

**FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION**

VA ILLIANA HEALTH CARE SYSTEM,

EMPLOYER,

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1963,

UNION.

ARBITRATOR'S AWARD
FMCS Case No. 08-58383
GRIEVANCE ARBITRATION

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	John M. Hopkins
DATE OF GRIEVANCE:	May 09, 2007
DATE OF HEARING:	February 24, 2009
RECEIPT OF HEARING TRANSCRIPT:	March 4, 2009
DATE OF AWARD:	March 25, 2009

ADVOCATES

FOR THE EMPLOYER:

Michael M. McFatrige, Staff Attorney

FOR THE UNION:

William Umphenour, President

WITNESSES

James Cullum, Chief of Engineering Service.
Michael Coons, Utility Sys. Repair Supervisor
Kay Cox, Chief of Human Resources

John M. Hopkins, Boiler Plant Oper.
Richard C. Miller, Boiler Oper., Ret.
Jeffrey M. Stier, Boiler Plant Oper.
Donald W. DeMoss, Boiler Oper.
Theresa M. Hopkins, Reg. Nurse

ALSO PRESENT

Connie S. Ohl, Labor Relations Specialist

ISSUE

Did the Employer violate the Collective Bargaining Agreement by limiting the location where the Grievant can take his 15-minute rest breaks to an area within listening distance of the Boiler Plant and subjecting them to interruption due to equipment malfunction?

JURISDICTION

The matter at issue, regarding interpretation of terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties, came on for hearing pursuant to the grievance and arbitration procedures in said agreement. Relevant provisions of the Grievance Procedure, Article 42 and Arbitration, Article 40, provide as follows:¹

Article 42 – GRIEVANCE PROCEDURE.

“Section 7, Step 4. If the grievance is not satisfactorily resolved In Step 3, the grievance may be referred to arbitration as provided in Article 40, Arbitration.”

“Article 40 – ARBITRATION.

Article 40, Section 1. – Notice to Invoke Arbitration.

Only the Union or Management may refer to arbitration any grievance that remains unresolved after the final step under the procedures of the Article 42, Grievance Procedures. A notice to invoke arbitration shall be made in writing to the opposite party within thirty (30) calendar days after receipt of the written decision rendered in the final step of the grievance procedure.

¹ Article 40, Arbitration also contains provisions for “Expedited Arbitration,” which is not applicable to the instant matter being processed under “Conventional Arbitration.”

Section 2 – Conventional Arbitration Procedure.

- A. On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service (FMCS) to provide a list of seven (7) impartial persons to act as an arbitrator. The parties shall meet within ten (10) calendar days after receipt of such list to select an arbitrator (this may be done by telephone for national level grievances). If the parties cannot mutually agree on one of the listed arbitrators, then Management and the Union will alternatively strike one potential arbitrator's name from the list of seven (7) and will then repeat this procedure until one (1) name remains. The remaining person shall be the duly selected arbitrator. The parties will choose lots to determine who strikes the first name. Following the selection, the moving party will, within fourteen (14) calendar days, notify the Federal Mediation and Conciliation Service of the name of the arbitrator selected. A copy of the notification will be served on the other party. The time limits may be extended by mutual consent.
- B. The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. All witnesses necessary for the arbitration will be on duty time if otherwise in a duty status. On sufficient advance notice from the union, management will rearrange necessary witness' schedules and place them on duty during the arbitration hearing whenever practical. Such schedule changes may be made without regard to contract provisions on Hours of Duty. A reasonable amount of preparation time for arbitration will be granted in accordance with the provisions of Article 45 Official Time and local supplementary agreements.
- C. The arbitrator's fees and expenses shall be borne equally by the parties. If either party requests a transcript, that party will bear the entire cost of such transcript.
- D. For single station local grievances, the site normally will be the facility where the grievance exists. At the Local's request, another site may be designated upon mutual agreement. If another site is used, the Local will pay the cost of the site. For grievances at the national level, the Department and the Council President will communicate to work out a mutually agreeable site for the arbitration.
- E. The parties will attempt to submit a joint statement of the issue or issues to the arbitrator. If the parties fail to agree on a joint submission, each shall make a separate submission. The arbitrator shall determine the issue or issues to be heard.

- F. The arbitrator's decision shall be final and binding. However, either party may file an exception to the arbitrator's award in accordance with applicable law and regulations. The arbitrator will be requested to render a decision within sixty (60) days. Any dispute over the interpretation of an arbitrator's award shall be returned to the arbitrator for settlement, including remanded awards.
- G. An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level under procedures set forth below. Where it is mutually agreed between the Council President and the Department within thirty (30) days after a local has filed a notice for arbitration, an arbitration dispute will be elevated to the national level. The arbitrator has full authority to award appropriate remedies, including reasonable legal fees, pursuant to the provisions of Section 702 of the Civil Service Reform Act, in any case in which it is warranted.

Under the procedure referenced above, the Parties selected Rolland C. Toenges as arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted in accordance with the terms and conditions of the CBA and the rules and regulations of the Federal Mediation and Conciliation Service.

The Parties were afforded full opportunity to present evidence, testimony and argument relevant to the matter in dispute. The Parties were afforded full opportunity to examine and cross-examine witnesses. All witnesses were sworn under oath.

There were no procedural or substantive objections made to the matter in dispute being properly before the arbitrator.

A stenographic record was made of the hearing and furnished to the Arbitrator.

BACKGROUND

VA Illiana Health Care System, Danville, Illinois (Employer) provides primary, secondary, medical and surgical care, acute psychiatric care, extended long-term care and skilled nursing home care including Rehabilitation, Alzheimer's and Palliative Care to veterans primarily residing in central Illinois and west central Indiana. The Employer offers a full cadre of ambulatory care including mental health and substance abuse services.

The Employer has 401 authorized beds including 223 nursing home beds. The Employer is also responsible for the healthcare services offered at Community Based Outpatient Clinics in Peoria, Decatur and Springfield, Illinois, and West Lafayette, Indiana. The population of veterans in the service area is approximately 150,000.

The American Federation of Government Employees, Local 1963, (Union) is the exclusive representative for all nonprofessional and professional V A Illiana Health Care System employees, certified by the Federal Labor Relations Authority. Among the Union represented employees is Boiler Plant Operators, the job class at issue in the instant proceeding.

The VA Illiana Health Care System campus in Danville, Illinois includes a mechanical system that provides heating, air conditioning and related utilities. Included in the mechanical system is the "Boiler Plant," which is the work site giving rise to the instant grievance.

The Boiler Plant has several large high-pressure vessels (boilers) that provide steam to the VA Illiana campus. State and Federal regulations require that these high-pressure boilers must be constantly monitored to insure safe and efficient operation. The workers monitoring these boilers are required to have a "Boiler

Operator's License," commensurate with the size and type of boiler equipment operated.

Because the boilers must be under constant surveillance by the Boiler Plant Operators, their work schedule covers seven days per week and 24 hours per day. On the second shift, third shift and weekends there is normally only one Boiler Plant Operator on duty (Operator In Charge). During the day shift on weekdays there is typically more than one Boiler Plant Operator on duty, which affords opportunity for off site breaks and equipment maintenance. One Operator can monitor the equipment while the other(s) performs maintenance and take an off site breaks if desired.

Monitoring of the boiler plant equipment is done by odor, sight and sound. The Boiler Plant Operator can observe whether the equipment is operating correctly by observing the control system and listening for malfunctions. There is an alarm system that sounds if certain malfunctions develop. The Boiler Plant Operator responsible for monitoring the boiler plant equipment must conduct periodic inspections and remain within hearing distance while on duty.

The instant grievance alleges that the Employer is violating the CBA by requiring the sole Boiler Plant Operator, assigned to monitor the boiler plant equipment, to remain within hearing distance of the boiler plant equipment when taking 15-minute rest periods. The Grievant also alleges violation of the CBA by subjecting Boiler Plant Operators to interruption of their break when equipment malfunctions require their immediate attention.

The remedy sought by the Grievant is additional staffing so there is at least two qualified Boiler Plant Operators on each shift. The Grievant argues that additional staffing would allow Boiler Plant Operators, like certain other employees, to take their break away from their regular work site and not be subject to interruption. In the alternative, the Grievant seeks additional compensation for his rest breaks.

The Parties processed the grievance through the various steps of the CBA grievance procedure, but without resolution. Thus, the dispute comes before the instant proceeding for resolution.

EXHIBITS

JOINT EXHIBITS:

J-1. Master Agreement – 1997 (Collective Bargaining Agreement) [CBA], between the Department of Veterans Affairs (VA) and the American Federation of Government Employees (AFGE).

J-2. John Hopkins Arbitration File, FMCS 080805-58383, dated 07/09/07.

UNION EXHIBITS:

U-1. Opening Statement narrative plus CBA Articles, 2, 16, 20 and 33.

U-2. Excerpt, 31:0360(32)NG – Council of VA Locals and VA - - 1988 FLRAdec NG, Pages 96 and 97 of 102.²

U-3. Position Description – Boiler Plant Operator with supporting documentation.

U-4. Statement of Richard Miller, IVAHCS Boiler Plant Operator, Retired, dated August 10, 2007.

U-5. Statement of Theresa M. Hopkins, RN, dated 07/11/ 2007.³

EMPLOYER EXHIBITS:

E-S. Opening Statement and Argument narrative.

E-1. VA Directive 2008-062, Boiler Plant Operations, dated 10/15/2008.

E-2. MCM Number 138-14, Boiler Plant Operations, Maintenance and Inspection.

² The Employer's objection to this exhibit based on relevancy and foundation is noted.

³ The statement by Theresa M. Hopkins contained a hand written note by a Cathy Morris, RN that she concurred with the statement by Hopkins. The Employer raised objection to Ms. Morris's note being admitted as evidence because she was not present to stand cross-examination. The Arbitrator sustained the objection.

E-3. VHA Directive 2003-050, Boiler Plant Operations, dated 09/11/003.

E-4. VA Handbook 5023, Part I, Chapter 5, Negotiating Agreements.

E-5. Notification of Personnel Action, Promotion of John M. Hopkins, Boiler Plant Operator, dated 08/29/2008.

POSTION OF THE PARTIES

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

- Boiler Plant Operators do not receive the required rest breaks given to all other workers in the Facility Management Service.
- Boiler Plant Operators have a right to rest breaks the same as that allowed other employees under the “equal protection” guarantee of the constitution.
- In 1992 or 1993, employees in the ICU area were compensated for lost breaks due to a lack of qualified staff.
- It is recognized that the Boiler Plant requires the constant presence of a Boiler Plant Operator, however these employees are entitled to two 15-minute breaks in an eight-hour period.
- VA Illiana policy provides that Boiler Plant Operators must not leave the Boiler Plant unattended and cannot be relieved by unqualified persons.
- “While working the 2nd pr 3rd shift or weekends the operator is the only person at the boiler plant and has the responsibility of all decisions for all facets of plant operations, maintenance, and repair necessary to provide continuous, efficient operation of all the equipment providing the steam to the VA Illiana Health Care System . . .”⁴
- For safety reasons, there should be more than one Boiler Plant Operator on duty at all times, whereby each Operator could be relieved for their 15-minute break. This would provide proper relief and care in case of injury or other medical emergency.
- Article 16 of the Master Agreement states, “In an atmosphere of mutual respect, all employees shall be treated fairly and equitably . . . It is therefore agreed that Management will endeavor to establish working conditions

⁴ Union Exhibit #3, Boiler Plant Operator – Mechanic. Principal Duties and Responsibilities.

which will be conducive to enhancing and improving employee morale and efficiency.”

- Management is committing discrimination against Boiler Plant Operators and other VA Illiana employees not allowed to leave their work area on breaks.
- Article 20, Section 1,B, of the Master Agreement states, “A rest period of 15-minutes duration will be allowed each employee twice during each eight-hour day, normally one in the first half and one in the second half of the shift.”
- The Chief of Facilities Management Service grievance response was that, as sole Operator in the Boiler Plant, the Grievant’s constant presence is required and he was required to eat his lunch and take his rest periods as the workload allows within the confines of the Boiler Plant.
- The Master Agreement only states that an employee will be allowed two 15-minute rest periods during an eight-hour shift. Workload is not mentioned in the Article as being a condition for an employee to take a break.
- Breaks have been an issue in the Boiler Plant for some time. A former employee received a reprimand for taking a break.
- Federal statutes and Government-wide regulations govern the administration of all matters covered by the Master Agreement.
- Where any Department regulation conflicts with the Master agreement and /or a Supplemental Agreement, the Master Agreement shall govern.
- The Union’s position is supported by 31:0360(32)NG – NFFE, Council of VA Locals and VA – 1988 FLRAdec NG, pages 96 and 97 of 102:⁵
 - “10. Rest Break. (1) Each employee is authorized one twenty (20) minute rest break within each one-half (1/2) period of the normal workday for that employee. (2) Additionally, one twenty (20) minute rest break is authorized within each four (4) hour period of overtime worked. (3) Employees shall be allowed to take the rest break away from the immediate worksite.”

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

⁵ Source: <http://www.flra.gov/decisions/v31/31-032-3.html>, 1/30/2008.

- An rest break exception is provided in the Master Agreement for employees in positions which require an employees' constant presence:

“Article 20 – Hours of work and overtime, Section 1. – General, B. A rest period of fifteen (15) minutes duration will be allowed each employee twice during each eight (8)-day, normally one in the first half and one in the second half of the shift. . . Management will not restrict employee mobility during rest breaks except for those positions which require employees' constant presence.” [Emphasis Added]

- Boiler Plant Operators meet the exception referenced in Article 20, Section 1, B, as their mobility on rest breaks is restricted to hearing distance from the Boiler Plant, when the sole Operator on duty.
- The Union's interpretation of Article 16, Section 1, of the Master Agreement as affording “equal protection” under the constitution is a non-issue. There is no constitutional right to a rest period as a working condition, absent a constitutionally protected claim, such as age, race, etc. and none is alleged.
- The Union's reference to Article 16, Section of the Master Agreement that “Employees will also be afforded proper regard for and protection of their privacy and constitutional rights . . . ” is irrelevant to the issue of rest periods. The Grievant works eight hours and is paid for eight hours. There can be no violation of the Grievant's privacy and constitutional rights, as a matter of fact and law.
- Boiler Plant Operators – Mechanics work as a “self directed” work team that is totally responsible for the efficient and effective operation, maintenance and repair of the Boiler Plant. They must be alert at all times to the odors, sounds and visual conditions of the equipment.
- While working the 2nd, 3rd shifts and on weekends as the sole Boiler Plant Operator they are in complete charge of all operations. As “Operator In Charge” the Boiler Plant Operator must maintain a constant presence and has authority to call in engineering personnel for emergencies.
- Management, in accordance with applicable laws, has the unfettered right to assign a sole Building Plant Operator on the 2nd, 3rd shifts and weekends. Title 5 of the Unites States Code, Part III, Subpart F and Chapter 71, provides at 5 U.S.C. Section 7106 (2008) that management has the authority to determine the number of employees, to assign work and to determine the personnel by which agency operations shall be conducted.

- Different than most employees who work an eight-hour shift, and have an unpaid meal/lunch break, the Grievant's work shift is eight hours from start to finish. There is no specified meal/lunch break period. The Grievant is allowed a paid meal/lunch break within the eight-hour shift, but it is to be taken within hearing distance of the Boiler Plant at a time when it will not compromise plant operation.
- The Master Agreement does not mandate exactly "when" the break period is to be taken – the Grievant has flexibility to take his breaks whenever he wants as long as he gets his work done and maintains a constant presence in the Boiler Plant.
- Like with the meal/lunch break, the Grievant may take his 15-minute breaks within hearing distance of the Boiler Plant and when it will not interfere with plant operation. The Grievant admits that his supervisor/leader never denied him the opportunity to take a break so long as his duties were fulfilled.
- The Grievant's alternative request that, if no trained operator is available, he be compensated for the break periods is not permitted, as a matter of fact and law. First, the Grievant is receiving the mandated rest periods under the Master Agreement. Second, the grievant is being compensated for the rest periods.
- The Grievant's position would result in him being paid for more than the eight hours of his shift or that he only work seven and one-half hours while being paid for eight.
- The Grievant's salary is established under WG-5204-10 and cannot be supplemented as a matter of law.
- The Grievant's classification and salary was upgraded to WG-5204-10 in July 2008. This was in recognition of the retirement of the Boiler Plant Group Leader, resulting in Boiler Plant Operators having the additional responsibility of "Operator In Charge."
- If a Boiler Plant Operator is scheduled to work Monday through Friday, on the day shift, there is normally another Boiler Plant Operator-Mechanic on duty, which allows taking their break away from the Boiler Plant.
- There are currently seven qualified Boiler Plant Operators, including the Grievant. Per agreement of the Boiler Plant Operators themselves, four rotate through three eight-hour shifts. The remaining Operators provide relief for the four rotating Operators and perform maintenance during the weekday shift. The rotating Operator is the "Operator In Charge."

- The only time the Grievant works alone and receives his regular pay rate is the Saturday day shift. He gets paid for eight-hours, even though he is normally allowed a meal/lunch break and two rest breaks.
- The Grievant's regular or base pay rate as of August 31, 2008 was \$25.63 per hour. While working the 2nd shift his pay rate was \$27.55 and while working the 3rd shift \$28.19 per hour. On Sunday, the Grievant receives 25% more or \$6.41 as premium pay.
- The Grievant is presently working weekday shifts (Monday – Friday, 8:00 a.m. to 4:00 p.m.) and can normally take his breaks away from the Boiler Plant since there is another qualified Operator on duty.
- As a “past practice” the Boiler Plant Operators have maintained a “constant presence” at the Boiler Plant since the 1997 Master Agreement was negotiated and before. The Grievant has been a Boiler Plant Operator since 1994.
- The Grievant's claim that Nurses in the ICU received compensatory time when not allowed to take breaks away from the ICU was prior to the 1996 Master Agreement that permits management to restrict mobility of employees during their rest periods when their positions require constant presence. There is no record to support the Grievant's claim. Even if there were records to support this claim, as a local agreement it would have expired and it would have been contrary to statute and regulations that generally prohibit additional compensation above that set by statute.
- Although the Grievant is restricted to taking his breaks within hearing distance of the Boiler Plant, he has adequate facilities available for taking breaks. Within the Boiler Plant itself, there is a “break room” that includes a microwave, refrigerator, table radio, and bulletin board. There is also an air-conditioned room with computer access and a locker room with toilet facilities and a shower. The Boiler Plant itself is a large building with a spacious common area. As such, the Grievant has available facilities that allow opportunity to relax and rest.

WITNESS TESTIMONY

The Grievant testified to Union Exhibit #2, which is a two-page excerpt from a 102-page decision involving another Union (NFFE) and a different collective bargaining agreement than the one at issue in the instant matter. The Grievant quoted a provision from this document:

“Article 24 (a), Rest Breaks, Number 10, (1) “Each employee is authorized one twenty (20) minute rest break within each one-half (1/2) period of the normal work day for that employee. . . . (3) Employees shall be allowed to take the rest break away from the immediate worksite.”⁶

The Grievant testified as to the procedure in the event a boiler goes down and for getting it back on line; that it requires immediate action due to the importance of maintaining steam and preventing an explosion. The Grievant testified that in an emergency he must respond, even if on break. The Grievant testified that because he must maintain constant surveillance of the Boiler Plant, when he is the only one on duty, he is limited where he can take his break to the Boiler Plant. The Grievant testified that at all times he must be able to see, smell and hear the boilers so a problem can be anticipated before it happens.

The Grievant testified that being unable to take a break away from the Boiler Plant causes hardship because it gets extremely hot in the Plant and he is precluded from going to a canteen for a soft drink, or just having the freedom to take his break where he wants.

The Grievant testified that the rest break practice has been in existence for a long time and was described to him by the then supervisor, J. Richard Graham, when he went to work in the Boiler Plant.

⁶The Employer raised an objection to Union Exhibit #2 on the basis of relevance and lack of foundation. The Arbitrator took note of the objection but accepted the document into evidence for whatever it is worth.

The Grievant identified Union Exhibit #3, the Position Description for Boiler Plant Operator, dated 08/06/2008.⁷ The Position Description includes the following statements:

“ . . . While working the 2nd or 3rd shift or weekends the operator is the only person at the boiler plant and has the responsibility of all decisions for all facets of plant operations, of all the equipment providing the steam to the VA Illiana Health Care System. . . When working a shift the Boiler Plant Operator – Mechanic is the “Operator In Charge” with the authority to call in engineering personnel for emergencies. . . “

The Grievant testified that the alarm system in the Boiler Plant is not fully reliable which requires that the Boiler Plant Operator must remain in the Boiler Plant when the sole Operator In Charge. The Grievant testified that it gets extremely hot in the Boiler Plant and there is no opportunity to walk outside the Plant and cool down.

On cross-examination, the Grievant acknowledged that meal/lunch breaks are not an issue. The Grievant also acknowledged that his supervisor has never denied his taking a break and there is an air-conditioned room within the Plant, but doesn't think he can be in there. The Grievant also acknowledged that he drinks coffee constantly and warms it up as needed in the break room. The Grievant acknowledged that he now works the week day shift and normally can take his break away from the Boiler Plant, as there is an Operator to relieve him.

On cross-examination, the Grievant acknowledged that the Master Agreement in Article 16, Section 1 (B) qualifies that rest periods may “normally” be taken and are not absolute. The Grievant testified that when he worked in housekeeping, for some eleven years, he was given the opportunity to take his rest breaks away from his

⁷ Union Exhibit #3 is a series of documents regarding an upgrade of Boiler Plant Operator to pay grade 10, due the retirement of the Boiler Plant Operator Leader, with the effect of Boiler Plant Operators having the additional responsibility of “Operator In Charge.”

work area and believes this is everybody's right. The Grievant stated that not being allowed that same freedom, as a Boiler Plant Operator, is the basis for his grievance.

On cross-examination, the Grievant acknowledged that the Master agreement, Article 20, Section 1 (B) also contains the statement: "... Management will not restrict employee mobility during rest breaks except for those positions which require employee' constant presence..." The Grievant responded that "...that's fairly clear to me that unless I'm allowed - - unless somebody comes to relieve me to take a break, I can't take a break. That's what it says."

Union witness, Richard Miller, Boiler Plant Operator – Retired, testified that it has been a long standing practice that breaks were to be taken within 100 foot radius of the Boilers, even outside the building. Miller testified that there is a fairly reliable alarm system on the boiler system with double alarms.

On cross-examination Miller stated that he had worked at VA Illiana for almost 32 years before retiring about three years ago. Miller acknowledged that he took breaks, but they weren't scheduled.

Union Witness, Jeffrey Stier, Boiler Plant Operator, testified that he has been working shifts by himself since he started in 1993 and has been restricted to taking his breaks in or near the Boiler Plant this entire time. Stier testified that there are some problems with the alarm system as it should be on its own electrical circuit.

On cross-examination Stier testified that he is free to drink coffee on the job and can sit down occasionally. Stier acknowledged that he has never been told he cannot take a break.

Union witness, Donald w. DeMoss, Boiler Plant Operator, testified that he has been employed three years and is not allowed to leave the Plant if the only Operator on duty, but has never waived his right to a 15-minute break. DeMoss testified that the

alarm system is not meant to be doing what it is doing as it monitors ten items and the rest of the equipment is not on the system. DeMoss testified that he and other Operators take their breaks when ready in the break room located in the Boiler Plant.

On cross-examination, DeMoss acknowledged that the break room has a microwave, refrigerator, table, radio and coffee maker. DeMoss also acknowledged that there is an air-conditioned computer room and locker room with shower.

Union witness, Theresa M. Hopkins, Register Nurse, testified that she has worked at VA Illiana for some 31 years. Hopkins testified regarding her statement that for several years, as PM shift supervisor in the 1990's, she approved compensatory time for Nurses that were not allowed to leave the ICU on break.⁸ Hopkins testified that there was a requirement that at least two nurses be present in the ICU at all times.

Employer witness, James Cullum, Acting Chief of Engineering Services, testified that he has worked at VA Illiana for some six years. Cullum testified that, during the time period he supervised the Boiler Plant from about January 2007 to January 2007, he has never had any discussions with Boiler Plant Operators about rest breaks, heard anyone complain about them and never told anyone that they could not take rest breaks.

On cross-examination, Cullum acknowledged that if a boiler quits when an Operator is on break the Operator must respond immediately, if the only one on duty. Cullum testified that Operators have discretion as to when they can take a break and disagreed with the assertion that Operators don't have time for breaks. Cullum testified that the AOD checks hourly on Operators to insure they are alert.

⁸ The statement of Theresa Hopkins is in evidence as Union Exhibit #5.

Employer witness, Michael Coons, Utility Systems Repair Operator Supervisor, testified that he has been employed by VA Illiana for some 37 years. Coons testified that he has been the immediate supervisor of the Boiler Plant from February 2008 to the present. Coons testified to VHA Directive 2008-62, "Boiler Plant Operations,"⁹ and MCM Number 138-14, "Boiler Plant Operations, Maintenance, and Inspection."¹⁰ Cullum described these documents as the operating memorandum for the Boiler Plant facility, which has operating pressure over 15 pounds per square inch.

On cross-examination Cullum acknowledged that the above referenced documents were not in effect at the time the instant grievance was filed and the document in effect at that time was VHA Directive 2003-050, dated September 11, 2003.¹¹

On redirect, Cullum testified that the Directive 2008-062 replaced Directive 2003-050 and they are virtually the same. Cullum testified that, in a typical eight-hour shift, Boiler Plant Operators largely observe the boilers, making sure they are working properly; they take chemical tests; walk through on the hour checking the whole Plant; checking for anything unusual; checking to make sure that everything is working properly – observation of the Plant is the main goal.

Cullum testified that the Operator going off duty briefs the Operator coming on duty. Cullum testified that Boiler Plant Operators are allowed to take two 15-minute rest periods per shift and he has never had any complaints about inability to take rest periods. Cullum testified that he has observed Operators on rest breaks and has never told any Operator that they cannot take a rest break. Colum testified that the Operators have discretion as to when they take their breaks.

Cullum testified that the Boiler Plant Operators work a straight eight-hour shift, start to finish. Cullum testified that there are currently seven Operators; four of

⁹ Employer Exhibit #1.

¹⁰ Employer Exhibit #2.

¹¹ Employer Exhibit #3.

them rotate through the shifts and three work Monday through Friday, 8:00 a.m. to 4:00 p.m. Colum testified that all Operators do the same work and the Operators among themselves decide which works rotating shift and which work weekday shifts; day shift Operators serve as relief Operators for those on rotation when needed. Colum testified that on weekday shifts an Operator could leave the Plant for the rest break when another Operator is on duty.

Cullum testified that, when an Operator is the only one on duty, they could take their break inside the Plant or go outside for a breath of fresh air, so long as they can hear the alarm system.

On cross-examination, Cullum testified that Operators on duty have discretion to go outside the Boiler Plant, so long as they have the door open and are able to hear the alarm system. Cullum testified that Operators are responsible for operation of the Boiler Plant during the entire eight-hour shift. Cullum testified that, from his own knowledge, an Operator knows what you can do and what you can't – you know when you can take a 15-minute rest period. If something goes wrong with the equipment while you are on break you have to attend to it and finish your break later. Cullum testified that an Operator could take a break pretty much anytime they want as long as there isn't some sort of turmoil going on.

On cross-examination, Cullum acknowledged that an Operator may need to sit in front of a boiler to be able to monitor it, but that would be a rare event and it would be once in a blue moon when there wouldn't be time for a break. Cullum testified that having only one Boiler Plant Operator on shift is a long-standing accepted practice of the VA across the nation. Cullum testified that the Boiler Plant Operators work an eight-hour shift, start to finish, with a paid lunch period plus are allowed two 15-minute rest periods.

On redirect, Cullum testified that he has not had any Operator complain to him that they weren't able to take their rest break.

Employer witness, Kay Cox, Chief Human Resources, testified she has about 15 years experience with VA Illiana, but left about a year ago and returned this past week. Cox identified a document titled VA Handbook 5023, Part I, Chapter 5, "Negotiating Agreements."¹² Cox referenced an attachment titled "Notification of Personnel Action," which reflects promotion of the Grievant to Boiler Plant Operator, WG-10 at a salary rate of \$25.63 per hour, dated 08/29/2008.¹³

Cox testified that rest periods are included in the compensable workday, meaning that rest periods are on compensated time. Cox testified that no additional compensation or compensatory time is allowed if an employee does not take his or her rest period.

Cox testified that employees working in the ICU are currently scheduled for 12 and one-half-hour shifts; they work 12 hours and receive a 30-minute lunch break. Cox testified that ICU Nurses are paid for 12 hours, but not for the 30-minute lunch break. Cox testified that this differs from Boiler Plant Operators whose lunch period is paid.

Cox testified that there are no records available relating to the Theresa Hopkin's claim that ICU employees, who did not take rest breaks, were given compensatory time during several years in the 1990's. Cox testified that the Master Agreement in Article 43, Section 1, General, provides that:

"Whenever any subject is addressed in the Master Agreement, the terms of the Master Agreement shall prevail over the same subject."¹⁴

¹² Employer Exhibit #5.

¹³ Employer Exhibit #5.

¹⁴ Joint Exhibit #1.

Cox testified that this means that the Master Agreement supersedes any local agreement to pay compensatory time for rest periods not taken, as the Master Agreement prohibits rest periods being added to periods of leave, such as compensatory time.¹⁵

On cross-examination, Cox testified that payroll time cards are kept for six years. When questioned whether it was possible that compensatory time was allowed for the lost breaks, Cox testified all she could speak to was that the 1997 Master Agreement and current VA Regulations both prohibit additional compensation for rest breaks.

DISCUSSION

The issue to be determined is whether the Employer violated the CBA by limiting where the Grievant can take his rest periods to within hearing distance of the Boiler Plant and subjecting them to interruption when equipment malfunctions require immediate response.

It is clear from the Grievant's argument that he equates the above referenced limitation to being denied the rest periods to which he is entitled. The Grievant bases his belief of entitlement on the rest period privileges he enjoyed when working in housekeeping. In the alternative, the Grievant argues he is entitled to additional compensation in lieu of rest periods. In support of this argument, he points to an arrangement involving ICU Nurses that, according to the Grievant's spouse, took place during the 1990's.

The limitation on taking his rest period within hearing distance of the Boiler Plant applies only when the Grievant is the sole Boiler Plant Operator on duty. On the

¹⁵ Article 20, Hours of Work and Overtime, Section 1 – General. “. . . Rest periods will not be added to periods of leave or at the beginning or end of the employee's work shift. . . “

weekday shift, where the Grievant currently works, there is normally more than one Operator on duty allowing him to take a rest break away from the Boiler Plant.

The limitation on rest breaks also applies to the meal/lunch break, which is not being grieved. The meal/lunch break, like the two rest breaks, is on paid time for Boiler Plant Operators. Boiler Plant Operators are on a 24/7 schedule, which works out to three eight-hour shifts per 24-hour day seven days per week as there is no overlap between shifts.

According to the record, a paid meal/lunch break is exclusive to Boiler Plant Operators. For example, ICU Nurses have twelve and one-half-hour shifts, are paid for 12 hours and have a one-half unpaid meal/lunch break.¹⁶

Clear and convincing evidence in the record shows that, although the Boiler Plant requires the constant presence of a Boiler Plant Operator, this does not preclude rest periods when the Operator In Charge is within hearing distance of the alarm system.¹⁷ The record shows that this permits the Operators to take their rest periods in the break room, the computer room, locker-room and outside the Plant, so long as they are within hearing distance of the alarms. The Boiler Plant break room is equipped with facilities common to a lunchroom such as a refrigerator, coffee maker, microwave and table. The locker room has toilet facilities and a shower. There is also an air-conditioned computer room in the Boiler Plant.

Although the record shows there is less than complete confidence in the alarm system among Boiler Plant Operators, witness Richard Miller, who has had 32-years experience presented creditable testimony that it is fairly reliable with double alarms. Miller testified that there is a long-standing practice that rest periods were to be taken within a 100-foot radius of the Boilers, even outside the building.

¹⁶ Testimony of Kay Cox.

¹⁷ Testimony of Richard Miller, Jeffrey Stier, Donald DeMoss and James Cullum.

Although the Grievant testified that he couldn't go into the air-conditioned computer room, the evidence does not support this conclusion. Several witnesses identified the computer room as among locations where Boiler Plant Operators can take their break. The record shows that the reprimand issued to Richard Miller by a former supervisor some years ago, which the Grievant references to support his conclusion, was withdrawn.¹⁸

The record shows that there may be times when malfunctioning equipment limits full reliance on the alarm system, which would preclude taking a break outside the Boiler Plant. The record also shows that there may be instances when malfunctioning equipment may interrupt a break. Witness James Cullum presented credible testimony that "it would be a rare event for an Operator to not be able to take a break."

The Master Agreement is clear and unambiguous that breaks are **not** absolute. Article 20, Section 1 (B) contains the qualifier "normally:"

“. . . A rest period of fifteen (15) minutes duration will be allowed each employee twice during each eight (8) hour day, **normally** one in the first half and one in the second half of the shift. . . “ {Emphasis Added]

The Master Agreement is also clear and unambiguous that Boiler Plant Operators are subject to the limitation set forth in Article 20, Section 1 (B) restricting mobility when taking breaks:

“. . . Management will not restrict employee mobility during rest breaks, **except for those positions which require employee' constant presence.**” [Emphasis Added]

Uncontroverted evidence in the record shows that the limitation on breaks, for Boiler Plant Operators, has been a mutually accepted practice of long standing. The

¹⁸ Testimony of Richard Miller.

testimony of witnesses Richard Miller, Jeffrey Stier, James Cullum, Michael Coons and Kay Cox, shows that the current limitation on breaks has been in effect for many years and the instant grievance is the first occasion it has been challenged.

The length of time the limitation has been in effect without previous challenge clearly establishes it as what is customarily considered a controlling “past practice.”

¹⁹ This long-standing practice is also consistent with and supports the interpretation of the language in Article 20, Section 1 (B) as stated above.

The argument advanced by the Grievant, with respect to his entitlement to additional compensation based on the testimony of his spouse, is less than convincing. The evidence supporting payment of compensatory time to ICU Nurses in lieu of break time refers to something that happened over 20-years ago.²⁰ The Employer has no record of this arrangement having taken place. Further, to whatever extent such an arrangement was in effect, it has not been allowable since advent of the 1997 Master Agreement. The Master Agreement prohibits the payment of compensatory time (leave) for rest periods:

“Article 20, Section 1 (B). . . Rest periods **will not be added** to periods of leave or the beginning or end of the employee’s work shift.”

“Article 43, Section 1- General. . . Contract provisions contained in local contracts/supplements in existence prior to the Master Agreement will continue in effect **insofar as they do not conflict with the Master Agreement**. Whenever any subject is addressed in the Master Agreement, the terms of **the Master Agreement shall prevail over the provisions of the local agreement concerning the same subject.**”

¹⁹ See Elkouri & Elkouri, How Arbitration Works, Fifth Edition, at page 632:

“. . . past practice, to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as fixed, and established practice accepted by both Parties.”

²⁰ Testimony of Theresa Hopkins and Union Exhibit #5.

The Grievant's reliance on Union Exhibit #2 to support his case is also less than convincing. This document refers to a decision involving another Union (NFFE) and a different labor agreement having language inconsistent with that contained in the Parties 1997 Master Agreement. The Arbitrator finds this document too lacking in relevance and foundation to be considered material evidence.

Lastly, the Grievant argues that the limitation on rest periods for Building Plant Operators violates the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. This argument fails for two reasons; (1) The Equal Protection Clause prohibits **states** from denying any person within its jurisdiction the equal protection of the **laws**. The matter in dispute is not a law within the jurisdiction of a state; (2) The 14th Amendment is not by its terms applicable to the federal government.²¹

FINDINGS

1. Clear and convincing evidence shows that the Grievant was not denied his rest periods as provided by the 1997 Master Agreement. This is true notwithstanding the limitation that the rest periods must be taken within hearing distance of the Boiler Room and are subject to interruption due to malfunctioning equipment that requires his immediate response.
2. The limitation on rest periods for Boiler Plant Operators is in accordance with the terms and conditions of the 1997 Master Agreement between the Parties and does not constitute a violation of the Master Agreement.

²¹ Source: Cornell University Law School, LII/Legal Information Institute.

3. Compensatory time for rest periods is not permissible under the terms and conditions of the 1997 Master Agreement.
4. The current limitations on rest breaks for Boiler Plant Operators has been in existence for many years and previously unchallenged. As such, it also constitutes binding "past practice," notwithstanding any provision of the 1997 Master Agreement to the contrary.
5. The instant issue in dispute is not subject to the Equal Protection Clause of the 14th Amendment to the U. S. Constitution.

AWARD

The grievance is denied.

CONCLUSION

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 25th day of March 2009 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR