

IN THE MATTER OF THE ARBITRATION BETWEEN

International Union of Operating Engineers,  
Local Union No. 70

Union

and

**OPINION AND AWARD**

Grievance of IUOE, Local 70  
(Blair – Vacation Request)

Douglas County Hospital,

Employer.

BMS Case No. 11-PA-0069

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ARBITRATOR:

Janice K. Frankman, J.D.

DATE OF AWARD:

June 15, 2011

HEARING SITE:

Douglas County Hospital  
111 17<sup>th</sup> Avenue  
Alexandria MN 56308

HEARING DATE:

April 13, 2011

RECORD CLOSED:

May 16, 2011

REPRESENTING THE UNION:

Kelly A. Jeanetta, Attorney at Law  
Miller O'Brien Cummins  
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REPRESENTING THE EMPLOYER:

Cyrus F. Smythe, Consultant  
18955 Maple Lane  
Excelsior MN 55331

## **JURISDICTION**

The hearing in this matter was held on April 13, 2011. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of BMS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on May 16, 2011, when the record closed and the matter was taken under advisement.

## **ISSUE**

The Employer did not submit a written statement of the issue. The Union submitted the following written statement in its Post-Hearing Brief:

Did the Employer violate the parties (sic) Collective Bargaining Agreement when it conditioned entitlement to weekend vacation on the employee having to find her own replacement?

## **BACKGROUND AND SUMMARY OF THE EVIDENCE**

Suzanne Blair ("Grievant") was hired by Douglas County Hospital ("Employer" "Hospital") on October 4, 1999. She has worked as an Assistant in the Sterile Processing Unit during her tenure at the Hospital. On April 13, 2010, she submitted a form to her supervisor requesting authorization to take a paid vacation week-end on November 6 and 7, 2010. It was the first time she had requested week-end vacation time. In the past, she had traded a scheduled work week-end with an employee scheduled for a different week-end. She submitted her request more than six months in advance so that she could be assured that she could go deer hunting with her husband the week-end which she was customarily scheduled to work. On April 23, 2010, after she was required to find a replacement if she wanted to take the vacation week-end, she filed a Grievance seeking an award directing the Employer to authorize the two day week-end vacation. The Employer denied her Grievance through three steps, and the Union submitted the matter to arbitration by notice dated July 29, 2010.

### The Grievance

This Grievance was filed two times by Dave Eiyneck, Business Representative, who directed the first filing at Step 1 on April 23, 2010, to Amy Evjen, Sterile Processing Department Operating Room Supervisor. A second cover letter and form dated May 7, 2010, and identified as Step 2, were directed to Sister Patrice Kiefer, Hospital Human Resources Director. The filings are identical in form and substance, and both are time stamped as received on the dates they were filed. Mr. Eiyneck advised Sister Patrice Kiefer as follows:

Enclosed please find a grievance filed on behalf of Suzanne Blair. On April 13, 2010 Suzanne submitted to Amy Evjin a request for vacation on November 6 and 7, 2010. It was reported that Amy returned the written request stating that she would have to find her own replacement for these dates.

This action is in violation of Article 14, Sections 14.1 through 14.5. On May 5, I received a call from Cy Smythe, Labor Consultant for Douglas County Hospital. He instructed me to have Suzanne Blair discuss this issue with Amy Evjin per Step 1 grievance procedure. I called Suzanne to see if she was comfortable discussing this with Amy without representation. She said it would be fine. On May 6<sup>th</sup> Suzanne Blair attempted to discuss this matter with Amy Evjin per Step 1 of the grievance procedure in accordance to the Labor Agreement. Amy's only response to Suzanne was, 'I got nothing.'

Please contact me at the Local 70 office so that we may schedule a meeting and attempt to resolve this matter.

Employer Exhibit 2, page 4

William G. Flaig, Hospital Administrator provided a Step 2 response by letter dated May 26, 2010, and directed to Mr. Eiyneck:

Based on discussion between you and Ms. Suzanne Blair on Wednesday, May 6, 2010 and Hospital representatives concerning the grievance of Suzanne Blair, the Hospital indicated through Lori Kluver that your vacation request could only be granted consistent with the long-standing past practices of the Sterile Processing Department of individuals finding a replacement for specific vacation days requested.

Union Exhibit 2; Employer Exhibit 2, page 6

By letter dated June 8, 2010, Mr. Eiyneck directed a Step 3 grievance to Sister Patrice:

\* \* \*

Upon receipt and review of the vacation policy of Douglas County Hospital, SPD Department, I cannot find any evidence of the language supporting the position of the Hospital in regards to employees having to find their replacement prior to approval of their filed vacation requests.

Employer Exhibit , page 9

By letter dated July 26, 2010, Mr. Eiyneck was advised that the Hospital Governing Board had denied the Step 3 Grievance. Mr. Eiyneck advised Sister Patrice

by letter dated July 29, that the Union was proceeding to Step 4, moving the matter to Step 4 arbitration and contacting the Bureau of Mediation Services for a list of arbitrators. The Arbitrator was advised of her selection on October 19, 2010. The hearing date was selected and confirmed on February 2, 2011.

### Work Schedules; Vacation Requests

Full-time work schedules in the Hospital and the Department vary, including the number of week-ends an employee is routinely scheduled to work, and the regular shifts to which an employee is assigned. With near certainty, employees work the same week-ends year over year.

This matter is focused upon week-end work, and the Grievant's request to take off as vacation a scheduled work week-end. There is no dispute that employees are not required to find replacements for requested weekday vacation days. Lori Kluver is Manager of the Department, having been a supervisor and assistant during her 18 year tenure in the Department. She testified that employees have always been requested to find a replacement when they wanted to take a week-end off for which they were scheduled, and that there had been no difficulty in accommodating employees until this case.

Ms. Bellair and several other employees, who testified for both parties, stated that they had never requested a vacation week-end because they had always been able to arrange for trades and not use their vacation time. One employee in the Dietary Department, who works every other week-end, testified that she has always been authorized to take vacation week-ends to which she is entitled without finding a replacement. Her testimony was unrefuted.

Ms. Bellair requested the November 6 and 7, 2010, week-end more than six months in advance because she wanted to be certain that she could go deer hunting with her husband. Ms. Kluver had no contact with the Grievant about this matter. She was contacted by Amy Ejven, Supervisor in the Department since 2007, to discuss the Grievant's request. Ms. Ejven testified that the Grievant was denied her request for vacation on November 6 and 7, 2010, because she did not follow proper procedure. Ms. Bellair's testimony was unrefuted that her offer to work for a co-worker who would be on maternity the week following the week-end she had requested was rejected.

Ms. Ejven reviewed payroll records back to 2005, and found only one employee who records showed had taken week-end vacation and had made a trade with another employee. She had no knowledge as to the specifics of any request which may have been made for vacation time or why the records reported vacation and a trade. There is no disagreement that employees enjoy the flexibility of being able to make trades for any work day with the approval of their supervisor and that the employees are responsible for finding a trade.

Karen Becker is a former supervisor and manager in the Sterile Processing Department. She did not testify, and there is no evidence or testimony as to her specific employment dates. In July, 2002, she responded to an employee's questions concerning week-end vacation time. Dawn Schlosser was new to the Department and was concerned as to how she could be certain that she would have specific week-ends off for which she had personal obligations scheduled before she joined the Department. Ms. Becker responded:

Dawn,  
How I have been doing it is:  
If it is your weekend off they do not fill out a request.  
If not your weekend, you exchange with someone or take vacation. If you request vacation I find a replacement. If you exchange, you find a replacement.  
I do not see that I will be changing weekends. I worked into the change all the new people. If you want to be sure you will have to request vacation.  
If weekends change you will have it off. If they do not you can cancel your request before the schedule request is due.  
You can have two vacation weekends. If you have any questions please come and talk.  
Thank you,  
Karen

Union Exhibit 4

Ms. Becker drafted a "Policy for Requesting Days Off" dated June 1, 2010, which addresses "Vacation or Holidays", "Days off Request" and "Requesting a Specific Day Off for an Extended Period of Time". It directs procedure and policy for requesting vacation time as follows:

Fill out the white vacation/holiday request form with date/dates requested for day off, vac, or holiday. Please deliver your request to a manager/supervisor. Requests will not be granted more than one year in advance. All requests for vac/hol must be requested by the first Thursday of the posted schedule. The requests will be honored in the order they are received (date and time) Make sure a supervisor signs your request. All vacation/holiday/day off requests must be handed in by the person making the request. No exception will be made after the arrangements have been made. Please keep communication open with manager/supervisor.

Employer Exhibit 5

On February 15, 2011, the Grievant submitted requests to Ms. Evjen which included week-end days, April 23 and 24, 2011. Ms. Evjen responded to the requests as follows:

Your vacation for May 19, 20, 23 and 24 of 2011 are the first request for vacation for those days.

Your request for April 23 and 24 of 2011 have been received (sic). Per past practice as you are aware you need to email the department to see if anyone can either pick this shift up or trade. If no one will help you out please come and talk to Lori, Chris, or myself.

Union Exhibit 3

This was the first written statement of the “past practice” which the Grievant had seen. During her testimony at the hearing, Ms. Evjen acknowledged that the April 23-24 week-end vacation request had been granted. She stated she did not know whether the Grievant had contacted anyone to work for her those days

### Relevant Contract Provisions

Articles IV, VI, XIV, and XVIII of the parties’ CBA address Employer Authority, Employee Rights – Grievance Procedure, Vacation and Work Schedules respectively. Relevant provisions follow:

#### **ARTICLE IV – EMPLOYER AUTHORITY**

- 4.1 The Employer retains the full and unrestricted right to operate and manage all manpower, . . . . to select, direct, and determine the number of personnel; to establish work schedules and to perform any inherent managerial function not specifically limited by this AGREEMENT.
- 4.2 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate. (emphasis added)

Joint Exhibit 1, page 3

#### **ARTICLE VI – EMPLOYEE RIGHTS –GRIEVANCE PROCEDURE**

##### 6.4 ARBITRATOR’S AUTHORITY

- A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the Union, and shall have no authority to make a decision on any other issue not so submitted.(emphasis added)

Joint Exhibit 1, page 6

**ARTICLE XIV – VACATION**

14.1 Full-time employees shall accrue vacation according to the following schedule:

<u>Years of Service</u>	<u>Rate of Accrual</u>
* * *	
After eight (8) years	1.667 days per month

14.4. Vacation requests must be in writing and approved by the Supervisor or appointed representative before being taken. Request shall be submitted at least two (2) weeks prior to the posting of the work schedule covering the period of time for which such request is made.

14.5 . . . .After eight (8) years of service, employees shall be entitled to two (2) normally scheduled weekends (four (4) weekend days) as vacation per year.. . . .(emphasis added)

Joint Exhibit 1, page 10

**ARTICLE XVIII – WORK SCHEDULES**

18.2 The general pattern of scheduling work shall be as follows:

\* \* \*

E. Exceptions to the general pattern of scheduling may be made by the mutual agreement of the employee and the supervisor or by the mutual agreement of employees in the same job classification desiring to switch shifts or in cases of changes in patient census, emergency or other unavoidable situations. (emphasis added)

Joint Exhibit 1, page 13

**OPINION AND FINDINGS**

It is appropriate to sustain this Grievance. The Union has satisfied its burden of proof, demonstrating that the Employer breached the parties' CBA when it denied the Grievant's request for week-end vacation for failure to follow past practice. Clear and unambiguous Contract language supports the Union's case. The Grievant was entitled to take vacation on a week-end for which she was scheduled to work. The Employer has failed to refute the Union's case. There is no evidence of a past practice requiring an employee to find another employee to trade week-ends in order to take a week-end vacation to which she is entitled, consistent with express terms of the Collective Bargaining Agreement.

Under rare circumstances, a party may be able to defeat clear and unambiguous contract language by demonstrating an unequivocal and well-established practice which, in effect, repeals a contract provision. The parties' unwavering repeated actions under the same circumstances over a significant period of time may lead to such a conclusion. In this case, however, there is clear contract language which addresses, in two separate Articles, entitlement to vacation days, including week-ends, and work schedules which may be altered through trades between employees to which their supervisor approves. There is no question that the employees involved in this case appreciate the latitude the work schedule provision affords them, and that they regularly take advantage of it. It is apparent that employees prefer to save vacation time whenever they can and seek trades to accomplish a need to take a scheduled week-end off. There is no credible evidence to support the Employer's position that well-established past practice requires an employee seeking authorization to take a scheduled week-end as vacation to seek a trade with another employee. In fact, there is no credible evidence of the practice to any degree.

The Employer has argued that the Union's position is unethical and unlawful because it requires the Employer to treat employees in a disparate manner, favoring an employee who requests vacation over another who will be required to work in her stead. It argues further that the CBA provides management rights in support of its actions. In fact, the express CBA provisions in question, which address vacations and scheduling, were agreed to by the Employer and are enforceable against it.

Because authorization is required in the scheduling of vacation time, it is clear that the Employer does, indeed, have discretion in the scheduling of vacation recognizing a need for adequate staff. In the absence of some Employer discretion, the required approval would have little meaning beyond record-keeping. In this case, however, there has been no suggestion that the Grievant's request, made more than six months in advance of her requested vacation week-end, was not reasonable or, for any reason, could not be authorized. The Employer has erred in its application of the Contract in this apparent first case addressing the manner in which the week-end vacation provision, which sets out an employee benefit, is properly applied. It has simply failed to distinguish between week-end trades and vacation requests.

The Union seeks a remedy which calls for posting of an admission of the Employer's error and ultimately its breach of the parties' Collective Bargaining Agreement. While the Arbitrator's authority is expressly limited by the parties' Contract, there is no language which limits or precludes the fashioning of a remedy which calls for application and enforcement of the Contract as written. The Arbitrator's discretion in this regard calls for a reasonable and effective remedy which is not simply punitive and, perhaps, humiliating, but instead provides direction to avoid future grievances and a possible guidepost for future bargaining.

## **AWARD**

The Grievance is sustained. Consistent with the foregoing Opinion and Award, the Employer shall cease and desist from conditioning the taking of a vacation week-end upon an employee finding another employee to work in her stead.

Dated: June 15, 2011

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Janice K. Frankman, J.D.  
Labor Arbitrator