

IN THE MATTER OF ARBITRATION BETWEEN

FAIRVIEW SOUTHDALÉ HOSPITAL)
"Employer")
AND) FMCS Case No. 100308-54556-3
MINNESOTA NURSES ASSOCIATION)
"Union")
Mandatory On-Call

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: January 19, 2011; St. Paul, MN

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INTRODUCTION

Fairview Southdale Hospital (the “Employer” or the “Hospital”) is an acute care hospital located in Edina, MN. The Employer and Minnesota Nurses Association (“MNA” or the “Union”) were parties to a Collective Bargaining Agreement (the “Agreement”) effective by its terms from June 1, 2007-May 31, 2010 (Joint Exhibit #1). There are approximately 1,000 registered nurses (RN’s) in the bargaining unit.

The Union filed the Step 2 grievance on July 24, 2009 after the Employer had advised the Union that it intended to include scheduled off-premises on-call hours as part of postings for two RN positions in the Labor & Delivery unit. On August 1, 2009, the Nurse Manager for Labor & Delivery sent the internal position posting to all of the RNs on the Labor & Delivery unit, notifying them of the two available positions. The posting described the details for the positions, including the disputed on-call component. Nine RNs expressed interest in these two positions as posted (including the on-call requirement). The positions were awarded to the two most senior bargaining unit RNs who applied.

The Union argued in its Step 2 letter that the Employer would not include scheduled on-call as part of the two posted positions in Labor & Delivery, inasmuch as the Labor & Delivery unit did not have mandatory on-call as an “established practice.” Taking the “established practice” verbiage from the following sentence in Article 5, which is the key language in dispute:

If on-call duty is not part of a nurse’s confirmed employment understanding, on-call shall not be newly assigned to any nurse on a unit where on-call assignment has not been an established practice.

Step 2 grievance meeting was held on September 2, 2009, and thereafter the Employer sent a letter to the Union denying the grievance. On September 24, 2009, the Union demanded to arbitrate the Labor & Delivery grievance.

MNA filed a separate grievance dated March 4, 2010 (received by the Employer on March 8, 2010), over the Employer’s decision to include on-call as part of other positions that were posted for different units. The Arbitrator in this case stated at the hearing that he has been called upon to decide the July 24, 2009 grievance involving the two posted positions for the Labor & Delivery unit – not the separate grievance that the Union filed seven months later.

Although the issue before the Arbitrator concerns the two Labor & Delivery positions, the Union presented evidence related to the March of 2010 grievance and the additional positions in other units that were created to include scheduled call. This put the Employer in the position of needing to introduce its own evidence so as to not allow the Union to have the only word. The body of this brief explains why the grievance before the Arbitrator involving the two Labor & Delivery positions must be denied. Attached to the Employer’s brief is an Addendum that describes how the creation of the additional positions with call cannot in any case result in a different outcome.

The Arbitrator has not reviewed the Addendum because the issue in this case limits my authority solely to the grievances involving the postings in the Labor & Delivery Unit grieved on July 24, 2009.

THE ISSUE

Did the Employer breach Article 5 of the Collective Bargaining Agreement in August of 2009 by posting two new positions in the Labor & Delivery unit that included on-call duty as part of the confirmed employment understandings for the nurses who accepted the positions.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4F

Confirmation of Work Agreement

The Hospital shall provide the nurse with written confirmation of the nurse's employment understanding. This confirmation shall include her or his salary and increment level, including the credit assigned for such prior work experience, the number of hours per payroll period for which the nurse is being employed, and shift rotation to which the nurse will be assigned. This confirmed employment understanding shall not be changed without consent of the nurse...

ARTICLE 5

On-Call Duty

Assignment of a nurse to on-call duty or standby to work beyond her or his scheduled shift shall not be used as a substitute for scheduled on-duty staff when there is a demonstrated pattern of a consistent and continuing need for nursing care.

If on-call duty is not a part of a nurse's confirmed employment understanding, on-call shall not be newly assigned to any nurse on a unit where on-call assignment has not been an established practice.

A nurse will not be required to be on-call on a weekend off or regular day off. The preceding sentence shall not prevent weekend calls on units which are normally not open on weekends.

If a nurse is called to work while on-call and works a total of sixteen (16) or more hours in any twenty-four (24) hour period, she or he shall have the option of being released from the scheduled work shift immediately following the scheduled period of on-call duty.

A nurse who has attained the age of sixty (60) shall not be required to take on-call duty.

On-call duty shall be compensated as follows:

Off-Premises On-Call Pay:

- A. A nurse shall be paid at an hourly rate of one hundred ten percent (110%) of the state or federal minimum wage, whichever is higher. Effective June 1, 2005, the hourly rate shall become seven dollars (\$7.00) per hour or the higher of the state or federal minimum wage, whichever is greater for off-premises on-call duty. She or he will not be scheduled for a period of less than four (4) hours of on-call duty. Such on-call time shall not be considered hours of work for the purpose of determining overtime pay.

If a nurse is called to work while on-call off premises, she or he will be guaranteed not less than four (4) hours pay. Such four (4) hours shall be paid at the rate of time and one half (1-1/2) the nurse's regular rate of pay to the extent that the total of hours worked and guaranteed exceed eight (8) hours in one (1) day or eighty (80) hours in a payroll period...

BACKGROUND

Fairview Southdale opened in 1965, and MNA became the representative of the RNs employed by the Hospital shortly thereafter.

This case revolves around the following language in Article 5 of the Agreement:

If on-call duty is not a part of a nurse's confirmed employment understanding, on-call shall not be newly assigned to any nurse on a unit where on-call assignment has not been an established practice.

The Union's claim is that, for those units that have not had call as an "established practice," the Hospital cannot assign any nurses to scheduled on-call.

In some care units the RNs for a number of years have been on-call. Neither of the Union's grievances is directed towards these units. The Union filed the grievances to challenge the Hospital's decision to expand on-call to any of the other patient care units to Labor & Delivery.

Various units did not have on-call assignment as an "established practice." That is why the Hospital, for those units, posted positions that included on-call as part of the position, exceeding through the posting and acceptance process that scheduled on-call would become part of their work agreements.

The terms of the nurse's work agreement were included in the posting for those particular positions. The job postings for staff nurse positions include the following details:

- The patient care unit;
- The number of authorized hours (e.g., 64 hours or .8 FTE);
- The shift (e.g., days, nights, rotating days and evenings, or rotating days and nights);
- The shift length (e.g., 8 hours or 12 hours);
- The weekend rotation (e.g., every other weekend or every third weekend); and
- Whether the position includes on-call.

When a nurse applies for and accepts a posted position, that nurse has a new work agreement. The terms for the nurse's new work agreement can be ascertained by reviewing the details that were specified in the posting. When a nurse applies for and accepts a new position, he/she has a new work agreement, matching the terms described in the posting. The Hospital considers that the nurse has voluntarily consented to the terms of the new work agreement.

During the summer of 2009 the Hospital determined to use scheduled call as the means to ensure that an additional nurse was on standby as needed. The Employer brought this decision to the Union for discussion prior to moving forward. The parties held three meetings on this topic prior to August 1, 2009, when the Hospital sent the posting to the Labor & Delivery nurses.

- The Hospital advised the Union that it wanted to attach on-call to two new positions that would be posted in Labor & Delivery important.
- The Union took the positions that, because on-call had not been an "established practice" in Labor & Delivery, the Hospital could not move forward with this plan.
- The Union argued that the Employer should take alternative steps to bring in additional nurses when faced with the need to do so.
- The Union suggested that the Hospital should conduct a pilot program of voluntary call. The Hospital agreed to this proposal. The pilot program commenced on June 1, 2009 and lasted for six weeks. During this period, on-call slots were placed on the preliminary schedule and remained posted, so that the Labor & Delivery nurses could sign up to take them. Over the course of the six week pilot, not a single nurse signed up for an on-call slot. This was not the first time that Labor & Delivery conducted a program of voluntary call. In the fall of 2008, a six week pilot was conducted in the very same manner with similar results.
- The Union stood by its position that the Hospital could not post the two Labor & Delivery positions with scheduled on-call. The Employer did so.

On August 1, 2009, the Hospital sent the internal position posting to all of the RNs on the Labor & Delivery unit. In relevant part, the posting provided as follows:

These are the two positions available:

.5FTE, 10 hour shifts starting at 0900-1930. Weekend 1, 3 and 5 Off Premise
ON-CALL from 0700-1530 Saturday and Sunday

.5FTE, 10 hour shifts starting at 0900-1930. Weekend 2, 4 and 6 Off Premise
ON-CALL from 0700-1530 Saturday and Sunday

If you would like more information on what OFF Premise ON-CALL is, please refer to you[r] MNA contract for pay and details.

*** The Off Premise ON-CALL positions on the weekend are to address the high peak volume that may walk through the door from triage and need to be admitted. Having someone available to the unit on a scheduled ON-CALL basis allows for safer staffing and increased patient and physician satisfaction as well.

Nine RNs expressed interest in these two positions as posted. The positions were awarded to the two most senior bargaining unit RNs who applied – Katie Grimm and Brenda Kassel.

The posting included the details that make up a confirmed employment understanding including the authorized hours, the shift and shift length, the weekend rotation, and the fact that the positions included on-call.

RELEVANT BARGAINING HISTORY

Tom Vogt began representing various Twin Cities hospitals (including Fairview Southdale) in the mid-1960s. The negotiations between these hospitals and MNA were conducted on a multi-employer basis from sometime in the 1960s at least through the 1995 negotiations. The multi-employer group included Fairview Riverside, North Memorial Medical Center, the HealthEast hospitals, and the Allina hospitals.

The language relied upon by the Union in support of its grievance was added to the parties' Collective Bargaining Agreement as the result of the 1987 negotiations. A comparison between the previous contract (7/9/84-5/31/87) and the successor contract (6/1/87-5/21/89) reveals the following about the outcome of the 1987 negotiations:

- There was no separate article devoted to on-call in the 1984-87 contract. During the 1987 negotiations, the parties agreed to create a new article devoted to on-call duty, which became Article 5 in the 1987-89 contract.
- Prior to the 1987 contract, there was no restriction that limited the assignment of on-call duty to bargaining unit nurses. During the 1987 negotiations, the parties agreed to add the key language.
- The confirmation-of-work-agreement language was also added to the contract as the result of the 1987 negotiations.

Vogt was the chief spokesperson for the hospitals during the 1987 negotiations. Karen Patek was the chief spokesperson for the Union during the 1987 negotiations. The accounts provided by Vogt and Patek largely line up with respect to the manner in which the proposals leading to the adoption of the relevant language.

The Union initiated the discussions surrounding this topic by including the following proposal among its March 3, 1987 list of initial proposals:

That on-call duty not become a part of a nurse's normal work schedule without consent of the nurse, and that regularly scheduled on-call duty newly added to a nurse's work assignment subsequent to June not continue without consent of the nurse.

The parties did not exchange another proposal on this topic until May 10, 1987, when the Union presented the following proposed language:

If on-call duty is not a part of a nurse's confirmed employment understanding, the nurse shall not be assigned on-call duty unless mutually agreed between the nurse and the Hospital.

The Union was, therefore, still pushing the baseline rule that on-call duty could not be assigned to an RN unless there was mutual agreement between the RN and the hospital.

On May 12, 1987, the management bargaining team made the following counter-proposal:

If on-call duty is not a part of a nurse's confirmed employment understanding, the nurse shall not be assigned scheduled on-call duty on a general medical/surgical unit unless mutually agreed by the Hospital and the nurse.

The Hospitals picked up the same introductory language – “[i]f on call duty is not a part of the nurse's confirmed employment understanding” – to serve as the exception to the restriction that followed. However, the hospitals proposed a different baseline rule. The hospitals were only willing to live with a “mutual consent” requirement, if that requirement was limited to “general medical/surgical units.” The hospitals were working off of the same structure that had been proposed by the Union, and under that structure, the hospitals now assert that authority to make on-call a part of the RN's work agreement as an exception to the proposed restriction that followed the introductory language.

Later on May 12, 1987, the Union presented a modified proposal:

[If on-call duty is not a part of a nurse's confirmed employment understanding, the nurse shall not be assigned scheduled on-call duty on a general medical/surgical unit unless mutually agreed by the Hospital and the nurse.] The previous sentence notwithstanding, on-call shall not be merely assigned to any nurse on a unit where on-call assignment has not been an established practice affecting a majority of nurses in that unit.

Thus, the Hospital claiming the proposed language included the principle that an RN could be assigned to on-call, if call was part of the nurse's work agreement.

The hospitals countered by proposing the language that would end up in the contract. This became the parties' agreement contained in the 1987-89 contract:

If on-call duty is not part of a nurse's confirmed employment understanding, on-call shall not be newly assigned to any nurse on a unit where on-call assignment has not been an established practice.

This language has not changed since the conclusion of the 1987 negotiations.

Several years ago, the Employment implemented mandatory call for RNs working in the Endoscopy unit. The Union in that case did not grieve the implementation of mandatory call for the relevant group of Endoscopy nurses.

The Union was aware of what was happening in Endoscopy at the time. According to HR Representative Heckmann, MNA Representative Jean Ross told him that the Employer could not add on-call to the new positions in Endoscopy. Cindy Kroos met with the nurses in Endoscopy about the issues. The Union did not grieve because the nurses in Endoscopy had set up a voluntary rotating system to handle on-call and chose not to change this situation. Employer included on-call as part of the work agreements for nurses hired into new positions, or the fact that the Employer began to require that the nurses on the unit take on-call hours.

POSITION OF THE MNA

On July 24, 2009, MNA filed the written Step 2 grievance opposing the unilateral posting of mandatory on-call duty in a unit in which it was not an established practice. Because of concern that mandatory on-call would be expanded beyond Labor & Delivery, the grievance was crafted to embody "Labor & Delivery nurses and any other similarly affected nurses," and was broadly framed:

The basis of the grievance is that the hospital intends to post positions with mandatory on-call as a requirement in a unit that does not have mandatory on-call as an established practice...

The Minnesota Nurses Association asks that the hospital follow the contract and not post positions that have mandatory on-call in a unit that does not have mandatory on-call as a practice and make whole any and all nurses for any loss including, but not limited to, wages and benefits.

Fairview Southdale responded on September 21, 2009:

The Hospital asserts that these are "new positions" which have been posted and adding mandatory on-call duties not changing a "nurse's confirmed employment understanding." Since these are new positions, as opposed to existing, the Hospital is not newly assigning mandatory on-call. On the contrary, those applying for these new positions accept the mandatory on-call as part of a new employment understanding and for that reason, the Hospital believes no violation has occurred and respectfully denies the grievance.

Thus, the Hospital relies on the presumption that anyone who would apply for a position posted with on-call is accepting mandatory on-call. On September 24, 2009, MNA filed its request for arbitration.

At each step in the grievance process, MNA asserted that mandatory on-call was a term and condition of employment that could be changed only through contract negotiations, and invited Fairview to bring the subject into the 2010 negotiations. The Hospital never responded to this position, and failed to bring the subject forward in the 2010 collective bargaining.

Based on management's early reference to "thinking about future postings" MNA was deeply concerned about the potential "creep" of mandatory on-call beyond the units in which it was an established practice. This had been the very concern leading to the contract language in the first place. MNA sought assurances from management that this was not the Hospital's intent and that the posting of mandatory on-call would be limited to the two positions in Labor & Delivery, and Senior Human Resources Representative Robb Heckmann gave such an assurance, specifically stating, "It is not our intent to attach call to other areas."

In March 2010, for the first time some postings for positions with mandatory on-call appeared that were outside areas where it had been an established practice. MNA representative Jeanne Delie went to Robb Heckmann's office and confronted him about his promise not to institute mandatory on-call in other areas. His response: "Things change." By the end of March 2010, every single nurse position posted included mandatory on-call duty. The pattern is clear: the Hospital is hiring only part-time nurses and using on-call duty to fill the gaps, making them "yo-yo" nurses.

MNA received many complaints about mandatory on-call from Fairview Southdale nurses. This is reflected in the MNA e-mail sent to members seeking information about the job postings.

Foremost was the complaint that nurses who agreed to take positions with "on-call" in the posting were misled by the Hospital. They were told that they could schedule on-call shifts at their own discretion as to what worked for them.

The Hospital's imposition of mandatory on-call was not based on mutual understanding.

Mandatory on-call shifts scheduled at management's discretion burden nurses' personal lives. Nurses with young children have to bear the burden of paying for child care when they are on call, whether they are called in or not, or have to find babysitters to cover them for random on-call night shifts. Nurses with other commitments outside work, such as school or clinicals, or who have to pull night-shift on-call duty, find their lives and schedules in turmoil. The institution of mandatory on-call may "help" the Hospital, but it is at the expense of nurses' personal lives and their morale, not to mention patient safety.

Some bargaining unit members find themselves compelled to take positions with mandatory on-call duty attached – because they have to change their positions for such personal reasons as needing to adjust their hours, and there are no positions posted without it. Nurses'

only option may be to not make the change they needed, or to take the position and refuse to accept mandatory on-call. Neither of these are acceptable options, and demonstrate the importance of Section 5's "mutual understanding" limitation.

MNA recognizes the Arbitrator's statement to limit his decision to the grievance involving Labor & Delivery. MNA, however, requests that he reconsider in light of the broad language of this grievance.

By unilaterally incorporating mandatory on-call duty in postings for nurse positions in units where call was not an established practice, Fairview Southdale Hospital is trying to circumvent the parties' original intent as reflected in negotiations, 22 years of past practice, and the industry custom and practice among the signatory Twin City Hospitals. Fairview Southdale's unilateral postings in Labor & Delivery and in virtually every other unit since is an action never intended to be permissible under Section 5. It is action which Fairview Southdale attempted before and which MNA consistently and successfully opposed since the contract language went into effect in 1987. Section 5 of the contract does not give Fairview Southdale the right to eviscerate the intent and the practice through the fiat of unilaterally declaring and posting mandatory on-call in positions outside units where it has been an established practice.

Pressure to cut costs in the mid-1980s caused MNA concern that the Twin City hospitals would cut back on the needed staffing. In an effort to protect its members from such encroachment, the MNA proposed language to limit the use of mandatory on-call. A new on-call provision was added to the 1987 contract.

The first paragraph of the new on-call provision states its overarching principle: "On-call duty will not be used as a substitute for scheduled on-duty staff in those areas where there is a pattern of consistent and continuing need." This is especially true for those units in which on-call had not been an established practice. This paragraph sets forth the general principle that mandatory on-call could not be used to supplant nursing staff – that those units in which it was not an established practice will staff efficiently to meet patient care needs without imposing mandatory on-call.

Both the MNA and the Twin City hospitals recognized that there were some units in which mandatory on-call had been an established practice. The parties agreed that these established areas were OR and peri-op units. The concession made by MNA was that the hospitals could impose mandatory on-call duty on nurses only in those units in which it had been an established practice. In all other units, mandatory on-call had to be only by the agreement of the nurse. If a nurse didn't want mandatory on-call, she could refuse without recrimination.

At this juncture, the parties disagree over the term "employment understanding." The MNA has always interpreted this to require informed, uncoerced consent, coupled with the ability to refuse. Fairview interprets "employment understanding" to encompass any unilaterally conceived job posting, offering no real choice to nurses: take it with mandatory on call, or leave it.

This fundamental disagreement renders the language ambiguous. Because it is unambiguous, its intent must be discerned by examining the bargaining history, the past practice between the parties, and the industry practice among the Twin City hospitals who agreed to the identical contract language.

Nurses working in units where mandatory on-call is not an established practice can be assigned mandatory on-call duty only by mutual agreement. For such agreement to have any meaning at all, it cannot be imposed by fiat. Unilaterally declaring such positions as requiring acceptance of on-call assignments removes the essential element of choice.

The Hospital argues that nurses can choose not to apply for these on-call positions, but that begs the question. If Fairview is allowed to characterize any new position to require on-call, the result is coercion. Nurses who do not (or cannot) consent to on-call duty are excluded from any new position – any opportunity for advancement, for a different shift or for a change in their hours. Nurses do not have the option to say, “I will take that position, but without mandatory on-call duty.” It is unilateral, not consensual in any meaningful sense of the word.

By unilaterally posting positions with mandatory on-call duty, Fairview Southdale is violating the practice in the industry among the very hospitals who were at the bargaining table when this language was negotiated. Under the same contract language, mandatory on-call is limited to the units in which it has been an established practice, principally the OR and peri-op units. Nowhere else has mandatory on-call been instituted in a unit outside those in which the hospital and MNA agree that it has been an established practice.

Evidence of industry custom and practice is a guide to determining the intended meaning of an ambiguous contract provision – especially where the same agreement was bargained between the Union and several employers.

Twenty-two years of consistent practice involving Section 5 demonstrates the parties’ agreement that mandatory on-call would not be imposed outside those units in which it had been an established practice. MNA confronted Fairview Southdale management on threatened inclusion of mandatory on-call duty in confirmed employment understandings in the past and Fairview Southdale agreed not to engage in such practice.

The Hospital argues that his 22 year past practice has been altered by the institution of on-call in a few departments in the few years preceding this grievance (most notably, Endoscopy). In face, this example represents no change in that practice.

As for Endoscopy, mandatory on-call has never been instituted. Rather, the nurses among themselves have worked out a voluntary system by which no one ever is assigned on-call. They choose their own on-call shifts, and coverage is achieved without mandatory assignment. MNA has never considered such a voluntary system to be inconsistent with Section 5. Indeed, when Fairview Southdale first proposed to add on-call duty to the two positions in Labor & Delivery, both parties considered a voluntary system such as that in Endoscopy in lieu of imposing mandatory on-call.

Even if this example were considered to be inconsistent with past practice, they do not rise to the level of overturning 22 years of otherwise consistent past practice. To be persuasive as an indicator of the parties' intent, past practice need not be perfectly uniform. It is sufficient if the practice is the predominate pattern that is longstanding, well-known, and accepted or acquiesced in by the parties. Even if Endoscopy were considered to be a departure from past practice, in light of 22 years of consistent practice, it amounts to nothing more than a "scattered exception."

The only arbitration of a dispute concerning Section 5 involved the operating room at North Memorial Medical Center. In that case, the issue was whether the employer violated Section 5 of the contract when it assigned mandatory on-call duty to nurses working in the operating room, a unit in which mandatory on-call was an established practice. That case presented an entirely different issue and denial of the grievance has no relevance to the case at hand. Indeed, if anything, that Award reinforces the parties' understanding that mandatory on-call was appropriately confined to areas in which it was an established practice.

In the present arbitration, Fairview Southdale introduced not only the Arbitration Award, but also MNA counsel's post-arbitration brief in that case. While the relevance of that brief is questionable, Fairview Southdale may point to a footnote, suggesting that the employer should have notified nurses through postings of the on-call assignment. This footnote is meaningless in the case before this Arbitrator, because it refers only to postings for nurse positions in the operating room where mandatory on-call was an established practice. The footnote does not even suggest that unilateral posting outside such established practice units would be an acceptable means of utterly circumventing Section 5's requirement of nurses' consent.

Fairview Southdale is creating the very condition which gave rise to the negotiation of Section 5 back in 1987: keeping bare minimum of staffing and relying on regularly scheduled nurses to work above their agreed number of shifts to meet workload demands – "yo-yo nurses." The language negotiated in 1987 was intended to protect nurses from this fate, and to prevent the spread of on-call nurses working in units where it was not an established practice.

If Fairview Southdale is allowed to require on-call in any new position, it logically will lead to evisceration of Section 5 in its entirety. With each job newly requiring mandatory on-call duty, eventually the Hospital unilaterally could manufacture mandatory on-call duty as established practice not just in the "established practice" units, but in all of them. Then, even the pretense of "consent" would evaporate.

For all of the reasons set forth above, MNA respectfully submits that Fairview Southdale's postings of nurse positions with mandatory on-call in units where it is not an established practice violates Section 5. The Union respectfully requests that the grievance be sustained and that mandatory on-call be removed from the postings and confirmed employment understandings of nurses working in units where mandatory on-call is not an established practice.

POSITION OF THE HOSPITAL

Article 5 of the Agreement provides that on-call duty can become a part of a nurse's confirmed employment understanding, even if on-call assignment has not been an established practice on that unit.

The unambiguous language compels the conclusion that the Employer's interpretation is correct. Although the term "established practice" does not appear in the key sentence of Article 5, the Union's purported interpretation of this sentence is simply wrong. The language states that, if on-call is not part of the nurse's work agreement – and on-call has not been an established practice on the unit – then that nurse cannot be required to take call. It necessarily follows that, if on-call duty is part of the nurse's work agreement, then the Employer may schedule the nurse for call, even if on-call has not been an established practice on that unit. Simply put, if on-call is part of the nurse's work agreement, then that is an exception to what might otherwise be a prohibition against scheduling that nurse for call based on whether or not on-call has been an established practice on that unit.

The key provision establishes that there are two alternatives for newly scheduling or assigning a nurse to on-call duty – (1) if on-call is part of the nurse's work agreement, or (2) if the nurse is working on a patient care unit where on-call assignment has been an established practice. There are plainly two separate options for scheduling call authorized by the key sentence.

Those units where on-call assignment has been an established practice, the Employer would have the right to assign call to all nurses, i.e., even those nurses who do not have on-call as part of their work agreement. Therefore, the introductory phrase is completely meaningless as to the nurses working on units that do have on-call as an established practice. Given that the Hospital would have the right to schedule all nurses for call in units where call has been an established practice the significance of the introductory phrase becomes undeniable. Thus, including on-call as part of the work agreement is a separate and distinct option for assigning nurses to call, independent from the ability to assign call to those nurses working on a unit where call has been an established practice.

The Union's interpretation of the language completely ignores the introductory phrase. The Union has argued that, because Labor & Delivery did not have on-call as an established practice, the two nurses who accepted the posted positions cannot be scheduled for call. The Union would have the introductory phrase not exist, as if the language provided as follows:

...On-call shall not be newly assigned to any nurse on a unit where on-call assignment has not been an established practice.

Of course, there is no basis whatsoever for ignoring the introductory phrase. In fact, to do so would run afoul of the most basic rules of contract interpretation.

Notably, the Union has not offered any other explanation as to the purpose for, or meaning of, the introductory phrase. There is no other explanation.

Given that the language is plain and unambiguous, the analysis of this issue should be concluded. If, nevertheless, the contractual language is deemed ambiguous, it would be helpful to examine evidence of the parties' intent and the bargaining history confirms the Employer's interpretation. The bargaining history, described above, supports the Hospital.

The Union initially proposed the introductory phrase on May 10, 1987:

If on-call duty is not a part of a nurse's confirmed employment understanding, the nurse shall not be assigned on-call duty unless mutually agreed between the nurse and the Hospital.

As a baseline rule – on-call duty could not be assigned to an RN unless there was mutual agreement between the RN and the Hospital. However, under the Union's own proposal, there was an important exception to the rule: Mutual consent would not be required, if on-call duty was part of the RN's confirmed employment understanding. Including on-call as a part of the RN's work agreement was a proposed exception to the restriction that followed of the confirmed-employment-understanding phrase (i.e., mutual agreement). There is no other plausible explanation for the purpose and effect of the introductory phrase.

The parties were always working off of the structure of the Union's May 10, 1987 proposal. Each back-and-forth proposal contained the introductory phrase ("if on-call duty is not a part of a nurse's confirmed employment understanding"), followed by language that would restrict management's ability to schedule mandatory call for nurses who did not have call as part of their work agreement. The Union demanded a stringent rule of "mutual consent" and this became less and less restrictive, until the parties landed on the language referring to "any nurse on a unit where on-call assignment has not been an established practice."

In summary, when the Union proposed "mutual consent" as the baseline proposal on May 10, 1987, this was accompanied by the introductory phrase, "if on-call duty is not a part of a nurse's confirmed employment understanding." The introductory phrase cannot be viewed as anything other than an exception to the proposed baseline requirement of "mutual consent." Given the circumstances, it is readily apparent that, during the bargaining process, including on-call as part of the nurses' work agreement was always treated and construed as an exception to the baseline rules. There is no basis for concluding that, when the parties landed on the baseline rule that made it into the contract (i.e., "any nurse on a unit where on-call assignment has not been an established practice"), they somehow intended for the introductory phrase to operate in some other manner.

If the contract language and bargaining history were not enough, it is noteworthy that there is no past history of contract administration to undermine the Employer's interpretation of the Agreement. In fact, the past administration of the contract affirmatively supports the Employer's position as to the only possible meaning for the key language in Article 5.

Most notably, in late summer of 2004, the Hospital began including on-call as part of the work agreements for nurses taking new positions in Endoscopy. The documentation that

confirms that the new position identified that call was part of the position. Moreover, there were other nurses who accepted new positions in Endoscopy that included on-call. The Union never grieved.

While these nurses were able to collaborate and get all of the required slots covered without management needing to dictate who would take call on what days, this does not affect the crucial details, which are (1) that management dictated that nurses would have to fill call slots and (2) through the process of including on-call as part of the work agreements for new positions on the unit. The only difference between that case and the situation involving the affected nurses in Labor & Delivery is that, in Endoscopy, the nurses collaborated to make sure that the required call slots were covered, whereas in the current case, the scheduling is handled differently. This does not change the fundamental fact that the Employer's decision to post positions that included on-call as part of the position was the catalyst for the implementation of scheduled call for Endoscopy.

As discussed above, the key sentence in Article 5 provides that the Hospital can schedule a nurse for call if on-call is part of the nurse's work agreement, even if on-call has not been established practice in that nurse's unit. The only remaining question is whether on-call has, in fact, become part of the affected nurse's work agreements. The answer to this question is "yes," and the grievance must be denied as the result.

At the outset, it cannot be overemphasized that the Employer has not unilaterally changed any nurse's work agreement to include an on-call component. In other words, the Employer did not unilaterally advise a single nurse that his/her existing position has been changed to include scheduled call hours. Rather, on-call has become part of the affected nurses' work agreements as the result of voluntarily applying for and accepting new positions. It is precisely through the posting and acceptance process that the various terms for any given nurse's work agreement are set.

One of the terms that makes up the work agreement is whether the position includes on-call. With respect to the composition of the work Agreement, Article 4(F) of the Agreement provides as follows:

F. Confirmation of Work Agreement:

The Hospital shall provide the nurse with written confirmation of the nurse's employment understanding. This confirmation shall include her or his salary and increment level, including the credit assigned for such prior work experience, the number of hours per payroll period for which the nurse is being employed, and shift rotation to which the nurse will be assigned. This confirmed employment understanding shall not be changed without consent of the nurses.

Although Article 4(F) does not specifically identify "on-call" as being included within the nurses' work agreement, the introductory phrase in the key sentence of Article 5 does specifically state that "on-call duty [can be] a part of a nurse's confirmed employment understanding."

It is undisputed that the terms of the nurse's work agreement are driven by the elements of the position as identified in the posting for that particular position. When a staff nurse position is open, the details for the position are posted, so that the nurses can determine whether they wish to apply. Thus, the job postings for staff nurse positions include the patient care unit; the number of authorized hours (e.g., 64 hours or .8 FTE); the shift (e.g., days, nights, rotating days and evenings, or rotating days and nights); the shift length (e.g., 8 hours or 12 hours); the weekend rotation (e.g., every other weekend or every third weekend); and (as established above) whether the position includes on-call.

When a nurse accepts a posted position, that nurse has a new work assignment. The terms for the nurse's new work agreement can be ascertained by reviewing the details that were specified in the posting. When an RN applies for and accepts a new position, the nurse now has a new work agreement matching the terms specified in the posting.

It is notable that MNA has in the past specifically stated that on-call becomes part of a nurse's work agreement through the process of posting new positions to include call. In the 1997 case involving North Memorial Hospital, MNA argued that – even though the Operating Room as a whole had scheduled on-call as an established practice – certain individual nurses on that unit who had not been taking call could not be forced to do so, inasmuch as on-call was not part of their work agreement. On brief, counsel for MNA (who is MNA's designated representative in the instant matter) attempted to take North Memorial to task for not including on-call as part of the “posting requirements” or “job advertisements.”

In the North Memorial case, MNA went on record to state that, in order to make on-call part of the work agreement, the employer only needed to “change[] their posting requirements noting that nurses may have additional call responsibilities for new jobs.” In fact, according to the Union's brief, MNA actually proposed to North Memorial that it should just “change posting requirements and work agreements” for nurses taking new jobs, but the employer ignored this proposal and still did not mention on-call as part of “recent job advertisements.” To the extent that MNA has completely reversed its position in this case, the Union has offered no explanation for its about face.

In summary, the key language in Article 5 plainly provides that on-call duty is one of the features comprising a nurse's confirmed employment understanding. The evidence adduced at the hearing unequivocally established that it is through the posting and application process that the terms of a nurse's work agreement – including whether on-call is part of the work agreement – are set.

In this case, the 8/1/09 Labor & Delivery job posting identified the fact that on-call would be part of the positions, and on-call became part of the two nurses' work agreements upon accepting these jobs. When the two nurses applied for and accepted these positions, on-call became part of their work agreements.

The Union argues that on-call could not become a part of any nurse's confirmed employment understanding, unless the nurse consented to the call under some sort of “knowing”

and “truly voluntary” standard. The Union never did articulate what would be required to meet this standard. The Union cannot succeed in its attempt to create such a standard out of thin air.

Moreover, the issue in this case pertains to the two Labor & Delivery positions, and as to those two positions (and the nurses who accepted them), the Union’s position is completely off the mark. Given the contents of this posting, the nurses who accepted these positions were well aware of the nature of the on-call component. The Union did not even call Grimm or Kassel to testify at the hearing. In these circumstances, there is no basis whatsoever for the Union to argue that they did not voluntarily agree to their new work agreements with the on-call component.

Even if the creation of new positions to include scheduled call were subject to a reasonableness test, the Employer has acted reasonably in this case. Prior to even posting two Labor & Delivery positions, the Hospital attempted to sit down with the Union and address the issues. The Hospital, in fact, agreed to hold off on implementation while it attempted to try a potential solution proposed by the Union, i.e., the pilot program of voluntary call. It was only after the parties held three meetings to discuss the topic that the Hospital finally went forward with the posting on August 1, 2009.

As for the substance of the Employer’s decision, it is impossible to predict where there might be a sudden and unexpected increase in the number of expectant mothers arriving at the Hospital. By having someone on-call, it is guaranteed that a nurse is on standby and this naturally contributes to safe patient care and reduced stress levels for the nurses who are on-duty. The fundamental point is that having a nurse on-call is a beneficial tool to deal with an unexpected increase in patient volumes.

The Hospital has in recent years experienced increased volatility in patient census, and having a nurse on-call is a means to be prepared for those occasions. Nursing can be a stressful job, and stress levels are eased if the nurses on the unit know that another nurse is standing by in the wings. Patient care units are actually closed due to inadequate staffing but having an on-call nurse come in relieves the pressure, keeps the patients moving from the emergency room to other units. From the standpoint of being good stewards of health care dollars – especially in today’s environment – the Hospital cannot justify paying nurses to be onsite waiting for patients to possibly arrive. Obviously, it cannot be said that the Employer has acted rashly or without justification in this case.

DISCUSSION AND OPINION

MNA’s grievance in this matter is, hereby, sustained in part and denied in part. In the first instance, the grievance has merit in regard to the Union’s correct interpretation in the dispute language as discussed in the following part. In like manner, the reasons for denying the grievance, as regards the named two Grievants, will be fully detailed after the interpretive issue is thoroughly reviewed.

As to the issue of whether the collective bargaining agreement confers on the Hospital the authority in Article 5 to include an on-call requirement in its position postings, the short answer

is that it does not. The MNA view of the intention of the Article bargain on mandatory on-call is firmly supported on several grounds, including bargaining history,¹ industry practice, the parties' past practice, and the interpretive principle of avoiding a nullity, each of these will be covered seriatim.

- Bargaining History. It remains undisputed that essentially the same language as now appears in Article 5 was proposed by MNA in negotiations for the 1987 collective bargaining agreement. The several hospitals including Fairview Southdale knew, or reasonably should have known, that the intent and purpose of this initiative was to restrict and to limit the authority to expand the requirement of mandatory on-call as a condition of a nurse's employment.

Arbitrators essentially serve as surrogates of the parties, charged with the responsibility for discerning the intent and purpose of the bargain. There should have been no doubt in the minds of any representative of the hospitals party to the bargain expressed in the language of Article 5 that its announced intent was not to expand but rather to purposefully restrict the spread of mandatory on-call requirements beyond those units where established practice permitted such requirement.

That express purpose and intent, captured in the language of Article 5, is in this case presented by Fairview as grounds for the very extension of the mandatory on-call the bargain was intended to restrict. In sum, the Hospital's position in this case virtually turns the intent of the disputed provision on its head.

This Board of Arbitration recognizes the strong argument presented by the Hospital that the language of Article 5 nowhere prohibits it from posting the requirement of on-call as a condition for filling any vacancy. Any nurse who subsequently bids for such posting thereby meets any contractual test of mutual agreement to the terms and requirements described on the posting.

As logical as this line of argument may seem, however, the force of other indicia of contractual intent and purpose must prevail. Specifically, the following "sources of enlightenment" proves more persuasive:

- The Parties' Past Practice. The historical record covering a 22 year period shows a consistent management implementation of Article 5 that accords with the MNA position in all particulars save perhaps with a single arguable exception in Endoscopy. Some seven years after entering Article 5 into the labor contract, the Hospital imposed mandatory on-call in the Endoscopy unit. The nurses affected by this action did not grieve.

The Hospital now asserts that MNA acceded to its imposition of on-call in that unit. This assertion lacks merit. The undisputed facts of this situation reveal that by the time an MNA representative visited these members to determine their wishes, the Endoscopy nurses had

¹ Justice William O. Douglas advised in the *Steelworkers' Trilogy* (1960) that arbitrators should "consult other sources of enlightenment than the sparse language of the labor contract to best resolve disputes over the intent and purpose of an agreement." See "The Trilogy at 50-Foundation for the 21st Century," William Gould, National Academy of Arbitrators, 2010 Annual Meeting.

already put in place a voluntary rotation system to deal with the matter and did not want to pursue formal grievance action.

In effect, these nurses chose to waive their Article 5 rights in this instance. It should be duly noted in this regard that, like any other member of the bargaining unit, an individual may waive any contractual right or benefit to which they are entitled. Any and all such waivers, however, cannot bind or impair the contractual rights of co-workers to that same entitlement.

As a matter of law, only the exclusive bargaining representative, i.e., the MNA owns the collective bargaining agreement as regards to the power to waive pursuit of remedy for any putative violation of contract. Even then, this authority is not unfettered as any union that chooses not to pursue grievance challenge to an apparent contract violation risks a potential membership charge of failure of fair representation.

For the foregoing reasons it cannot be said that MNA had effectively waived its Article 5 claims or acceded to the Hospital's imposition of mandatory on-call in Endoscopy or any other unit.

The Hospital argues further that its increased reliance on mandatory on-call results from the volatility and unpredictability of the patient census in labor and delivery care. The Hospital produced no evidence to show that the historical pattern of variability in pregnancies in the wider population in general or in the metro area specifically has changed so markedly as to justify a departure from its 22 year on-call staffing practices. Save and except for the non-precedential situation in the Endoscopy unit the Hospital has for a period sufficiently long to qualify as a binding past practice, remained in line with the MNA interpretation of its Article 5 on-call restrictions.

- **Industry Practice.** For purposes of this review, the effective definition of the "industry," for like-situated comparison, consists of the 12 metro area hospitals that are signatory to the same collective bargaining agreement as Fairview Southdale. It remains uncontroverted by any reliable evidence to the contrary that all of these other hospitals, covered by the same Article 5 terms as Fairview Southdale, have handled their nurse staffing in a manner consistent with the MNA version of contractual limitations on mandatory on-call.

The Hospital argues correctly that nothing in the hearing record shows that this pattern of industry practice developed due to the terms of Article 5. This line of argument fails in light of the fact that the Hospital made such a convincing case that its disputed on-call staffing practice produces both better health care results and cost savings.

While the MNA industry practice does, in fact, rely on circumstantial rather than direct evidence, it must be recognized that as Marvin Hill and Tony Sinicropi advise in their respected treatise Evidence in Arbitration² "circumstantial evidence can be a fully probative device."

² BNA Series on Arbitration, Washington, DC (1980).

The authors go on to observe that the probative value of circumstantial evidence depends on the strength of the inferences that can be drawn from such evidence, i.e., the logicity and reasonableness of the selected inference over others which can also be drawn.

In the present case, the compelling inference to be drawn from the observed on-call practices of all other hospitals in the metro industry practice is that each and all have deliberately and knowingly determined to conduct on-call decisions in compliance with Article 5 limitations. This conclusion necessarily follows from the logical surmise that since the benefits of flexible on-call in cost savings and improved health care delivery are so obvious as to the administrators at Fairview these same benefits must be equally obvious to health care delivery professionals at the other hospitals in the metro industry sample.

The only reasonable inference to be drawn from these realities must be that the other metro area hospitals do not pursue the flexible on-call benefits claimed by Fairview Southdale is an industry wide recognition of the contractual limitations on mandatory on-call contained in Article 5. Thus, Fairview Southdale stands as virtually the sole outlier in the metro hospital industry in rejection of MNA's interpretation of that provision.

The Hospital continues to pursue the assertion that by including the mandatory on-call feature in its posting, the "R.N. who accepts the posted position follows on the heels of the confirmed employment understanding phrase" (mentioned in the introductory phrase of the disputed provision). Implicit in this line of argument is the Hospital's proposition that the MNA is wrong to equate the terms "confirmed employment understand" with any concept of mutual consent.

Returning to the role of industry standards in construing of common contract language, again, if all the other hospitals treated the requirement of confirmed employment understanding as Fairview Hospital proposes in this case, it must be assumed that each and all would in like fashion cast off the Article 5 limitations on mandatory on-call and secure the vaunted benefits of greater flexibility claimed by Fairview. No other hospital in the Metro group subject to Article 5 has done so.

- Standard Principles of Contract Interpretation. Among the well established guides to correct interpretation of contract language in dispute is the rule that "contracts must be read as a whole so as to give force and effect to their various parts and, thereby, to avoid any nullity."³ Simply stated, this interpretive principle is commonly understood to mean that arbitrators should avoid any interpretation that would render any contract language meaningless.

Application of this principle of interpretation to the competing positions of MNA and the Hospital it can be readily seen that only the MNA interpretation of Article 5 provides force and effect to all parts of Article 5, i.e., that the Hospital can add a mandatory on-call requirement to any position where such feature already was part of established practice on the unit, or where a nurse reaches a "confirmed employment understanding" with the Hospital to accept the on-call feature, i.e., a mutual consent, process.

³ See Chapter 9 Standards for Interpreting Contract Language in Elkouri and Elkouri, How Arbitration Works, BNA Series on Arbitration, Washington, DC (4th ed., 1989).

By contrast, the Hospital's interpretation that the "confirmed employment understanding" means merely an effective communication of the position requirements of a nurse who then signs off that she recognizes and acquiesces to the on-call feature. This interpretation ignores the obvious fact that MNA proposed this language for the stated purpose of protecting nurses from unilateral imposition on-call requirements and not simply to make sure a nurse understood that mandatory on-call was being imposed as a condition of accepting a new position.

The Hospital vainly seeks to remove from the introductory phrase of the disputed provision any sense of mutuality in the process of offer, negotiation, and finally, confirmed understanding in filling vacancies where on-call does not exist as an established practice.

The Hospital argues that if the intent of the bargain was to install the concept of mutual consent into Article 5, MNA should have made this clear when it crafted its proposed language. Its failure to do so, argues the Hospital, should be held against its proffered interpretation in this case.

Arbitrators rarely apply the principle that any ambiguity in the language of a contract should be construed against the party who proposed the terms in dispute. This interpretive principle only has merit where it can be shown that the objecting party has been somehow injured or disadvantaged by its good faith reliance on misleading language authored by the other. Perhaps MNA could have and should have crafted the terms confirmed employment understanding in words more descriptive of its intent when proposing the disputed provision.

The Hospital, however, has not shown that it relied on some misunderstanding of the intent of these words to its injury over the past 22 years where it, with a simple possible exception, applied Article 5 consistent with the MNA interpretation of its purpose. Absent some evidence of harm through misguided reliance on ambiguity arising from faulty worded proposals, the concept of forfeiture against the proposer has been largely rejected by most courts and arbitrators.

While the Hospital's interpretation lacks merit because it would drain any significant meaning from the terms "confirmed employment understanding," thus nullifying their 22 year long accepted intent, it is the latter part of the disputed provision where its interpretation would require the Arbitrator to actually excise from the provision the words "established practice."

The "established practiced" test constituted a major exception to restriction of mandatory on-call. There can be no doubt over the express intent to retain mandatory in any and all units where it already existed as an "established practice."

Again arbitrators are expected to give force and effect to all parts of an agreement and to avoid any interpretation which would render any significant part of a provision meaningless. That would be the effective result, i.e., making the reference to an "established practice" meaningless if the Hospital's proffered interpretation of Article 5 were adopted in the present arbitration. Indeed, such interpretation when attached to all new postings, pursuant to the

announced intent of the Hospital, would eventually make mandatory on-call assignment the universal norm for all nursing positions.

Traditionally, MNA has made freedom from mandatory on-call assignments a high priority in recognition that those with children and a working spouse or who are single parents face difficult problems in handling child care – particularly in times of illness and other emergencies. Mandatory on-call further burdens nurses engaged in furthering their educations.

It simply makes no sense to suggest that MNA would bargain away this high priority issue to install such a grant of authority to the Employer. Chief Negotiator Patek testified that the primary concern of MNA in the negotiations for the 1987 labor contract was to place limitations on the “creep” of mandatory on-call into units of the Hospital where it was not already an established practice.

DECISION

- A. For any or all of the foregoing reasons, the grievance is hereby sustained in regard to the MNA’s interpretation as to the intent of Article 5 prohibiting the requirement of on-call as a condition of employment in any nursing position where it is not an established practice.
- B. The MNA submitted insufficient proof to establish that the two nurses whose bids were selected for the vacancies in Labor and Delivery were in any way coerced into accepting on-call despite any wishes they may have had to the contrary.

The record contains no testimony from either that on-call posed particular problems for them in parenting, caregiving, or professional development programs.

As a consequence, this part of the grievance is denied.

- C. In order to reach the substantive issue in this case, it was necessary to determine the intent and purpose of Article 5. In so doing this decision concludes that the Hospital’s addition of mandatory on-call where such condition was not already an established practice, or where mutually agreed upon – not as a mandatory condition of the position – is in violation of this Collective Bargaining Agreement.
- D. The Arbitrator retains jurisdiction solely over questions relating to remedy, for a period of ninety (90) calendar days from issue.

June 3, 2011
Date

John J. Flagler, Neutral Chair

Philip Finkelstein
MNA Panel

Thomas Trachsel
Hospital Panel