

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MOUNDVIEW MEMORIAL HOSPITAL & CLINICS**

and

**SEIU HEALTHCARE UNITED FOR QUALITY CARE,  
DISTRICT 1199 WISCONSIN (NURSES AND TECHS)**

Case 16  
No. 71222  
A-6489

(Grievance 241-040)

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**Appearances:**

**Jeremy Normington-Slay**, Chief Executive Officer, Moundview Memorial Hospital & Clinics, 402 West Lake Street, Friendship, Wisconsin 53934, appearing on behalf of the Moundview Memorial Hospital & Clinics.

**Nicholas E. Fairweather**, Attorney, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of SEIU Healthcare United for Quality Care, District 1199 Wisconsin.

**ARBITRATION AWARD**

Moundview Memorial Hospital & Clinics (Hospital) and SEIU Healthcare United for Quality Care, District 1199 Wisconsin (Union) are parties to a collective bargaining agreement (Contract) providing for final and binding arbitration of grievances arising under the Contract. On November 9, 2011, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission requesting appointment of a commissioner or one of its staff members to serve as arbitrator. The undersigned was appointed.

Hearing was held on February 2, 2012 at the Hospital's facility in Friendship, Wisconsin. The hearing was not transcribed, but was audio recorded by the Union. The Parties stipulated that the audio recording would be available to the Arbitrator when preparing this Award. However, the Union later reported that the audio recording was of poor quality and, as a result, the Arbitrator did not receive a copy of the recording and it was not used in preparing the Award. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on March 5, 2012, thereby closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following Award.

**ISSUE**

At the hearing, the Parties stipulated that I may frame the issue in the Award. The Union proposes the following statement of the issue:

Did the Union establish a past practice requiring the employer to pay its worksite leaders for attendance at grievance adjustment hearings?

The Hospital proposes the following issues to be decided:

1. As to Meeting with SEIU Service and Support.

Did the Union establish a past practice requiring Moundview to pay Ms. Heider for her attendance at a grievance meeting involving the SEIU Service and Support bargaining unit occurring after the conclusion of her scheduled work shift on August 4, 2011?

2. As to meeting with SEIU RN/NT.

Did the Union establish a past practice requiring Moundview to pay Ms. Heider for her attendance at a grievance meeting involving the SEIU RN/NT bargaining unit occurring after the conclusion of her scheduled work shift on August 4, 2011?

I frame the issues to be decided as:

Did the Hospital violate the Contract by not paying Grievant for her attendance at the August 4, 2011 grievance meeting that occurred after her scheduled shift? If so, what is the remedy?

**RELEVANT CONTRACTUAL PROVISIONS**

ARTICLE 8  
Grievance Procedure

...

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

...

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, Work Site [sic] Leader and to 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 or 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.

#### ARTICLE 15 Worksite Leader

Section 1. The Employer recognizes the right of the Union to select not more than three (3) Worksite Leaders, who are employees, in the bargaining unit.

Section 2. A. Worksite Leaders, upon approval from their supervisor, which shall not be unreasonably denied, shall be permitted to leave their work stations for a period of time not to exceed one (1) hour per day at no pay:

1. To present a request for adjustment which has been requested by an employee or group of employees;
2. To investigate a request for adjustment of a dispute so that the request can be presented;

Section 2. B. Worksite Leaders, upon approval from their supervisor, which shall not be unreasonably denied, shall be permitted to leave their work stations for a period of time not to exceed one (1) hour per day with pay:

1. To accompany and represent another employee at a meeting with management when such a meeting may result in disciplinary action;
2. To attend a meeting with representatives of the Employer or Union when such meetings are necessary to present any adjustment of a dispute.

Section 3. The Union agrees to provide the Hospital with an updated written list of Worksite Leaders.

Section 4. The Employer agrees that there will be no discrimination against the authorized Worksite Leaders because of Union activity. Worksite Leaders shall not be hindered, coerced, restrained, or interfered with in the performance of their duties. No Worksite Leaders shall leave his/her job while his/her presence is vital for the safe and efficient operation of the Hospital.

Section 5. Members selected by members of the bargaining unit will be entitled to regular pay during negotiations provided they were scheduled to work the shift on which negotiations are being conducted. No overtime pay will be authorized for those hours of negotiation.

...

ARTICLE 17  
Union Activities

Except where otherwise specifically provided in this Agreement, no union activities will be conducted in patients' rooms, public corridors or other public areas or in work areas at any time, and no employee will engage in any union activities while he or she is on duty. Union activities include such activities as dues collection, solicitation of members, distribution of union literature and other union information, and similar activities.

ARTICLE 19  
Labor/Management Meetings

The parties agree that full cooperation and understanding between the parties and a harmonious relationship will promote efficient performance which is in the interest of both the employees and the Hospital. To this end, parties recognize that matter other than formal grievances may arise which may be appropriate to discussion a labor-management meeting. Meetings will be scheduled on a quarterly basis or more frequently as are mutually agreed upon for the discussion and/or resolution of reasonable and appropriate subjects, with the Employer's representative and the Union's representative in attendance. Management will, staffing permitting, make reasonable efforts to provide coverage for the work site leader to attend the meeting. One work site leader in attendance shall be in paid status.

## BACKGROUND

Grievant is a registered nurse and has worked for the Hospital in that capacity for approximately twelve years. She is also a member of the Nurses and Tech bargaining unit represented by the Union and has served as Worksite Leader during most of her employment with the Hospital. For many years and during all times relevant to this grievance, she was the only Worksite Leader for the Nurses and Tech bargaining unit. In her role as Worksite Leader, Grievant attends meetings related to grievances filed by Nurses and Tech bargaining unit members. Service Employees International Union Healthcare (SEIU Healthcare) employs a Project Director who serves as a Union representative and works with the Worksite Leaders at the Hospital in bargaining negotiations and grievance processing.

On August 4, 2011 at 3:30 PM, SEIU Healthcare's Project Director and Hospital management scheduled a meeting for the purpose of discussing grievances, including one grievance involving the Nurses and Tech unit. On that day, Grievant's regularly scheduled shift ended at 3:15 PM, at which time she clocked out. She then clocked back in at approximately 4:00 PM and reported to the meeting which had already begun, with Hospital management and SEIU Healthcare's Project Director in attendance. When Grievant arrived at the meeting, a grievance related to another bargaining unit was being discussed. Hospital management asked Grievant if she wanted them to proceed to discuss the Nurses and Tech grievance since she was present. Grievant responded that she was not in a rush and that she did not want to interrupt the discussion that had already begun. Grievant subsequently attended the meeting and clocked out at approximately 5:30 PM, following the conclusion of the meeting.

Subsequent to the August 4, 2011 meeting, Hospital management informed Grievant of its view that she was not entitled to be in pay status for the meeting and her payroll hours for August 4, 2011 were reduced by 1.5 hours, the amount of time Grievant spent in the meeting. A grievance was filed over the denial of pay for the meeting. The grievance was denied by Hospital management at the earlier steps of the grievance procedure, resulting in these proceedings.

## DISCUSSION

The Contract provides limited circumstances where Worksite Leaders are entitled to receive pay for attending to Union business. One of those circumstances – attending a labor-management meeting pursuant to Article 19 – is not at issue here because neither Party alleges that the August 4, 2011 meeting in question was a labor-management meeting. Because I also find that no other contractual provision or enforceable past practice provides for pay in such circumstances, I have denied the grievance.

The Union argues that Section 2.B of Article 15 entitled Grievant to attend the August 4, 2011 meeting in pay status. In relevant part, that provision provides:

Section 2.B. Worksite Leaders, upon approval from their supervisor, which shall not be unreasonably denied, shall be permitted to leave their work stations for a period of time not exceed one (1) hour per day with pay:

...

2. To attend a meeting with representatives of the Employer or Union when such meetings are necessary to present any adjustment of a dispute.

The use of the language “leave their work stations” makes it clear that an employee must be on duty at the time she attends the meeting. In this case, it is undisputed that Grievant was not on duty at a work station at the time she attended of the meeting. She had been off duty for approximately 45 minutes before she entered the meeting and, as a result, she did not leave her work station to attend the meeting. I therefore conclude that this provision does not require the Hospital to pay Grievant for her attendance at the August 4, 2011 grievance meeting.

The Union also argues that Section 2 of Article 8 required Grievant’s attendance at the August 4, 2011 meeting and that the Parties’ past practice dictates that she be paid for her attendance at the meeting. I find that, even if that provision can be read to require her presence at the meeting, neither the contractual language nor past practice establish that she is entitled to be paid to attend the meeting. The language relied upon by the Union provides that at step 3 of the grievance procedure:

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.

This language, and the entirety of the Article 8 grievance procedure, is silent as to whether Worksite Leaders attending grievance meetings are entitled to attend such meetings in pay status. As described above, Article 15 provides that Worksite Leaders will be paid to attend such meetings, for up to one hour, when such meetings occur during their shift and require them to leave their work stations. However, there is no similar provision addressing pay status for attendance at grievance meetings when they do not occur during the Worksite Leaders’ shift.

The Union argues that there is an enforceable past practice related to Article 8 requiring the Hospital to pay Worksite Leaders for attendance at grievance meetings occurring outside their shift. I find that there is insufficient evidence to support the existence of such an enforceable past practice.

The generally cited standard for establishing the existence of an enforceable past practice is found in Elkouri:

When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, “In the absence of a written agreement, ‘past practice’, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.”

Elkouri & Elkouri, *How Arbitration Works*, 6th Edition at pages 607-608 (quoting *Celanese Corp. of Am.*, 24 LA 168, 173 (Justin, 1954).

Neither Party introduced documentary evidence regarding the existence of a past practice. During the processing of the instant grievance prior to the hearing, each Party asked the other to produce documentation to support their position as to whether or not a past practice existed. The Hospital CEO testified that he directed the Hospital’s director of nursing and a payroll employee to review the time and payroll records for such evidence. The CEO testified that it was reported to him that no evidence of payment for such meetings was discovered during the search. The Hospital reported this finding to the Union. The Union did not respond to the Hospital’s request for documentation.

Both Parties ask me to draw inferences against the other from their respective failure to produce documentary evidence in support of their positions. I decline to do so because each Party conceivably could have produced documents in support of their positions. The Hospital reasonably should possess time and payroll records that it could have produced to compare against a schedule of grievance meetings to support its conclusion that Worksite Leaders were not paid for grievance meetings occurring outside their shift. The Union and Grievant reasonably should possess Grievant’s time and payroll records that could have been produced to cross check with its records of grievance meetings to establish that she had historically been paid for time spent attending grievance meetings occurring outside her shift. Because both Parties failed to produce such evidence, the only inference I can draw is that such evidence does not exist to support either position. In short, the failure to produce documentary evidence is an evidentiary “wash” that does not support an inference in favor of, or against, any Party.

In the absence of documentary evidence, I am left with the nebulous testimony presented at hearing on the past practice issue. Grievant testified that she has historically been paid for attending similar meetings after her shift but could not recall, even roughly, when or how many of such meetings occurred when she was paid. SEIU Healthcare’s Project Director testified to her recollection that Worksite Leaders had been paid for their attendance at post-shift grievance meetings and that it had not been an issue in the past, but also did not provide any information as to when or how many of such instances occurred. The Hospital CEO testified that he did not have any recollection of Worksite Leaders requesting to be paid, or in fact being paid, to attend post-shift grievance meetings.

Given the foregoing, this factual record is insufficient to support a conclusion that the alleged past practice is (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time. Specifically, the lack of any documentary evidence under these circumstances where such evidence reasonably should exist, in the form of payroll and time records available to both Parties, convinces me that the alleged past practice is not readily ascertainable over a reasonable period of time. I therefore conclude that there is no enforceable past practice between the parties requiring the Hospital to pay Grievant for the post-shift grievance meeting on August 4, 2011.

### CONCLUSION

For the foregoing reasons, I conclude that the County did not violate the Contract when it did not pay Grievant for her attendance at the August 4, 2011 meeting. The grievance is denied.

Dated at Madison, Wisconsin, this 7<sup>th</sup> day of August, 2012.

Matthew Greer /s/

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Matthew Greer, Arbitrator

MG/gjc

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