

**THE MATTER OF ARBITRATION BETWEEN**

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**MINNESOTA NURSES** )  
**ASSOCIATION,** )  
 )  
 **Union,** )  
**and** ) **ATTENDANCE POLICY**  
 ) **GRIEVANCE**  
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 )  
**NORTH MEMORIAL MEDICAL** )  
**CENTER,** )  
 )  
 **Employer.** ) **FMCS Case No. 141202-51570-3**  
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Arbitrator: Stephen F. Befort

Hearing Date: April 7, 2015

Post-hearing briefs received: May 18, 2015

Date of Decision: June 17, 2015

**APPEARANCES**

For the Union: Christopher K. Wachtler

For the Employer: James M. Dawson  
Jessica M. Marsh

**INTRODUCTION**

The Minnesota Nurses Association (Union), as exclusive representative, brings this grievance claiming that North Memorial Medical Center (Employer) violated the parties' collective bargaining agreement by unilaterally adopting new attendance guidelines. The Employer contends that it had the inherent management authority to adopt the guidelines and that the guidelines are

reasonable. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

## **ISSUE**

Were the attendance guidelines issued by North Memorial Medical Center in 2013 a reasonable exercise of its implied management rights?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE 32 – SICK LEAVE**

#### E. Verification of Illness

The hospital may request reasonable evidence of illness. General requirements of a physician's certificate for proof of sickness shall not be made, but individual nurses may be required to furnish such certificates, provided that such nurse is given advanced notice that the certificate is required. A nurse shall not be required to explain an illness at the time sick call in is made. Such explanation may be required at a later time based on a review of the pattern of sick leave use. No nurse shall be penalized for legitimate use of sick leave or be subject to discipline based solely on the number of sick leave days used except for the application of Article 36. The preceding sentence shall not prevent the use of counseling related to sick leave. For RNs who are at any level of performance improvement related to sick time utilization at or above coaching, sick leave will not be granted for absences from work on the day immediately preceding or following a holiday, weekend, or day(s) off when the nurse is not scheduled to work unless reasonable evidence of such illness is presented to the Hospital.

### **ARTICLE 36 – ABILITY TO MEET SCHEDULED HOURS**

Managers will begin a review of individual work patterns on their assigned units. The review will include the days a registered nurse does not work when they are scheduled, the frequency, and pattern. This will not include Workers' Compensation, Medical Leaves, and Family Medical Leave. Human Resources and Health Services will be consulted to confirm which days should be included.

Coaching:

If a pattern develops, including the review noted in the above paragraph, the manager will meet any mutually agreeable time to review the pattern with the Registered Nurse. Managers will notify the nurse that, if the pattern continues, the performance improvement process will be utilized. Management has the option to reduce the work agreement of a nurse who is routinely unable to meet his/her existing work agreement to no less than his/her actual average compensated hours.

The terms of this article may be administered regardless of the provision of a medical statement.

**FACTUAL BACKGROUND**

North Memorial Medical Center is a large acute-care hospital located in Robbinsdale, Minnesota. The Union represents registered nurses (RNs) employed by the Medical Center. The Employer and the Union have negotiated a series of collective bargaining agreements over the past several decades.

The issue of regular and predictable attendance has long been a concern for the parties. A study conducted by the Employer, for example, indicated that each full-time RN averaged taking 9.4 days of paid sick leave during calendar year 2006.

The testimony at the hearing demonstrated that the matter of attendance has been a frequent subject of negotiation. During negotiations for the 1989-92 contract, the Union proposed language that would make the “use of sick leave for illness not be a basis for discipline.” The Employer resisted this suggestion but agreed to language stating that “no nurse shall be subject to discipline based solely on the number of sick leave days used.” Arbitrator William Berquist interpreted this provision in a 1992 award in which he ruled that the contract language prohibited discipline for absenteeism only to the extent that the discipline “is based solely on the number of sick days used.” In 1995, the parties agreed to modify this provision to read as follows:

No nurse shall be penalized for legitimate use of sick leave or be subject to discipline based solely on the number of sick leave days used.

In 2007, this same sentence was amended by adding a proviso at the end stating “except for the application of Article 36.” During that same round of bargaining, the parties agreed to amend Article 36 to permit management to reduce work agreements in certain situations and to engage in coaching or performance improvement, regardless of whether a medical statement has been provided.

Finally, during the 2010 round of negotiations, the Employer indicated its desire to modify Article 36 to eliminate the ambiguity of a “frequency and pattern” approach to absenteeism. Union witness Barb Gundale testified that the Employer was interested in substituting a numerical threshold for the existing “frequency and pattern” language. Ultimately, the 2010 bargaining did not result in any amendments to either Article 32 or 36.

In 2000, the Employer adopted a set of “Attendance Guidelines” applicable to all employees other than the RNs represented by the Union. Director of Labor and Employee Relations Jeff Cahoon testified that the Medical Center decided not to apply the guidelines to the RNs because the Union “pushes back pretty hard on a regular basis.”

The Attendance Guidelines implemented a no-fault attendance policy. Under this policy, non-exempt absences are tracked over a rolling 12 month period. Exempt absences include workers compensation absences, Family and Medical Leave, funeral leave, and any other leave required by law. For non-exempt absences, the guidelines establish the following matrix applicable to full-time employees:

<b>Occurrences</b>	<b>(or) Total Days</b>	<b>Action Taken</b>
6	8	Supervisor review w/ ee
7	10	Verbal warning
8	12	Written warning
10	14	Suspension without pay
12	16	Termination

Variations of this matrix apply to employees with less than full-time appointments. According to Mr. Cahoon, the Guidelines do not necessarily apply in lock-step fashion, and managers have the discretion to consider mitigating circumstances.

At a joint staffing meeting on January 8, 2013, the Employer proposed extending the Attendance Guidelines to cover unit employees. In an email message sent two days later, the Union took the position that the parties' contract did not permit the use of numerical thresholds as a basis for discipline. At a subsequent March 12, 2013 joint staffing meeting, Mr. Cahoon explained that the matrix implicates "not just discernible patterns but also the number of days missed and frequency. Management will be taking a consistent approach." On March 20, 2013, MNA Labor Relations Specialist Joe McMahon sent Mr. Cahoon a letter that stated as follows:

If North Memorial intends to implement an absenteeism policy (thresholds for instances and days missed for purposes of addressing absenteeism), the unilateral implementation will be grieved. An attendance policy is a mandatory subject of bargaining. No such policy has been negotiated between North Memorial and the Minnesota Nurses Association.

Mr. Cahoon responded two days later in a letter stating:

It has been well established that management has the right to effectively and efficiently run its business and to make management decisions whether or not a contract contains a written management rights clause. The consideration and implementation of an attendance guideline rule fits precisely within the category of implied management rights. Further, we believe Section 36 of our contract would also authorize such a rule.

Accordingly, without waiving our right to ultimately implement an attendance policy rule, we are prepared to meet with the Union and see if we can reach a negotiated resolution. . . .

On March 28, 2013, the Union sent a responsive letter advising the Employer that it “declines bargaining a new Attendance Policy rule” and that it would file a grievance and an unfair labor practice charge if the Employer “unilaterally implements any policy/rule related to absenteeism thresholds or discipline.”

The Employer thereafter implemented the Attendance Guidelines and, by the end of May 2013, the Employer had disciplined 18 nurses pursuant to the guidelines matrices. The Union filed the instant grievance on April 12, 2013. This grievance challenges only the Employer’s adoption of the guidelines and not the individual disciplines imposed. The Union also filed an unfair labor practice charge claiming that the Employer’s action constituted violations of Section 5(a)(5) and (1) of the National Labor Relations Act. The regional office of the National Labor Relations Board has deferred that charge to this arbitration proceeding.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union contends that the matter of attendance is a mandatory subject of bargaining and that the Employer violated both the contract and the NLRA by unilaterally adopting a new attendance policy without first bargaining with the Union. The Union argues that it did not waive

its right to bargain when the Employer belatedly offered to discuss the policy in March 2013 because the implementation of the new policy was already a fait accompli. Finally, the Union maintains that the new Attendance Guidelines are inconsistent with the parties' contract in that they base discipline upon a specific number of absences.

### **City**

The City initially claims that it has inherent management rights to direct the workforce despite the absence of an explicit management rights provision in the parties' contract. The Employer builds on this contention by asserting that the Attendance Guidelines are valid as a reasonable set of workplace rules. The City also argues that the Union waived its right to bargain over the new policy and that the guidelines are not inconsistent with the terms of the parties' agreement.

## **DISCUSSION AND OPINION**

The resolution of this grievance requires the sequential analysis of the following three issues:

- 1) Does the Employer possess inherent management rights?
- 2) May the Employer adopt work rules to address attendance requirements?
- 3) Do the Attendance Guidelines implemented by the Employer conflict with either the parties' collective bargaining agreement or the parties' duty to bargain?

### **A. Inherent Management Rights**

The parties' collective bargaining agreement does not contain an explicit management rights clause. The Employer, nonetheless, argues that it possesses inherent rights to direct the workforce. The Union does not actively oppose this assertion.

A leading labor arbitration treatise provides support for the Employer's contention. The COMMON LAW OF THE WORKPLACE states: "Even in the absence of a clause affirmatively authorizing such management conduct, the arbitrator will ordinarily sustain the employer's action on the grounds that it retained or 'reserved' the right to act as it did." *Id.* at 101 (2<sup>nd</sup> ed. 2005). Several arbitrators also have determined that employers in similar positions have implicit management rights. *See* Minnesota Nurses Association and North Memorial Medical Center (Miller 2014); Minnesota Nurses Association and Methodist Hospital (Flagler 1985); Minnesota Nurses Association and Abbott Northwestern Hospital (Boyer 1982).

Based on the above, I find that the Employer does possess a zone of inherent management rights, even in the absence of an explicit management rights clause.

**B. The Adoption of Work Rules Relating to Attendance**

It is well recognized that an employer has the right to adopt reasonable work rules on a unilateral basis if not inconsistent with law or a collective bargaining agreement. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 13-144 (7th ed. 2012). This principle also applies to rules relating to attendance expectations. *Id.* at 13-153.

But this general rule is not without limit. The unilateral implementation of work rules is permissible only if the rules are reasonable in nature, if they are not in conflict with the terms of the parties' collective bargaining agreement, and if they are implemented under circumstances in which an exclusive representative has not requested negotiation over a mandatory topic of bargaining. *Id.* at 13-144-150.

Addressing the first of these limitations, the Attendance Guidelines appear to be "reasonable" on their face. The guidelines establish a predictable and consistent formula for

addressing the problem of excessive absenteeism. They exempt absences protected by law or contract, such as FMLA and workers compensation leave. They permit supervisors to consider mitigating circumstances in administering the guidelines. And, they do not inhibit the Union's right to challenge individual discipline through the grievance arbitration process. Accordingly, the guidelines do not fail on the reasonableness prong of analysis.

**C. Conflict with Law or Collective Bargaining Agreement**

That brings us to the heart of this grievance. The Union contends that the Employer's unilaterally adopted guidelines conflict with Section 32 of the parties' agreement which prohibits the discipline of nurses "solely on the number of sick days used." The Union argues that the guidelines utilize a matrix that bases discipline solely and directly on the number of absences qualifying as sick leave.

The Employer asserts two objections to that characterization. The Employer first argues that the language of sections 32 and 36 state that absenteeism may be subject to the performance improvement process. According to the Employer, the performance improvement process includes disciplinary steps intended to deter absenteeism, meaning that the Employer is authorized to impose discipline for excessive absenteeism. While this much of the Employer's argument is accurate, the performance improvement language collides with the more specific prohibition on imposing discipline "solely on the number of sick days used." Taken together, the likely import of these provisions is that while the Employer has the authority generally to discipline employees for excessive absenteeism, it may not do solely on the basis of the number of absences or sick leave days used.

The Employer additionally argues that the guidelines do not impose discipline solely

based on the number of sick days used because the guidelines give managers the authority to temper discipline based on mitigating circumstances. While managers can modify the impact of the guidelines due to mitigating circumstances, it is nonetheless true that any discipline that does result flows directly and solely from the number of absences or sick days used by an employee.

By its plain language, the Attendance Guidelines provide for discipline based on the number of absentee occurrences (which may encompass multiple days) and the number of total days of absence. No other factor, such as a pattern of absences, is mentioned in the guidelines. Similarly, the letters sent to the 18 employees disciplined under the guidelines during March and April of 2013 refer only to the number of occurrences and days of absence as the basis for imposing discipline. Here again, no other factors are mentioned in the letters as relevant to the disciplinary decision. This provides powerful evidence that the sole basis for discipline is the number of sick leave days that employees use. The guidelines, accordingly, conflict with the parties' agreement and cannot stand absent the Union's consent.

This does not mean that the guidelines are wrong or misguided. It simply means that any such change in direction should be crafted through the therapeutic process of collective bargaining.

**AWARD**

The grievance is sustained.

Dated: June 17, 2015

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Stephen F. Befort  
Arbitrator

