BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MOUNDVIEW MEMORIAL HOSPITAL AND CLINICS

and

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE WISCONSIN

Case 17
No. 71223
A-6490

Appearances:

Mr. Jeremy Normington-Slay, 402 West Lake Street, Post Office Box 40, Friendship, Wisconsin, 53934, on behalf of Moundview Memorial Hospital and Clinics.

Attorney Nick Fairweather, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, Madison, Wisconsin, 53701-2155, on behalf of Service Employees International Union Healthcare Wisconsin.

INTRODUCTION

Moundview Memorial Hospital and Clinics ("Employer") and the Service Employees International Union Healthcare Wisconsin ("Union") are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. On November 9, 2011, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a premium pay dispute. The filing requested that the Wisconsin Employment Relations Commission appoint a commissioner or staff member to serve as sole arbitrator, and the undersigned was so appointed. A hearing was held on March 21, 2012, in Friendship, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no transcript of the proceeding was made. The Employer and the Union each submitted initial and reply post-hearing briefs; the last of which was received on April 25, 2012. On that date, the record in this matter was closed.

BACKGROUND

The Employer is a hospital and clinics operation located in Friendship, Wisconsin. The bargaining unit represented by the Union consists of nurses and medical technologists working

for the Employer. Starting in 2003, pursuant to Article 9, Section 4 of the Agreement between the Employer and the Union, bargaining unit members assigned to the shifts that ran from 2:45 p.m. to 11:15 p.m. and from 10:45 p.m. to 7:15 a.m. were paid a shift premium of $1.05 per hour.

In the summer of 2009, the Employer instituted 12-hour shifts for the nursing staff that ran from 7:00 a.m. to 7:00 p.m. and from 7:00 p.m. to 7:00 a.m. Then, in the fall of 2010, the Employer instituted another 12-hour shift that ran from 9:00 a.m. to 9:00 p.m. At that point, the 12-hour shifts had completely replaced the 8-hour nursing staff shifts referenced in Article 9, Section 4.

In the fall of 2011, Peg Heider, a registered nurse and a Union worksite leader, was approached by two nursing employees, Anita Hilt and Lisa Massen, who worked the 9:00 a.m. to 9:00 p.m. shift. Hilt and Massen each indicated to Heider that even though their work schedules took them within the range of hours identified in Article 9, Section 4, they were sometimes not receiving the shift premium provided for under that provision, and they did not understand how the premium was being applied. Hilt had attempted to get an explanation of what was going on with the shift premium from Rod Munger, who handled financial matters for the Employer, but she did not understand his answer. As worksite leader, Heider took responsibility for checking into the issue.

On a date not specified in the record, Heider first sent an e-mail message regarding the shift premium issue to the Employer's Emergency Department manager, Philip Fusco. Fusco did not respond to Heider's e-mail, but Cindy Buchanen, the Employer's Director of Nursing, did respond. Buchanen and Heider had a brief discussion regarding the Union's concerns.

Subsequently, on September 14, 2011, Heider approached Fusco in person and presented him with a written grievance regarding the shift premium issue. The grievance document identifies itself as a "union" grievance and does not name any individual employee. It identifies the violated contract provision as Article 9, Section 4, and states that "[s]taff is not receiving shift premium as per contract language".

Upon receiving the grievance, Fusco asked Heider if the grievance related to any specific employees. Heider stated that she did not want to identify any specific employees and that she was representing the nursing staff in general. Heider testified at hearing that she had presented the grievance as a "union" grievance because it was undetermined at that time how many people in the bargaining unit had been affected by the alleged violation of the Agreement.

Because Heider already had raised the shift premium issue in the previous e-mail message to which Buchanen had responded, she asked Fusco if the Employer would be willing to immediately advance the grievance to the next step. Fusco did not agree to advance the grievance to the next step. Later that day, Fusco put a written response to the grievance in Heider's mailbox, which stated the following:

Per Article 8, Section 2, Step 1: "Prior to filing a formal written grievance, the employee having a grievance must attempt to meet with her immediate supervisor to attempt to mutually resolve the matter."

The grievance that was presented to me was from Peg Heider, who I am not an immediate supervisor to, nor to the best of my knowledge is she concerned with the dispute in any capacity other than as a union representative. The language clearly states that the employee must attempt to meet with her immediate supervisor, not the union representative; therefore, the grievance procedure was not followed and will not be considered accepted at Step 1.

In addition to the aforementioned, the description of the grievance was too vague and erroneous. "Staff is not receiving premium as per contract language." The word "Staff" is too vague as it does not specify which staff members or members this concerns.

". . .as per the contract language" is a misrepresentation of Article 9, Section 4 which states provisions for staff assigned to a specific shift to receive the premium pay. It does not state the staff whose shift overlap a time. It is very specific to "staff" assigned to the 2:45 p.m. – 11:15 p.m. and the 10:45 – 7:15 a.m."

The language of the contract does not identify employees assigned to any other shift (i.e. 7a to 7p or 9a to 9p); therefore, the basis for the complaint is unwarranted.

Per Article 8, Section 2, Step 1, I would be more than happy to discuss this with the individual or individuals who feel that they are not receiving the proper compensation. I would also be more than amicable to discuss this with employee or employees with union representation if they chose to exercise this option as stated in the current contract.

In the couple days following September 14, Fusco spoke to Buchanen about the grievance.

On September 20, 2011, Heider returned to Fusco's office and asked him to advance the grievance to the next level. Fusco declined to do so, on the grounds he had articulated in his written response of September 14. He reiterated that he would be happy to speak directly to any one of his subordinates regarding the shift premium issue. He also indicated that, because the grievance was coming generally from the Union, it should be presented to Jeremy Normington-Slay, who is the Employer's CEO, or to Buchanan.

On September 21, 2011, Heider met with Normington-Slay to discuss, among other issues, a number of grievances the Union had filed. The shift premium grievance was among those discussed, and it was agreed that, notwithstanding certain procedural challenges by the

Employer, the meeting would constitute Step 3 of the contractual grievance process. Normington-Slay then issued the following Step 3 written response:

> Step 3 of this grievance is denied as there is no language in the Agreement that supports a premium being paid for 12 hour shifts in the ER. During the course of our investigation, we have found instances where employees have received some or all of a shift premium inappropriately due to employee time card errors and/or software programming. We will investigate these further to correct any errors.

Normington-Slay testified at hearing that the Employer never had intended to pay a shift premium to any employee who was not assigned to one of the two, specific, 8-hour shifts identified at Article 9, Section 4 of the Agreement. The Employer's investigation into its payroll records, however, revealed that it had paid a shift premium on some occasions to employees who were working on the 12-hour shifts. Normington-Slay indicated that these shift premium payments were the result of two errors being made by the Employer's automated payroll system. First, if an employee working the 9:00 a.m. to 9:00 p.m. shift stayed on the clock past 10:45 p.m., the system was adding the shift premium. The premium was not being added for the entire 9:00 a.m. to 9:00 p.m. shift, but from the time of the employee's immediately preceding punch-out, which was often around the lunch hour, until whenever the employee's shift ended. Second, the payroll system was giving employees working the 7:00 p.m. to 7:00 a.m. shift the premium for every hour of the shift.

On October 21, 2011, Char Vander Meulen, from the Employer's Human Resource Department, sent to SEIU representative Bonnie Strauss, who represents the bargaining unit as a project director employed by SEIU Healthcare Wisconsin, a memorandum stating the following:

> [The Employer] has discovered that an error in our time and attendance system along with errors in employee time clocking practices have caused an overpayment to RNs in the amount of $1.05 per hour on certain 12 hour ER shifts (i.e., 7:00 a.m. to 7:00 p.m. and 9:00 a.m. to 9:00 p.m.) that the bargaining unit employees did not previously bring to our attention. Details of the overpayments are set forth in the enclosed memos and spreadsheets to bargaining unit employees. The overpayments to individual RNs range from $16.25 to $2,421 as follows:

The memorandum then lists eight employees the Employer had identified as having received overpayments and provides the overpayment amount for each employee. It then goes on to state the following:

> At this time we are not requesting immediate repayment of the funds or changing our current practices, but we would like to discuss a resolution of this issue at the bargaining table during negotiations this fall. In the future we ask that bargaining unit employees bring all wage overpayments to our attention immediately when they occur.

The Employer also sent, on the same day, memoranda to the eight identified individual employees, indicating the amount by which each one had been overpaid and reiterating the paragraph set forth above regarding repayment and upcoming negotiations. At the time of the hearing, no repayments had been collected.

ISSUE

The parties entered into a stipulation at hearing to allow the arbitrator to frame the issue in the award. The following is the proposed statement of the issue recited by the Employer representative at the hearing:

1. Is the Union's grievance procedurally arbitrable in light of Article 8, Section 1 of the grievance procedure which requires that all grievances be initiated within 15 working days from the time the employee knew or should have known of the events giving cause to the grievance?

2. Is the Union's grievance procedurally arbitrable in light of Article 8, Section 2 of the grievance procedure which requires that the union follow certain steps before a grievance may be submitted to arbitration?

3. Did the Employer violate Article 9, Section 4 of the collective bargaining agreement?

The following is the proposed statement of the issue recited by the Union representative at the hearing:

> Did the Employer, Moundview Memorial Hospital and Clinics, violate Article 9, Section 4 of the collective bargaining agreement by failing to consistently pay shift premium wages for employees that worked in designated, bargained for time-ranges as provided in the contract? If so, what is the appropriate remedy?

The issues to be decided are framed as follows:

1. Is the Union's grievance procedurally arbitrable in light of Article 8, Section 1 of the grievance procedure which requires that all grievances be initiated within 15 working days from the time the employee knew or should have known of the events giving cause to the grievance?

2. Is the Union's grievance procedurally arbitrable in light of Article 8, Section 2 of the grievance procedure which requires that the union follow certain steps before a grievance may be submitted to arbitration?

3. Did the Employer violate Article 9, Section 4 of the collective bargaining agreement by failing to pay the shift premium provided for therein? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8
Grievance Procedure

Section 1. A grievance is hereby defined as a dispute concerning the meaning or application of this Agreement. A Step 2 grievance must be initiated within fifteen (15) working days from the time that the employee knew or should have known of the events giving cause to the grievance. In the event of a grievance involving discharge, the procedure shall start at Step 3. The grievance shall be presented in written form, signed by the employee discharged and/or the Union representative. In order to be timely, a grievance based on discharge must be filed by the end of the fifth (5^{th}) working day following the date upon which the employee is discharged. Working days shall be defined as a day other than a Saturday, Sunday, or Holiday as provided by this Agreement.

Section 2. The grievance procedure shall consist of the following steps:

Step 1. Prior to filing a formal written grievance, the employee having a grievance must attempt to meet with her immediate supervisor to attempt to mutually resolve the matter. The employee may be accompanied by a Union Worksite Leader at this or any subsequent step in the grievance procedure. The employee or her Union Worksite Leader must communicate to the employee's immediate supervisor that the matter is considered a grievance. The employee's supervisor shall verbally respond to the grievant and Work Site Leader no later than five (5) working days after the meeting.

Step 2. If a satisfactory settlement is not reached in Step 1, the employee or a Union representative shall reduce the grievance to writing and present it within five (5) working days following the response in Step 1 to the employee's department head. The department shall respond in writing to the grievant, Work Site Leader and Union within five (5) working days. If Step 1 has not been followed, the department head may refer the grievance back down to Step 1. Such action will not impact the timeliness of the grievance, assuming the Step 2 grievance has been filed within the fifteen (15) working day time frame.

Step 3. If a satisfactory settlement is not reached in Step 2, the employee or a Union representative shall present the written grievance to the Administrator within five (5) working days following the response in Step 2. The

Administrator or his designee shall convene a meeting within five (5) working days to include the employee, the Worksite Leader and/or Union representative, and such other persons as may be necessary to resolve the grievance, as soon as possible. The Administrator shall provide a written decision within ten (10) working days following the meeting to the grievant, Worksite Leader and to the Union.

Section 3. If the grievance has been timely processed through the specified procedure and remains unsettled, the Union may submit the grievance to final and binding arbitration within ten (10) working days following the receipt of the administrator's written response at Step 3. If notification of arbitration is not received by registered mail by the Hospital within ten (10) days following the decision of the Administrator in Step 3, the grievance shall be considered settled, and the employee and the Union shall have no further recourse over the grievance. The Union shall mail a formal request for arbitration to the WERC within forty-five (45) calendar days following the receipt of the Administrator's written response at Step 3.

If the grievance is taken to arbitration, it shall be the responsibility of the Union to contact the Wisconsin Employment Relations Commission and to request the Commission to appoint a member of its staff to serve as arbitrator. Expenses of the arbitrator shall be borne equally by the Employer and the Union.

Section 4. The decision of the arbitrator shall be final and binding on both parties. The sole authority of the arbitrator shall be to render a decision as to the meaning and application of this written contract with respect to the dispute. The arbitrator shall have no authority to add to, subtract from, modify or amend the express provisions of the Agreement.

Section 5. The time limits provided in this Article shall be strictly construed, unless extended by mutual written agreement of the parties. If the Hospital fails to respond to the grievance in a timely manner at any Step, the grievance may be appealed to the next step.

ARTICLE 9
Working Hours, Shift Premiums, Overtime, Call-In

. . .

Section 4. Shift Premium. Except as provided in Section 5, employees assigned to 2:45 PM – 11:15 PM and 10:45 PM – 7:15 AM shall receive a shift differential as follows: Effective 7/1/03 - $1.05 per hour.

. . .

ARTICLE 21
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 functions of the Hospital in cases of emergency. This section shall not be used for the purpose of destroying the bargaining unit.

DISCUSSION

Prior to addressing the merits of this case, there are threshold arbitrability challenges raised by the Employer that require attention.

Arbitrability

First the Employer contends that the grievance is not arbitrable because it was not filed in a timely fashion. The Agreement provides that a Step 2, written grievance must be filed within 15 working days from the time the employee knew or should have known of the events giving cause to the grievance. Here, Heider submitted the grievance in September of 2011. The Employer had fully converted to 12-hour shifts in the fall of 2010, and Normington-Slay testified that the Employer never intended to make the shift premium payments for any shift assignment outside the two identified in Article 9, Section 4. Although it is not absolutely clear from the record, it is fair to conclude, therefore, that the Employer stopped making shift premium payments (except for the inadvertent ones it made) around the fall of 2010. Thus, by the time Heider filed the grievance, the alleged violation of the Agreement had been occurring for approximately one year. Nevertheless, under the circumstances presented here, I do not find the grievance to have been untimely.

There is no evidence on the record indicating that the Employer ever announced or provided any type of notice that it intended to stop or had stopped making the shift premium payments. While the employees might have noticed on their own if the payments had completely stopped at that time, the fact that the Employer continued to make such payments on a somewhat

erratic basis would have decreased the likelihood that they would be able to discern that the Employer had changed its method for implementing Article 9, Section 4 of the Agreement.

The Employer argues that the employees should have known of the premium issue by virtue of having received their weekly pay stubs. This argument lacks persuasiveness, however, in a situation where the Employer had at least as much access to payroll records and also apparently had no idea, for exactly the same period of time, what was going on with the shift premium payments. Indeed, the Employer is now relying on its prior lack of awareness to take the position in this case that the inadvertent payment of some shift premiums should not be mistaken for evidence that the Employer believed it was obligated in any way to continue to pay such premiums after the shifts identified at Article 9, Section 4 were eliminated.

Obviously everyone found the payroll issue as it related to the shift premiums to be confusing. The record shows that Anita Hilt, one of the nurses who approached Heider about the shift premium issues, had actually attempted a few days before that to discuss the shift premium question with an individual in the Employer's finance office, and she went to Heider only after not being able to understand the explanation that had been provided. The payroll situation is apparently so confusing that Normington-Slay discovered, in the course of providing testimony and examining exhibits at hearing, that the memoranda that had been sent to employees documenting the alleged overpayments contained previously unnoticed errors. It would be inequitable to use confusion fully shared by the parties to the detriment of the Union and the advantage of the Employer in this case.

The second arbitrability challenge raised by the Employer relates to a requirement at Step 1 of the Grievance procedure. After sending the original e-mail communication about the shift premium issue to Fusco and receiving a response from Buchanen, the record shows that Heider provided the written grievance directly to Fusco. Fusco indicated at that time (and the Employer continues to take the position) that the grievance procedure set forth in the Agreement requires at Step 1 that an individual grievant must attempt to meet with his or her immediate supervisor to attempt to mutually resolve the matter. If the grievants were Emergency Department nurses, the Employer contends that those individuals should have approached Fusco personally, as the Emergency Department manager, and the record shows that they never did. If Heider was counting herself as one of the grievants, the Employer contends that she should have approached her supervisor, Buchanen, rather than Fusco.

For several reasons, I do not consider this issue to represent a procedural bar to consideration of the merits of this grievance. First, this was a union-wide grievance, and at the time it was filed the Union did not know who in the bargaining unit had been affected by the alleged contract violation. Given the potential breadth of the grievance, sending in one or both of the nurses who had approached Heider would have been inadequate. Sending in every single nurse in the bargaining unit would have been impractical. Further, the record indicates that Fusco told Heider, because the grievance was presented as a union grievance, to contact Buchanen or Normington-Slay about it. In as much as Buchanen had been the one to respond to Heider's initial e-mail message to Fusco about the grievance, contact already had been made with Buchanen. Indeed, accounting for the original e-mail message Heider sent to Fusco and meeting she ultimately had with Normington-Slay, Fusco, Buchanen, and Normington-Slay all were

informed, over a relatively short period of time, of the existence and nature of the grievance. The record does not suggest any way in which a personal visit by any individual member of the bargaining unit would have added substantively to the Employer's ability to respond to the grievance.

Merits

The fundamental question presented by the merits of this case is whether the Employer violated the Agreement to the extent that it ceased making shift premium payments after the fall of 2010, when 12-hour shifts took the place of the 8-hour shifts set forth in Article 9, Section 4. The Employer takes the position that the shift premium is only available to employees assigned to the specific shifts set forth in that provision. The Union takes the position that the premium should be paid for any hours worked that fall within those identified time periods, regardless of the beginning and end times of the shift on which they are being worked.

As discussed, the Union has argued here that the fact that the Employer has paid a shift premium at least in some instances since the fall of 2010 is an indication that it has believed that it was contractually obligated to do so. The Employer has argued that it only paid such premiums due to payroll errors and it supports its position by showing that it did not pay the premium consistently for hours worked during the time periods set forth in Article 9, Section 4. My review of the record leads to the conclusion that the evidence of what has occurred in the past is not helpful at all. Anita Hilt, one of the nurses who initially approached Heider, testified at hearing that she received the premium for some hours worked within the identified time periods, but not all of them. Heider testified that she worked some hours as a medical-surgical nurse that overlapped the hours set forth in the Agreement and that she sometimes received the premium but sometimes did not. Normington-Slay testified that the Employer never intended to pay the premium after the 8-hour shifts were eliminated, but that the premium was inadvertently paid for some (but not all) of the overlapping hours worked on the 9:00 a.m. to 9:00 p.m. shift and that it paid for all of the hours on the 7:00 p.m. to 7:00 a.m. shift. Normington-Slay also testified that, when the Employer discovered the payroll error, it ceased making the payments for the 9:00 a.m. to 9:00 p.m. shift but that, at the time of hearing, it was still making premium payments for the 7:00 p.m. to 7:00 a.m. shift. The Employer's failure to discontinue all such payments is confusing in light of its position that it never was obligated to pay a shift premium to an employee assigned to one of the 12-hour shifts.

In light of these inconsistencies, one is left with the words of the Agreement for guidance. A reading of Article 9, Section 4, suggests that this provision must have been written with two very specific shift assignments in mind. If the provision simply intended to cover, as the Union contends, a span of hours as opposed to specific shifts, presumably the provision would not state two, overlapping time periods, as it does. Thus, a very narrow reading of the provision would lead one to conclude that only employees assigned to one of the two identified shifts should receive shift premium pay.

My obligation, however, is not only to interpret and apply the words of the Agreement, but also its essence. It is clear that the Employer and the Union agreed to put the shift premium provision in the Agreement. At hearing, Normington-Slay testified that a shift premium is

offered because off-time shifts are more difficult to staff. He stated that having a nurse stay overnight is "a lot to ask". Even though the Employer here has the ability, under the management rights clause at Article 21 of the Agreement, to set working hours, the ability to take such action should not undermine the policy choice the parties made in deciding to provide a shift premium to late-night workers. To find otherwise would be to render Article 9, Section 4 meaningless.

One of the Employer's primary contentions in this case is that the Union is attempting to obtain through arbitration that which it could not achieve at the bargaining table. In so arguing, the Employer points to the following bargaining proposal, which was introduced by the Union on January 31, 2012:

> **Article 9, Section 4 Shift Premium** – Modify as follows:
> ~~Except as provided in Section 5,~~ ***E***mployees ***working during the hours of*** ~~assigned to~~ 2:45 PM – 11:15 PM and 10:45 PM – 7:15 AM shall receive a shift differential ***of*** ~~as follows: Effective 7/1/03 $1.05~~ ***$1.25 and $1.50 respectively for each*** ~~per~~ hour ***worked during these hours.***

It is clear that the changes to this provision would go some length toward eliminating the issue with the provision already discussed here. Although the proposed draft confusingly leaves in two sets of overlapping hours, taking out "assigned" and adding in "working during the hours of" does something to shift the focus of the provision to hours rather than shifts. Nevertheless, I am not persuaded that the Union's position in this case is undermined by this proposed change. First, the proposal came from the Union in January of 2012, after the grievance in this case was filed. Second, there does not appear to be any inconsistency between the position the Union is taking here – the position being that the Employer should have been paying the premium under Article 9, Section 4, as it has been written in the Agreement – and the fact that the Union made a bargaining proposal attempting to clean up language that is confusing under the current circumstances.

Remedy

The Union has requested a remedy that awards back-pay to employees going back to the fall of 2010. While the grievance is being sustained, no back-pay will be awarded. The fact that many of the late-shift hours were and have continued to be compensated with a shift premium combined with the fact that the employees were not completely vigilant about whether they were receiving premium payments makes the most equitable application of this award prospective.

Having considered the foregoing record as a whole, the undersigned makes the following

AWARD

The grievance is sustained. Going forward from the date of this award the Employer shall pay the shift premium set forth at Article 9, Section 4, for every hour worked, regardless of the hours of the assigned shift, that falls within the time periods identified in that provision.

Dated at Madison, Wisconsin, this 24th day of July, 2012.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

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