share on-call duties with, and the Employer has chosen not to use its RNs to ameliorate scheduling issues. The nature of the issues faced in the last round of bargaining made it effectively impossible to address the narrow issue posed by the grievance. Thus, grievance arbitration is the Grievant's sole recourse. The grievance should be granted and an appropriate remedy ordered.

From the Employer's perspective, the contract fully addresses the Grievant's situation, and thus poses no contractual gap. The issue posed by the grievance reflects the ongoing difficulties faced by a small, rural hospital. The Employer cannot fully anticipate demand for its surgical facilities and is subject to an increasingly competitive marketplace. There is no doubt the Grievant is a long-term and valued employee who, but for the fluctuations of the medical market, would fill a full-time workload free of the on-call issues questioned by the grievance. Full or partial layoff affords no solution to the Grievant's or to the Employer's needs. Her unique skills cannot obscure that licensure gives RNs a broader spectrum of patient care duties to address in times during which there is no demand for surgical procedures. There is, in any event, no issue on this point because the RNs are in a different bargaining unit. Section 16.01F underscores that the grievance poses no issue an arbitrator can remedy. If it did, the grievance would be untimely. In any event, there is no contract violation and the grievance should be denied.

### DISCUSSION

The parties presented the grievance in an informal manner, seeking that the matter be resolved as soon as possible. I formulated the issues, which highlight that the grievance reflects frustration regarding the amount of on-call status that the Grievant's work schedule has come to involve. The grievance reflects a concern not simply with loss of pay but also with the inability of the Grievant to spread the burden of on-call through the exercise of her seniority. The Employer notes that the grievance may pose a timeliness issue, but that issue is difficult, if not impossible, to separate from the parties' positions on the grievance's merit. Thus, the issues stated above do not reflect a separate timeliness issue.

As the parties' positions highlight, the issue posed by the grievance is whether or not the labor agreement permits a remedy for the Grievant which is consistent with the limited scope of authority granted an arbitrator under Section 16.01. Put more simply, the issue is whether the grievance can be given a contractual basis.

The record establishes that it cannot. Whether or not it is wise policy to spread the on-call burden among the CORT and RN classifications, it is evident there is no contractual basis to do so. RNs are members of a different bargaining unit. Beyond this, there is no other CORT in this bargaining unit against whom the Grievant could assert the seniority rights granted under Section 4.05. There is, then, no way for an arbitrator under this agreement to apply Section 4.05 against less senior RNs.

Neither party entered argument regarding the layoff procedure. Thus, this record poses no issue on that point. This should not be read to imply any argument would create such an issue. At most, the Grievant was subject to a partial layoff. Even assuming a reduction in her hours produced a layoff, Section 3.02 puts benefit proration at issue and there is no reason to presume such an issue. There is, in any event, no dispute that the Grievant is “regularly scheduled to work eighty (80) hours in any fourteen (14) day period.” This means she remained a full-time employee under Section 3.01 at all times relevant here.

The grievance cites Section 3.01 as the specific provision grounding the grievance. That the Grievant is a full-time employee under that section falls short of establishing a guarantee of her hours. Section 4.01 states that a workday for a full-time employee “should consist of at least eight (8) hours in each day.” The reference to “should” precludes reading Section 3.01 to mandate eight hours per day. In any event, Section 4.05 unequivocally establishes that the Grievant’s workday and workweek are not guaranteed.

Even if the contract posed a fundamental ambiguity, there is no bargaining history or past practice to create the entitlement the grievance urges. The Union forcefully argues that in light of the difficult negotiating environment, it could hardly have negotiated the result for a single employee that the grievance seeks. The point is forcefully made and the Employer acknowledges that the Grievant is a long-term, valued employee. This cannot, however, obscure that Sections 4.05 and 4.06 authorize the actions taken by the Employer over a considerable period of time in response to declining demand for its surgical facilities. Section 16.01F does not afford any latitude for an arbitrator to overturn those actions. In sum, the grievance cannot be given a contractual basis and must be denied.

### **AWARD**

The Employer did not violate the collective bargaining agreement by its placement or payment of the Grievant for on-call or stand-by hours falling within her normal work schedule.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 28th day of May, 2008.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

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