

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration Between:

THE MILTON S. HERSHEY MEDICAL CENTER

“Employer,”

- and -

IBT LOCAL 776

“Union.”

Case No. 15-58004-1
(Overtime Limits – Richard Sitler)

**OPINION
AND
AWARD**

**Before
James W. Mastriani
Arbitrator**

Appearances:

For the Employer:

Bruce E. Rhoads
Director, Labor Relations
The Milton S. Hershey Medical Center

For the Union:

Irwin W. Aronson, Esq.
Willig, Williams & Davidson

A dispute arose between IBT Local 776 [the "Union"] and the Milton S. Hershey Medical Center [the "Center"] after the Center promulgated and implemented a policy in June 2014 limiting the number of hours of overtime that a unit employee can work for the stated purpose of reducing employee fatigue. Grievances were filed by several employees but the issue remained unresolved during the grievance procedure. The Union then filed a demand for arbitration with the Federal Mediation and Conciliation Service pursuant to the parties' collective bargaining agreement [the "Agreement"]. Thereafter, I was appointed to serve as arbitrator.

An arbitration hearing was held in Hershey, Pennsylvania on December 21, 2015. At the hearing, the Center and the Union argued orally, examined and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from Richard Sittler, Environmental Health Worker, Thomas Bender, Environmental Health Group Leader, Doug Miller, Chem Clave / Driver and Shop Steward, Jim Fenush, Director of Nursing – Clinical Support Services, Robin Armstrong, Institutional Environmental Health Manager and Mariann Kreiser, Human Relations Liaison II, Labor Relations Specialist. After receipt of oral closing statements, the record was closed.

ISSUE

At the hearing, the parties agreed to frame the issue to be heard and decided as follows:

On and after June 2015, did the Milton S. Hershey Medical Center violate the collective bargaining agreement when it limited overtime hours to 20 hours per week to prevent employee fatigue? If so, what shall be the remedy?

CITED CONTRACTUAL PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

5.1 The management of the Employer's operations and the direction of its working force are vested exclusively the Employer. The Union agrees that except for limitations of other provisions of this Agreement, expressed or implied, there are functions, powers, responsibilities and authorities belonging solely to the Employer prominent among which, but by no means wholly inclusive are: the hiring of employees; the direction of the working force; the establishment and enforcement of work rules; the determination of the number of men or women to be employed or retained in employment; the scheduling of overtime and the determination of the amount of overtime required; the establishment and maintenance of standards of quality and performance; the determination of employee competency; the maintenance of discipline; the determination of the work to be performed; the determination of the physical layout, machines, tools and equipment to be used in the operation of the Employer; the determination of operation schedules; the determination of the number of shifts to be worked; the determination of duties to be included in any job; the elimination, change or consolidation of jobs, departments, or subdivisions thereof; the reduction of the work force because of lack of work or administrative reasons; and the suspension, demotion or discharge of employees for just cause. The Employer agrees that in the exercise of its functions, powers, responsibilities and authorities, including but by no means wholly inclusive the establishment and enforcement of work rules, it shall take no action which is arbitrary or capricious or as a device to denude the bargaining unit or for the purpose of undermining the Union. The Employer further agrees that a grievance may be filed in accordance with the grievance procedure to determine whether action taken by the Employer violates this

Agreement or was arbitrary or capricious, or as a device to denude the bargaining unit or for the purpose of undermining the Union.

ARTICLE 9 – SENIORITY

9.4 Bargaining Unit Seniority

Bargaining unit seniority shall be applicable in determining the following employee rights:

- (e) to assign overtime work among employees in accordance with the overtime provisions of this Agreement;

ARTICLE 18 – OVERTIME

18.1 Definition

Overtime is all authorized time worked by an employee that is:

- (a) In excess of forty (40) hours a work week. For employees on a forty (40) hour overtime system, overtime compensation will be paid for hours worked in excess of forty (40) hours in a one (1) week time period.
- (b) In any work week in which a holiday occurs on a employee's regularly scheduled work day, or an employee has scheduled time off in advance chargeable to either accumulated PTO or personal holiday time, such holiday or time off shall be considered as time worked

18.2 Limitation of Overtime

Overtime work shall be performed only upon assignment by the Employer and shall be limited to strict necessity. Wherever practical, where there is overtime available in a job title for an available regular employee and a non-regular employee, such overtime work shall be assigned in priority order to the regular employee.

18.3 Overtime Pay

Overtime work is paid at the rate of time and one-half the hourly rate. If any overtime work is performed on a holiday (as defined in this Agreement), or a day granted as a holiday in accordance with Article 25, such overtime is paid at the holiday rate of pay in accordance with Article 26.

18.4 Assignment of Overtime

- (a) Voluntary overtime work shall be offered on the basis of bargaining unit seniority among employees with the same job title in a work area who have signed the overtime list for the designated period. If no employee in the work area with the same job title is available, the overtime work may be offered to the employee with the most bargaining unit seniority in the work area who has the ability, who is qualified to perform the job and who has signed the overtime list for the designated period; provided however, that the Employer shall not arbitrarily or capriciously change its practice in a particular work area. If through an oversight an employee misses a turn of overtime, that employee shall be provided an opportunity to work sufficient overtime hours to compensate for the overtime hours missed, at a time mutually agreeable to the employee and the employee's supervisor, and the employee shall be paid at the rate of twice the hourly rate for such hours worked.
- (b) Mandatory overtime will occur when the number of bargaining unit employees needed to perform the available work has not been satisfied by (a) above. The employee with the least bargaining unit seniority in the applicable job title and work area must accept the overtime work.
- (c) In all work areas, assignment of overtime on basis which differs from (a) and (b) above may be authorized if sanctioned by all of the affected employees in the work area and if approved by management and the Union.
- (d) When overtime less than two (2) hours is required at the end of the shift for the employee(s) to complete a trades job, the employee(s) may be requested to remain on the job and work the available overtime. Provided however, that if the employee(s) decline(s) the overtime, such overtime shall be assigned on the basis of (a) and (b) above.

ARTICLE 20 – WORK SCHEDULES

20.1 The establishment of work schedules is a function of management to be determined solely by the Employer, subject to the following limitations:

- (a) Employees normally shall be scheduled to work not more than five (5) days of work but may be scheduled for six (6) days to meet patient care needs. Days not scheduled as work days shall be considered as regularly scheduled days off.
- (b) An employee shall be entitled to a meal period on an employee's time, to be determined by the Employer, but not less than thirty (30) minutes or more than sixty (60) minutes, during each work day, except in circumstances as determined by management, wherein management requires continuous employment during an employee's entire shift because of nature of the work.
- (c) The Employer shall give an employee one (1) calendar week's notice of either a temporary change in the employee's regular work schedule lasting less than sixty (60) calendar days, or a permanent change that is not to a significantly different shift (see 20.1(e) below) except that such period of notice shall not apply in the case of an emergency. If a temporary change of schedule is made which requires temporary assignment of work on a Saturday or Sunday for an employee normally not scheduled to work on a Saturday or Sunday, such temporary change of schedule shall not change the employee's regular work schedule for the purpose of computing overtime under Section 18.1(c) (work on a regularly scheduled day off).
- (d) The Employer shall give an employee two (2) calendar weeks' notice of a change in the employee's regular work schedule which results in a permanent reduction in weekly hours work, except that such period of notice shall not apply in the case of an emergency.
- (e) The Employer shall give an employee sixty (60) calendar days' notice of a permanent change of shift if the change is to a significantly different shift such as a change from day shift to night shift, or to working on Saturday or Sunday, except in the case of an emergency.

- (f) An employee who reports to work and there is no work available shall be paid for three (3) hours on a straight time basis, unless:

The employee has been informed not to report to work by telephone, personal contact or letter mailed to his last known address; or

An emergency prevents work; or

The employee refuses suitable alternate work.

BACKGROUND

The central facts relating to the grievance are not in dispute. The Union represents employees who primarily provide non-patient care guest services. This includes Environmental Health Workers. A job description for this title was submitted into evidence¹ [U. Ex. #1]:

PRINCIPAL DUTIES AND RESPONSIBILITIES:

*Perform cleaning duties in assigned areas including stocking of dispensers *Strip sanitize and make beds in designated areas.

*Collect trash in designated work area.

Request and maintain supplies for work area as necessary.

*Maintain equipment and materials needed to perform work in a clean and orderly fashion. *Use and provide information to computerized systems.

Report needed repairs to group leader or supervisor.

Fill spray bottles with disinfectant for nursing units, clinics, etc.

Take beds to and from the basement to nursing floors and operating rooms.

¹ Testimony indicates that an Environmental Health Worker may not perform each and every task in the job description, depending on the worker's assignment.

All witness testimony reflects that prior to June 2014, the opportunity to work overtime was based on seniority without a limit on weekly overtime hours. The need to schedule overtime work is determined by supervision. Environment Health Group Leader Thomas Bender, a shop steward, testified that a department manager maintains a sheet or list of employees in a work area who were willing to volunteer to work overtime.² The manual list later became a computer spreadsheet. The list is revised every three to six months. Bender and Environmental Health Worker Richard Sitler testified that historically the most senior employee was given the first opportunity to work the overtime and that the employee normally took advantage of working whatever hours that were available. When this occurred, Sitler said he would normally work 25 or 30 hours of overtime.³ He testified that his supervisor would ask him towards the end of the prior week if he was willing to work overtime during the following week and the number of overtime hours would vary. Bender echoed Sitler's testimony. He acknowledged that on occasion, a junior employee might complain about not receiving overtime. According to Bender and Sitler, they had no knowledge of any situation in the past where an employee was non-attentive, fatigued or had been counseled or disciplined for poor job performance as a result of working more than twenty (20) hours of overtime during a week. Testimony from Center

² This procedure is consistent with the language in Article 18.4(a) requiring voluntary overtime to be offered to employees who sign an overtime list.

³ Pay and hours worked records were submitted into evidence as Joint Exhibit #9.

witnesses reflected agreement that these were the procedures that were followed prior to June 2014 and that they could not recall any incidents where employee or patient safety was compromised as a result of the number of hours of overtime that was worked.

The overtime procedures for unit employees changed in June 2014.⁴ At that time, the Center issued a policy that limited the number of overtime hours a unit employee could work to twenty (20) per week [Jt. Ex. #7]. The policy is as follows:

**Guest Services Worker Fatigue Guidelines
Hospital Administrative Manual
Policy Number: GS-P34
Effective June 2014**

PURPOSE

To reduce and alleviate worker fatigue in Guest Services that increases the risk of adverse events, compromises patient safety, and increases risk to personal safety and well-being.

GUIDELINE

Penn State Hershey Medical Center is committed to reducing the risk of fatigue resulting from extended work hours. This guideline applies to all **non-exempt staff reporting directly into Guest Services division (EHS, Food Services and Linen Services).**

PROCEDURE

1. Staff will be scheduled for no more than 60 hours per work week.
2. Staff will be scheduled to work no more than 16 hours per day.

⁴ Prior to this, in September 2013, the Hospital implemented a policy to reduce the risk of fatigue resulting from extended work hours for non-physician Clinical Care Services: diagnostic, treatment, or rehabilitative services provided by nursing, radiology and diagnostic imaging treatment, or rehabilitative services provided by nursing, radiology and diagnostic imaging, phlebotomy, laboratory medical services, pharmacy and all outpatient clinic areas. [H. Ex. #2].

3. Exceptions to the stated procedures can only occur with approval of the Assistant Manager and above.

**Please note this guideline is specific to scheduled hours of work. From time to time an employee's hours may fall outside this guideline; however those occasions should be the exception and not the rule.*

Testimony relating to the events that led to the Center's adoption of the June 2014 policy was offered by Jim Fenush, Director of Nursing – Clinical Support Services, Robin Armstrong, Institutional Environmental Health Manager and Mariann Kreiser, Human Relations Liaison II, Labor Relations Specialist. According to Fenush, the Center became aware of a publication issued by the Joint Commission issued on December 14, 2011. The Joint Commission publishes articles for accredited health care organizations and interested health care professionals. The specific publication Fenush referenced is entitled a "Sentinel Event Alert." The Joint Commission describes a Sentinel Event Alert as identifying "specific types of sentinel events, describes their common underlying causes, and suggests steps to prevent occurrences in the future." Fenush identified the specific publication that prompted the policy as "Healthcare Worker Fatigue and Patient Safety." Because the record shows that the publication was the primary motivating force in the Center's promulgation and implementation of its June 2014 policy, the publication is set forth below in its entirety, except for footnotes that have been omitted [H. Ex. #1].

Health care worker fatigue and patient safety

The link between health care worker fatigue and adverse events is well documented, with a substantial number of studies indicating

that the practice of extended work hours contributes to high levels of worker fatigue and reduced productivity. These studies and others show that fatigue increases the risk of adverse events compromises patient safety, and increases risk to personal safety and well-being. While it is acknowledged that many factors contribute to fatigue, including but not limited to insufficient staffing and excessive workloads, the purpose of this Sentinel Event Alert is to address the effects and risks of an extended work day and of cumulative days of extended work hours.

The impact of fatigue

Fatigue resulting from an inadequate amount of sleep or insufficient quality of sleep over an extended period can lead to a number of problems, including:

- lapses in attention and inability to stay focused
- reduced motivation
- compromised problem solving
- confusion
- irritability
- impaired communication
- slowed or faulty information processing and judgment
- diminished reaction time
- indifference and loss of empathy

Contributing factors to fatigue and risks to patients

Shift length and work schedules have a significant effect on health care providers' quantity and quality of sleep and, consequently, on their job performance, as well as on the safety of their patients and their individual safety. This fact has been borne out in numerous studies. Findings from a groundbreaking 2004 study of 393 nurses over more than 5,300 shifts - the first in a series of studies of nurse fatigue and patient safety - showed that nurses who work shifts of 12.5 hours or longer are three times more likely to make an error in patient care. Additional studies show that longer shift length increased the risk of errors and close calls and were associated with decreased vigilance, and that nurses suffer higher rates of occupational injury when working shifts in excess of 12 hours." Still, while the dangers of extended work hours (more than 12 hours) are well known, the health care industry has been slow to adopt changes, particularly with regard to nursing.

"An overwhelming number of studies keep saying the same thing - once you pass a certain point, the risk of mistakes increases

significantly," says Ann Rogers, Ph.D., R.N., FAAN, a nationally renowned sleep medicine expert with Emory University's Nell Hodgson Woodruff School of Nursing. "We have been slow to accept that we have physical limits and biologically we are not built to do the things we are trying to do."

Resident physician duty hours have also been the focus of many studies. While the Accreditation Council for Graduate Medical Education (ACGME) implemented duty hour restrictions in July 2003 limiting work shifts to a maximum of 30 hours and no more than 80 hours of work per week, numerous subsequent studies indicate that risks to patient safety and personal injury remain high for resident physicians working recurrent 24-hour shifts." In September 2010, ACGME published the final version of new standards, which became effective in July 2011 (www.acgme-2010standards.org).

An article in the November 2007 *Joint Commission Journal on Quality and Patient Safety* concludes that evidence strongly suggests that extended duration work shifts significantly increase fatigue and impair performance and safety. The article reports that residents who work traditional schedules with recurrent 24-hour shifts:

- Make 36 percent more serious preventable adverse events than
- individuals who work no more than 16 consecutive hours.
- Make five times as many serious diagnostic errors
- Have twice as many on-the-job attentional failures at night
- Experience 61 percent more needlestick and other sharp injuries after their 20th consecutive hour of work
- Experience 1.5 to 2 standard deviation deterioration in performance relative to baseline rested performance on both clinical and non-clinical tasks
- Report making 300 percent more fatigue-related preventable adverse events that led to a patient's death

A subsequent 2009 study also reveals an increased rate of complications among post-nighttime surgical procedures performed by attending physicians who had slept less than six hours.

"We have a culture of working long hours, and the impact of fatigue has not been a part of our consciousness," says Christopher P. Landrigan, M.D., M.P.H., director of the Sleep and Patient Safety Program, Brigham and Women's Hospital. The author of several research studies exploring the effects of provider sleep deprivation

on patient and provider safety, Dr. Landrigan stresses the importance of reduced work hours for all health care workers, and the need for widespread education of health care providers to recognize their limits. "Most are unaware of sleep and circadian biology and the degree that it affects performance. And, most do not realize how much research supports the need to make changes."

Actions suggested by The Joint Commission

There are some evidence-based actions that health care organizations can take to help mitigate the risks of fatigue that result from extended work hours - and, therefore, protect patients from preventable adverse outcomes.

For all organizations:

1. Assess your organization for fatigue-related risks. This includes an assessment of off-shift hours and consecutive shift work, and a review of staffing and other relevant policies to ensure they address extended work shifts and hours.
2. Since patient hand-offs are a time of high-risk - especially for fatigued staff – assess your organization's hand-off processes and procedures to ensure that they adequately protect patients.
3. Invite staff input into designing work schedules to minimize the potential for fatigue.
4. Create and implement a fatigue management plan that includes scientific strategies for fighting fatigue. These strategies can include: engaging in conversations with others (not just listening and nodding); doing something that involves physical action (even if it is just stretching); strategic caffeine consumption (don't use caffeine when you're already alert and avoid caffeine near bedtime); taking short naps (less than 45 minutes). These strategies are derived from studies conducted by the National Aeronautics and Space Administration (NASA), which state that people can maximize their success by trying different combinations of countermeasures to find what works for them. The NASA studies stress that the only way to counteract the severe consequences of sleepiness is to sleep. Strategies for determining shift durations and using caffeine to combat fatigue can be found in chapter 40 of "Patient Safety and Quality: An Evidence-Based Handbook for Nurses."
5. Educate staff about sleep hygiene and the effects of fatigue on patient safety. Sleep hygiene includes getting enough sleep and taking naps, practicing good sleep habits (for example, engaging in a relaxing pre-sleep routine, such as yoga or reading), and avoid food, alcohol or stimulants (such as caffeine) that can impact sleep.

Safety culture (for all organizations):

6. Provide opportunities for staff to express concerns about fatigue. Support staff when appropriate concerns about fatigue are raised and take action to address those concerns.
7. Encourage teamwork as a strategy to support staff who work extended work shifts or hours and to protect patients from potential harm. For example, use a system of independent second checks for critical tasks or complex patients.
8. Consider fatigue as a potentially contributing factor when reviewing all adverse events.

For organizations with a current policy that allows for sleep breaks for staff defined as essential by the organization:

9. Assess the environment provided for sleep breaks to ensure that it fully protects sleep. Fully, protecting sleep requires the provision of basic measures to ensure good quality sleep, including providing uninterrupted coverage of all responsibilities (including carrying pagers and phones, and coverage of both admissions and all continuing care by another provider), and providing a cool, dark, quiet, comfortable room, and, if necessary, use of eye mask and ear plugs.

According to Center testimony, after it became aware of the above publication in early 2012, discussions were held among executive staff as to its impact on the Department of Nursing and later as it concerned healthcare workers such as those involved in this proceeding who perform guest services. The Center then implemented the policy for non-physician Clinical Care Service Workers in September 2013 and then implemented a similar policy for unit employees working in guest services on June 2014.

The change in overtime procedures was not negotiated with the Union. According to Union testimony, it became aware of the policy after certain employees were told by their supervisors that they could no longer schedule

more than twenty (20) hours of overtime per week.⁵ As a result, overtime beyond twenty (20) hours that employees such as Sitler and Bender would normally be offered and worked were offered to less senior employees. In response to this, several workers filed grievances protesting that the reduction in their overtime hours by assigning the hours to lesser senior employees violated the Agreement.⁶ The individual grievances were submitted into evidence. [Jt. Exs. 2, 3, 4, 5 and 6]. After a second step grievance hearing was held, the Center made a comprehensive written response to the Union denying the grievance and supported its denial by setting forth various contract defenses.

Based upon these largely uncontested facts, the Union and the Center offer the following arguments in support of their respective positions.

The Union contends that prior to June 2014, there was a clear and consistent practice supported by contract language governing overtime procedures that was unilaterally changed when the Center implemented the June 2014 policy. That practice provided for an overtime opportunity to be first offered to the most senior employee without a limit on the number of hours that the most senior employee could work. If the most senior employee either declined to work the overtime or any amount of overtime that the employee was offered, the overtime opportunity would be afforded to the next senior employee. The Union acknowledges that the availability and amount of overtime is to be determined by

⁵ The policy allows for exceptions to the twenty (20) hour limit.

⁶ The grievances were filed by employees Sitler, Maldonado, Snyder, Brady and Cartwright.

the Center but that once the overtime hours were determined, the most senior employee had first opportunity and could work whatever overtime hours were available without a limit. The Union cites testimony reflecting that it was common for the Center to offer the most senior employee five (5) or more hours of overtime per day or twenty-five (25) to thirty (30) hours of overtime to be worked during the following week prior to the implementation of the June 2014 policy. According to the Union, the implementation has diminished overtime hours for the senior employees, thereby depriving them of compensation.

The Union further contends that the practice under which overtime was distributed prior to the new policy was consistent with, and required by, a reading of all of the relevant terms of the Agreement. It rejects any reliance the Center may have on Article 5 – Management Rights. It first notes that Article 5.1 provides that the Center’s managerial authority is subject to the expressed or implied limitations set forth in the other provisions of the Agreement, including those referencing seniority and overtime. It also cites other language in Article 5.1 that it also regards as limiting managerial authority:

[The Center] ... shall take no action which is arbitrary or capricious or as a device to denude the bargaining unit or for the purpose of undermining the Union. The Employer further agrees that a grievance may be filed in accordance with the grievance procedure to determine whether action taken by the Employer violates this Agreement or was arbitrary or capricious, or as a device to denude the bargaining unit or for the purpose of undermining the Union.

The Union cites to specific language in the Agreement that clearly recognizes the Center's obligation to assign overtime by seniority. In this regard, it points to Article 9 – Seniority and Article 18 – Overtime. Section 9.4 recognizes the applicability of bargaining unit seniority to various contractual rights including Subparagraph (e) that it asserts requires the Center to recognize seniority “to assign overtime work among employees in accordance with the overtime provision of this Agreement.” Turning to Article 18 – Overtime, the Union points to Article 18.4(a). According to the Union, this subsection governs the distribution of voluntary overtime on the basis of seniority consistent with the seniority rights recognized by Section 9.4 and supported by the longstanding practice of assigning overtime by seniority without a limit prior to the Center's implementation of the June 2014 policy limiting overtime opportunities to twenty (20) hours per week. Article 18.4 states:

Voluntary overtime work shall be offered on the basis of bargaining unit seniority among employees with the same job title in a work area who have signed the overtime list for the designated period. If no employee in the work area with the same job title is available, the overtime work may be offered to the employee with the most bargaining unit seniority in the work area who has the ability, who is qualified to perform the job and who has signed the overtime list for the designated period; provided however, that the Employer shall not arbitrarily or capriciously change its practice in a particular work area. If through an oversight an employee misses a turn of overtime, that employee shall be provided an opportunity to work sufficient overtime hours to compensate for the overtime hours missed, at a time mutually agreeable to the employee and the employee's supervisor, and the employee shall be paid at the rate of twice the hourly rate for such hours worked.

The Union also points to Article 18.4(b) which provides for the assignment of mandatory overtime for employees with the least bargaining unit seniority after more senior employees have declined to accept voluntary overtime. The Union also cites Article 18.4(c) which only allows for a different method for assigning overtime set forth in subsections 18.4(a) and (b) "if sanctioned by all of the affected employees in the work area and if approved by management and the Union." In this instance, it asserts no such approval has been granted to assign voluntary overtime to less senior employees simply because the Center has limited senior employees to working a limit of twenty (20) hours of overtime during a week.

The Center disagrees with the Union's contract interpretations and urges that the grievance be denied. Its contentions with respect to contract language were well articulated at hearing. They essentially parallel the written response it made when it denied the grievance after the second step hearing. That response stated:

The Union had alleged that management has violated the contract, specifically Article 9.4, Bargaining Unit Seniority, and Article 18.4, Assignment of Overtime, for limiting the number of hours of overtime worked by an employee to twenty (20) hours per week. When the Union was asked what article in the CBA specifically states that management cannot limit the number of hours of overtime offered to an employee, the Union had no reply. Also, management asked the Union if they were willing to take accountability for the liability if an employee becomes injured while working unlimited amounts of overtime, the Union refused.

Please note that under Article 5, Management Rights, "The Union agrees that except for limitations of other provisions of this

Agreement, expressed or implied, there are functions, powers, responsibilities and authorities belonging in s solely to the Employer ... the scheduling of overtime and the determination of the amount of overtime required ... the determination of operation schedules; the determination of the number of shifts to be worked..." In addition, Article 20.1, Work Schedules, "The establishment of work schedules is a function of management to be determined solely by the Employer..." and Article 20.2, "Nothing herein shall be construed to guarantee a set number of hours per day or week." Finally, Article 18.1, Overtime, "Overtime is all *authorized* time worked by an employee..." and 18.2, Limitation of Overtime, "Overtime work shall be performed only upon assignment by the Employer and shall be limited to strict necessity."

Considering that the contract does not specifically state that we cannot limit the number of hours of overtime worked by an employee and since the contract does support management to establish schedules as well as limitations of hours worked pursuant to the articles above, there is no contract violation. Therefore, I must respectfully deny this grievance.

At the arbitration hearing, the Center expanded upon the above response. Citing all of the aforementioned contract provisions, it submits that the Agreement recognizes that it has a management right to limit the number of overtime hours employees will be permitted to work during a single week.⁷ It contends that the Joint Commission publication reflects that its decision to promulgate the June 2014 policy was neither arbitrary nor capricious because the publication was supported by research data showing that healthcare institutions must endeavor to reduce worker fatigue to avoid harm to employees and patients and to reduce hazards in the workplace. It notes that it implemented the policy only after a thorough review of the fatigue factor by the Center's clinical professionals. It views the twenty (20) hour limitation as not being an unreasonable work rule and

⁷ It cites that the June 2014 policy provides for exceptions that can occur with the approval of the Assistant Manager and above.

that unit employees who perform guest service work are integrated with the work of healthcare workers who provide direct patient care as part of the Center's overall mission. For all of the above reasons, the Center urges that the grievance be denied.

DISCUSSION

I have thoroughly reviewed and carefully considered the arguments and evidence submitted into the record by the Center and the Union in support of their respective positions. The Union bears the burden to prove that the June 2014 policy implemented by the Center violated the collective bargaining agreement.

The Center contends that the underlying rationale for restricting the amount of overtime that a unit employee can work on a weekly basis is sound, supported by the research and findings of the Joint Commission on employee fatigue and that the June 2014 policy falls within its existing contractual rights and inherent managerial authority. The Union does not dispute that the Center has a responsibility to promote and protect patient safety and well being. It contends, however, that the Center's implementation of the June 2014 policy cannot be unilaterally implemented for unit employees without violating specific terms of the Agreement, prior practice and without first engaging in negotiations with the Union prior to its implementation.

The issue to be decided is one of contract interpretation, namely whether the Agreement authorizes or restricts the Center from placing a limitation on weekly overtime hours. The dispute does not extend to whether the Center has a right to determine the need for overtime work, to assign such work to the appropriate work areas or to determine whether an employee is qualified or physically capable of performing the work required. On this latter point, the record is devoid of any instance where the Center has determined that an employee has been inattentive to work or unable to properly perform his or her required duties as a result of fatigue caused by working in excess of twenty (20) hours of overtime in a single week. Similarly, the merits of the findings of the Sentinel Event are not at issue as they pertain to the issue of employee fatigue. While they are illustrative of the Center's desire to monitor and prevent employee fatigue and support its view that its action had a good faith purpose, the publication does not govern the issue of whether the Center had a contractual right to implement the June 2014 policy.

The terms of the Agreement that reference the rights of management, seniority and the assignment of overtime support the Union's position that the June 2014 policy violated the Agreement. The prior practice as to how those terms have consistently been applied in the past also supports the Union's interpretation of how the relevant contract clauses have been applied. I reach these conclusions for the following reasons.

The Center has argued that it had a reserved right to cap an employee's overtime hours because there is no language in the Agreement that specifically bars the Center from limiting the number of hours of overtime an employee can work. Given the contract provisions that are applicable, coupled with the longstanding practice that is consistent with the contract language, I do not find the Center's reserved right argument to be persuasive. The Agreement, as written and applied, need not contain specific language barring the Center from imposing such limits and would require language setting forth a distribution system other than, as here, the negotiated system recognizing strict seniority.

The Agreement's general seniority provision specifically references seniority as applicable in determining who is assigned to work overtime (Article 9.4). Article 18.4(a) specifically references the assignment of overtime and the procedures under which overtime is assigned. This subsection undermines the Center's claim that its contractual right to assign employees to work overtime extends to the right to determine the method upon which overtime is distributed to employees, including the imposition of a limit on the hours that an employee can work. This subsection clearly requires voluntary overtime to be offered on the basis of bargaining unit seniority among employees with same job title in a work area as long as the employee has first signed the voluntary overtime list for the designated period. This subsection goes on to state that if the Center is required to go outside the work area to find an employee qualified to do the work, it must first offer the overtime to the employee with the most bargaining unit

seniority. In either instance, there is no mention of a limit on overtime hours and strict seniority has been the factor in which overtime has historically been assigned.

Article 18.4(a) does not provide any other procedure for the distribution of overtime assignments. There is no mention of requiring overtime hours to be equalized, to be spread among employees nor governed by a system of employee rotation. The contract language and the clear practice of the parties under that language reflects a mutual understanding that voluntary overtime must first be offered on the basis of seniority without a cap or limit on the hours that the senior employee voluntarily chooses to work. The parties have also negotiated a procedure when going through the seniority list does not provide a voluntary bid to work overtime. Article 18.4(b) allows the Center to mandate overtime by assigning employees with the least bargaining unit seniority to accept the overtime assignment. The language in Article 18.4(a) and (b) both support the strength of the seniority factor when determining who is willing to work overtime voluntarily and who must accept overtime when overtime must be mandated. Thus, the system of overtime distribution prior to the June 2014 policy did not exist solely on the basis of a longstanding consistent practice but rather upon the totality of contract language that was aided and guided by the parties' practice.

It is also significant that the parties have negotiated language in Article 18.4(c) that allows them to authorize any different method for the assignment of overtime that would differ from what is dictated by subsections (a) and (b). Such deviation is permitted "if sanctioned by all of the affected work areas and if approved by management and the Union." There is no suggestion that the June 2014 policy meets the test for a mutually agreed upon method of overtime assignment that differs from the method set forth in Article 18.4(a) and (b). The cap or limit on overtime hours clearly represents a different method of overtime assignment and distribution because after twenty (20) hours have been assigned to the senior employee, this triggers the assignment of additional overtime to a less senior employee. If the parties had intended to alter the existing contractual method, they could have done so through the mechanism in Article 18.4(c). Testimony reflects that neither party sought to change the relevant contract language during the last round of collective bargaining.

The Center's contract defenses have all been considered. They recognize managerial authority in many areas but they do not authorize the unilateral implementation of the terms of the June 2014 policy. The Center asserts that the policy was authorized because of its right to establish work schedules under the terms of Article 20, to determine and schedule work that requires overtime, as well as the amount of bargaining unit overtime that it will assign to be worked. The exercise of these rights are not in conflict with the Center's contractual obligation to maintain the system for the allocation and distribution of overtime as

it existed prior to its adoption of the June 2014 policy. I have also considered the Center's claim that it had the unilateral right to adopt the June 2014 policy due to language in Article 18.1 stating that overtime is defined as all "authorized" time worked by an employee. This, the Center argues, allows it to deem that overtime hours for a senior employee beyond twenty (20) in a week are no longer "authorized" and thus the hours must be assigned to a less senior employee. This argument is not persuasive given the contract language that clearly places the term "authorized time" only in the context of defining when work is to be considered to be overtime worked rather than granting a right to the Center to determine which employee is entitled to work the hours that qualify as overtime. Despite the Center's additional reliance on a thoughtful and well researched professional article on employee fatigue, I find that the Union has met its burden to establish that the Center's implementation of the June 2014 policy violated the collective bargaining agreement.

I next turn to remedy. The remedy must be fashioned in a manner that is reasonably related to the violation found. The initial part of the remedy is for the Center to rescind the June 2014 policy as soon as it is possible to do so and return overtime procedures to the contractual method that has been reflected in prior practice.

The next issue is to determine whether relief must be given to employees who were adversely impacted by the implementation of the June 2014 policy.

The record reflects that employees have lost overtime opportunities they would otherwise have been offered and worked. The violation does not lend itself to a remedy that only orders future work opportunities to workers who have lost overtime. A monetary award is appropriate here because the contract requires overtime to be granted on a seniority basis and there is no contractual requirement for equalization or rotation where future overtime opportunities could be offered to make the affected employees whole. At least one of the grievances seeks the payment of twice the hourly rate for overtime hours missed as a result of the implementation of the policy. This remedy sought is apparently linked to language in Article 18.4(a) that provides for this type of remedy if an employee misses a turn of overtime "through an oversight." I do not find such a remedy to be appropriate here because any overtime missed in the instant case was not the result of an oversight. The double time remedy appears to be a penalty intended to apply to an isolated instance where an administrative error has caused a missed overtime opportunity. Affected employees suffered actual monetary losses rather than having missed overtime work opportunities temporarily postponed. In this matter, a remedy is required that provides the affected employees to be made whole for losses suffered as a result of the denial of overtime work that they would normally have worked except for the implementation of the June 2014 policy and at the rate they would normally have received. I retain jurisdiction solely for the purpose of resolving any disputes that arise in connection with the remedy.

AWARD

The Milton S. Hershey Medical Center violated the collective bargaining agreement when it adopted the June 2014 policy limiting overtime hours to twenty (20) hours per week. The Center shall rescind the June 2014 policy and return to the contractual method of overtime assignment that has been used in the past. Employees who were denied the opportunity to work additional overtime that they normally would have worked but for the twenty (20) hours per week limitation on overtime hours shall be made whole for the losses suffered as a result of the denial of overtime work they would have worked and at the rate of pay they normally would have received for such work. I retain jurisdiction solely for the purpose of resolving any disputes that arise in connection with the remedy.


Dated: January 7, 2016
Sea Girt, New Jersey



James W. Mastriani

State of New Jersey }
County of Monmouth } ss:

On this 7th day of January, 2016, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.



JOHN J. BLANCHARD
Attorney At Law
OF NEW JERSEY