

IN THE MATTER OF ARBITRATION BETWEEN

HENNEPIN COUNTY MEDICAL CENTER)
"Employer")
AND) BMS Case No. 09-PA-0943
HENNEPIN COUNTY ASSOCIATION OF)
PARAMEDICS AND EMT's) Paid Time Off (PTO) Grievance

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: October 28, 2009; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: November 20, 2009 (Original Date)
January 22, 2010 (After Mail Delay)

APPEARANCES

FOR THE EMPLOYER: Martin D. Munic, Attorney
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FOR THE UNION: Bruce P. Grostephan, Attorney
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Peter Naron, Pres, HCAPE
Wade Johnson, Sec., HCAPE
Andy Peter, Paramedic
Mike Zustiak, Paramedic
Dirk Bjornson, Paramedic

FACTS

The grievance involves Hennepin County Medical Center's (the "Employer") refusal to pay overtime according to the Union's interpretation to the Collective Bargaining Agreement. The grievance was first filed on February 26, 2009. The Employer responded on March 6, 2009. To clarify its position the Union amended its grievance on April 30, 2009. A provision that the Union relies on is Article 9, Section 4, Paragraph A:

Article 9 – Work Schedules – Pay

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Section 4. Worked hours in excess of the designated work shift or forty (40) hours per payroll week shall be overtime and compensated at one and one-half (1-1/2) times the employee's base pay rate, subject to the provision that no employee shall be eligible for overtime premium unless prior approval of the overtime work was granted by the employer.

Holiday leave and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium.

The Union asserts that it retained the application of this language with regard to overtime in Article 19, Section 9 in December, 2007. The language it negotiated, Article 19 – Flexible Paid Time Off (Flex PTO) that is relevant is:

Section 9. Language contained in this agreement governing the use of Sick Leave and Vacation shall be applicable to the use of Flexible Paid Time Off (Flex PTO).

Other provisions still apply to the payment of the overtime premium even though an employee has elected the leave plan entitled "Paid Time Off" under Article 18. Other provisions that govern overtime include Article 12-Short Notice Overtime, Article 13, Mandatory Overtime, Article 14-Long Notice Overtime, Article 15-Vikings/Gophers Regular Season and Post-Season Football Games, Article 16-Special Event Assignments, and Article 17, MLB/NBA and Intercollegiate Baseball/Basketball.

The employees who have selected to be on the paid time of program (PTO) is set forth in an attachment. Article 18 of the contract provides that effective January 1, 2009 all newly hired employees will be covered by flexible paid time off. Article 18, Section 2, effective January 1, 2009, current employees of the Hennepin County Medical Center would be offered a choice of being covered by the flexible paid time off program. After January 1, 2009, many of the unit members contend they had not been paid the proper overtime when they used PTO hours during the pay period.

The Employer denied the grievance on May 21, 2009 asserting that "The Flex PTO program in effect did not count PTO as hours worked for purposes of calculating overtime (and still does not)."

The Employer at the hearing on October 28, 2009, argued that PTO hours do not count as hours worked, that the members gave up the language in Article 9, Section 4.A., "Holiday leave

and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime,” when they selected to be bound by Article 18, Section 2-Paid Time Off (PTO), and that the Union and the employees waived Article 9, Section 4.A.1

POSITION OF THE EMPLOYER

HCMS unilaterally converted non-organized employees to the Flex PTO Plan as of March 2007. Such a change, however, would have to be bargained with respect to its union employees. All of the Collective Bargaining Agreements (CBAs) between HCMC and its unions, including HCAPE, were set to expire on December 31, 2007, except for the nurses’ labor contract.

One of management’s goals for the negotiations of the 2008-09 was to have all the unions accept the PTO plan. Based on comparisons to other Twin Cities hospitals and focus groups of its own employees, HCMC thought that PTO, including employer-paid short and long-term disability, was a better plan than traditional vacation and sick leave. HCMC wanted its benefit plans to be uniform for ease of administration, and this included having union and non-union employees on the same PTO plan.

Director of Operations Stephanie Secrest told HCMC’s labor negotiator Dobier that he was to have all the unions, including HCAPE, agree to the PTO plan which covered the non-organized employees.

Before negotiations began, Dobier invited HCAPE’s president and all the other union presidents to a meeting on the new benefits which HCMC had recently implemented for non-organized employees and including PTO.

When contract negotiations began, Dobier informed HCAPE that management wanted the Union to accept the PTO plan. HCAPE bargaining team members Combs and Johnson both admitted at the hearing that Dobier insisted that HCMC had to get PTO in order to settle the contract.

The parties reached a tentative contract agreement on December 28, 2007. Shortly thereafter, Dobier reported back to HCMC that HCAPE had agreed to “Flex PTO with the same plan as non-contract employees.” The agreement regarding PTO was that new hires as of January 1, 2009 would automatically be in the PTO plan, but employees hired before then could choose whether they wanted to convert to PTO or remain in the traditional vacation and sick leave system. Those switching to PTO could also cash out certain amounts of their sick leave. In addition, if they converted to PTO, HCMC would now provide short and long-term disability insurance to the employees with the cost completely borne by the employer.

This arrangement of new hires in the second year of the contract automatically entering the PTO plan and incumbents having the option to join the PTO system became the same deal HCMC reached on PTO with eight of its other unions. In fact, the PTO language used in the

HCAPE contract was the same language used in the PTO articles in all the CBA's with all the other unions at HCMC.

The incumbent HCAPE and other union employees were to make their election to remain in the traditional plan or switch to PTO during the November 2008 open enrollment period. HCMC informed the incumbent union employees about the PTO program, including mailings and informational sessions. On November 4, 2008 HCMC sent an e-mail to all union employees entitled "For Union Employees: Answers to Questions About Flex PTO." One of the questions and answers specifically addresses the issue of whether PTO hours taken would count as hours worked for calculating overtime. IT said:

Overtime

Q: If I elect PTO, do hours that I'm paid but I do not work (IE: PTO and EML) count toward overtime?

A: No, those hours do not count toward overtime.

Thus HCAPE employees were informed prior to converting to PTO that those hours would not count as hours worked for overtime calculations. HCAPE witness Michael Zustiak, for example, acknowledged receiving the November 4, 2008 e-mail and seeing the Q&A regarding overtime. Nevertheless, he opted to convert to PTO.

In total 35 HCAPE members converted to the PTO plan. Approximately 90 HCAPE members elected to remain with the traditional vacation and sick leave system. As part of the grievance process, HCMC has twice offered to allow any paramedic who switched to PTO to return to the traditional plan. Though the union contracts with HCMC have the exact same PTO language, only HCAPE has asserted that PTO leave counts as hours worked for purposes of overtime; the only union to have filed a grievance on this issue is HCAPE.

In negotiations for the next labor agreement (2010-2011), HCAPE has now proposed language which would amend the current contract to provide that Flex PTO leave would be considered hours worked for purposes of calculating overtime.

The plain language of the contract provides that PTO hours do not count as hours worked. The CBA provides that as of "January 1, 2009, all newly hired employees will be covered by the Hennepin County Medical Center's Flexible Paid Time Off (Flex PTO) benefit program." Article 19 § 2. Similarly, the section of the contract which allowed incumbent employees to switch to PTO provided that they may "elect to participate in the Flexible Paid Time Off (Flex PTO) program." Article 19, § 2.

The CBA's references to "the" HCMC Flex PTO plan area references to something which already exists, namely the PTO plan which was implemented for the non-union employees the previous year. That existing PTO plan, moreover, states that PTO hours did not count as hours worked for purposes of calculating overtime.

The CBA, moreover, has a section that specifically addresses which leave hours do constitute hours worked for purposes of calculating overtime. The language is found in Article 9 – Work Schedules – Pay, and it states:

A. Holiday leave, and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium.

Article 9, § 4A. JT Ex. 1, at 9.

It is a well-established rule of labor contract construction that the expressed listing of items means that similar items which were not listed are intended to be excluded. The doctrine is known as *expression unius est exclusion alterius*, i.e. “[t]o express one thing is to exclude another.”

Article 9, Section 4.A. expressly lists which types of leave pay (i.e., pay when no actual work is performed) are considered hours worked for calculating overtime, and thus any other kinds of leave pay not mentioned do not count as hours worked. Sick leave, for example, is not listed as one of the types of leave pay which is considered “hours worked.” Both parties agree that sick leave hours do not constitute hours worked. Yet no language in the CBA affirmatively states that sick leave hours do not count; it is only sick leave’s absence from the list in Section 4.A. which yields the undisputed conclusion that sick leave hours do not constitute hours worked for purposes of calculating overtime.

This same logic compels the conclusion that PTO hours do not constitute hours worked for overtime calculations. Just like sick leave, PTO is not included in Section 4.A.’s list of what kinds of leave pay are considered hours worked. In fact, HCAPE recognizes that the current CPA does not provide that PTO hours constitute hours worked because it has proposed for the next contract that “Flex PTO” be added to Section 4.A. as another type of leave pay which is considered hours worked.

Any ambiguity in CBA language regarding PTO should be construed against HCAPE. In an effort to circumvent the CBA language which clearly provides that PTO leave taken is not considered hours worked, HCAPE tries to put a gloss of bargaining history on an unrelated contract provision. Yet where, as here, contract language is unambiguous, extrinsic evidence such as prior negotiations should not be considered.

HCAPE argues that the language upon which it relies is ambiguous, and thus asserts that the purported bargaining history tips the scale in its favor. Even if the language is found to be ambiguous, the Union’s claim still fails because it drafted the provision in question, and thus its ambiguity must be interpreted against HCAPE.

HCAPE’s claim that PTO hours count as hours worked rests on Article 19, Section 9, which provides:

Language contained in this AGREEMENT governing the use of Sick Leave and Vacation shall be applicable to the use of Flexible Paid Time Off (Flex PTO).

HCAPE states that it drafted this language and that the express purpose of the provision was to ensure that PTO hours taken for vacation would still count as hours worked.

Conveniently, the HCAPE negotiators had their one discussion during bargaining about whether PTO would be considered hours worked only with Dobier, a person they know no longer works for HCMC.

The alleged agreement on how PTO hours would be treated with respect to overtime was not discussed in the presence of all the negotiators or at least shared with HCMC's other members of the bargaining team. Two of those members, VanBuren and Gesme, indicated that they never heard any mention during bargaining about whether PTO would count as hours worked.

VanBuren and Gesme testified the only discussions in bargaining regarding Article 19, Section 9 dealt with how employees using PTO would still have to request time off for vacation and notify management prior to a shift that they could not make it to work, i.e., that the existing provisions relating to notice requirements would still apply under the PTO system.

The language HCAPE authored to supposedly provide that PTO hours taken for vacation would constitute hours worked for overtime does not accomplish the task. Again, the text is:

Language contained in this AGREEMENT governing the use of Sick Leave and Vacation shall be applicable to the use of Flexible Paid Time Off (Flex PTO).

Article 19, § 9. Jt. Ex. 1, at 14.

This section makes no mention of "overtime," let alone the concept of "hours worked." The natural reading of this provision is that the rules in the CBA for using, i.e., taking, sick leave and vacation will also apply to the use of PTO. The CBA, moreover, does contain language addressing how to use sick and vacation time. See Article 19, Section 2 – Vacations D. (vacation requests must be submitted at least 48 hours in advance); Article 19, Section 3 – Sick Leave E. (listing situations appropriate for sick leave use) and G. (must notify supervisor at least two hours prior to start of shift).

If HCAPE's goal was to have PTO hours count as hours worked for purposes of calculating overtime, it could have used much clearer language than Article 19, Section 9. For example, HCAPE could have done for the 2008-09 CBA what it is proposing to do for the 2010-11 CBA: simply add PTO to Article 9, Section 4.A.'s list of what types of leave pay are considered hours worked for calculating overtime. The Union's language in Article 19, Section 9 does not provide that PTO hours count as hours worked. The best that can be said of Section 9 is that it is ambiguous with respect to whether PTO hours count as hours worked.

POSITION OF THE UNION

The Employer advised the Union members that the contract was controlling, not the policy. The Employer relies on Employer's Exhibit 1 dated November 4, 2008, page 4. Under the heading of "Overtime," the question is "If I elect PTO, do hours that I am paid but I do not work count toward overtime? Answer: No, those hours do not count toward overtime." However, the last sentence of the paragraph provides, "Currently eligibility for overtime pay after calling in sick or taking vacation varies by union contract." HCAPE's Union contract, provides that if time is taken for a vacation, that time counts toward the overtime calculation. Both parties agree that if PTO time is used for sick leave, it does not count for the overtime calculation.

Employer's December 20, 2007 seven part memo also supports the grievance of the Union. Employer's Exhibit 2 represents a portion of the HCMC Employee Handbook. The Employer relies on page 6 which states that vacation time is not considered as time worked in determining eligibility for overtime pay. However, page 7 provides that, "The Employee Handbook is not a contract of employment or a legal document and nothing in this Handbook creates an express or implied contract of employment." On page 5 of Employer's Exhibit 2, the Employee Handbook specifically states, "If the information in this Handbook conflicts in any way with terms and provisions of applicable collective bargaining agreements and/or legal requirements, the collective bargaining agreements and/or legal requirements supersede the information in this Handbook." The Employer relies on a policy which is in direct conflict with the binding collective bargaining agreement.

Dennis Combs, the Vice President of the Union, testified that a significant number of paramedics had found that the Employer was violating the contract in the payment of overtime while relying on its interpretation of PTO under its employment policy. In the hearing on October 28, 2009, the Union presented certain situations where the Employer violated the contract in the payment of overtime and also certain situations where the Employer complied with the contract in the payment of overtime when paramedics took PTO time.

Joint Exhibit 4, describes the example of Michael Zustiak working overtime during the pay period from February 1-14, 2009. Zustiak made the election of Flex PTO compensation. The first page of Union Exhibit 1 shows that he took four hours of PTO time during the payroll period. The third page indicates that he took four hours off for vacation on Sunday, February 8, 2009 for PTO time. He was paid for a total of ten hours on February 8, 2009. On Tuesday, February 10, 2009, he worked 5-1/2 hours at a Timberwolves game. Timberwolves game is defined as "long-notice overtime" under Article 17 and is considered desirable overtime. Zustiak also had 75 hours of overtime on February 5, 2009. On Page 5, he had 1.5 hours of overtime on February 14. In the pay period of February 1-14, he should have been credited with 6.25 hours of overtime. Instead, he received only 2.25 hours of overtime. Because he had used 4.0 hours of PTO time, the Employer took four hours of his overtime and made it regular time. The Employer should have construed his 4.0 PTO hours as part of his regular time, and paid him for 6.25 hours of overtime. The calculation in the amended grievance, Exhibit 4, p. 2, reveals that because the Employer failed to apply Article 9, Section 4, Zustiak's loss of the overtime premium amounted to \$62.64. Zustiak also testified about the pay period from July 5-18, 2009.

He identified Union Exhibit 2 with regard to that pay period. The last page of Union Exhibit 2 supports that he took 60 hours of PTO time from July 5-13, as vacation. On July 15, after he came back from his vacation, he worked at the Twins game, desirable overtime and he bid on that overtime. It is defined as overtime under Article 17, Joint Exhibit 1. The last page of Joint Exhibit 2 indicates that he worked 4.81 hours at the Twins game. This should equate to 4.75 hours of overtime. He also worked ½ hour of overtime on July 18, 2009. He should have been paid for 5.25 overtime hours. Instead, he was paid for 84.75 regular time hours of his vacation time. The Employer ignored Article 9, Section 4, in calculating his overtime because vacation was to be considered worked hours for the purpose of determining the overtime premium. Because of his PTO hours during the pay period, the Employer wiped out his overtime hours in violation of the contract.

Andrew Peter, a paramedic who worked for HCMC for two years, testified about a violation of contract with regard to his overtime in the pay period from February 15-28, 2009. Peter took 7.5 hours of PTO time as a vacation on Saturday, February 28. On February 19, he worked 7.5 hours on an overtime shift. On February 26, he worked 4.0 hours for education. The educational time is compensable time under Article 42, Section 2. The time became overtime pursuant to Article 9, Section 4, for work in excess of 40 hours per payroll week. On February 27, he worked a 7 hour overtime shift. He should have been paid a total of 18.75 hours of overtime. Instead, he was paid only 11.25 hours of overtime, because he received 7.5 hours of PTO time for vacation. The Employer reduced his overtime premium pay by 7.5 hours. Peter's 7.5 hours of PTO time were the last hours he worked in the payroll period. The Employer used the 7.5 hours of PTO time to simply replace overtime hours he had already worked.

Dirk Bjornson was a paramedic. An offer of proof was made with regard to Union Exhibit 10 for the pay period from March 29-April 11, 2009. The first page of Union Exhibit 10 disclosed that during the pay period, Bjornson received payment for 63.5 regular hours and 21.50 PTO hours. All hours were paid at straight time. There were additional hours under the earnings column for the Saturday differential and the Sunday differential. For the week of March 29-April 4, Bjornson was paid regular time for 45.5 hours. His offer of proof states that on Wednesday, April 1, he worked at a basketball game which is defined as long-notice overtime under Article 17. He had 14.5 hours PTO time during the week of March 29-April 4. The PTO time was taken as vacation, not sick leave. The Employer refused to count the PTO time of 14.5 hours in his hours worked for the application of the overtime premium for the basketball game on April 1. That was a violation of Article 9, Section 4. The week of April 5-11, included seven PTO hours and 36 regular hours. The seven PTO hours were taken as vacation. Pursuant to Article 9, Section 4, the PTO hours were required to count as hours worked. Since Bjornson worked a total of 43 hours during that payroll week, he is entitled to three hours of overtime instead of three hours of regular time. During the pay period, Bjornson was denied 8.5 overtime hours in violation of the contract. Bjornson should receive the overtime premium for the 8.5 hours. He only received regular pay for the 8.5 hours.

The Employer's violation of Article 9, Section 4, in refusing to apply PTO hours, vacation hours, as hours worked is arbitrary and unreasonable. The Employer does not consistently apply its own interpretation of Article 9, Section 4. With regard to Bjornson, during

the pay period February 1-14, 2009, he was paid for 52.5 regular hours, 27.5 PTO hours and 11.75 overtime hours. The third page of Union Exhibit 9 discloses that on February 7, 8 and 10, Bjornson took PTO hours for a vacation. On February 1, Bjornson worked .75 overtime hours. On February 5, he worked 11.0 overtime hours. In the pay period from February 1-14, 2009, Bjornson's PTO hours were counted as hours worked and they were not used to diminish the overtime hours he properly worked. Union Exhibit 9 is an offer of proof of proper compliance with Article 9, Section 4 and Article 19, Section 9.

Dennis Combs, the Vice President of the Union, on his own paycheck from February 1-14, 2009 had 65 regular hours and 16 PTO hours. He received one overtime hour. Combs testified that PTO hours were for vacation time that he took on February 4, 9, 11, 12. He had .5 overtime hours on February 2, and .5 overtime hours on February 10. The PTO hours were treated as hours worked because they were vacation time under Article 9, Section 4. The Employer did not use the PTO hours to deny Combs his appropriate overtime hours.

Combs testified about Michael Annoni, who had elected PTO hours. Annoni's paycheck from February 15-28, 2009 marked Union Exhibit 6. During that pay period, Annoni worked 78 regular hours, 2.0 PTO hours, and 8.5 overtime hours. The PTO hours were used for vacation on February 24. The overtime hours were worked on February 19 and 26, 2009. The PTO hours were properly treated as hours worked under Article 9, Section 4. The Employer did not diminish his overtime.

Combs identified Union Exhibit 7, the paycheck of Paramedic Emily Pronghofer, for the pay period February 15-28, 2009. Pronghofer was paid 77.0 regular hours, a total of 5.5 overtime hours (OTPrm 4.75 + OTPrm .75), and 6.0 PTO hours. The fourth page of Union Exhibit 7 discloses that Pronghofer worked a total of 47.50 hours during the week of February 15-21. She took vacation 3.0 hours (PTO hours) on February 18, 2009. She should have been paid for 7.50 hours of overtime under Article 9, Section 4. She worked 7.5 hours in excess of 40 hours under Article 9, Section 4. She should not have had her overtime penalized because of the use of 3.0 hours of PTO for vacation on February 18.

During the week of February 22-28, 2009, she worked a total of 40.75 hours. The Employer properly credited her with .75 hours of overtime pursuant to Article 9, Section 4. There was no violation of the contract the week of February 22-28, 2009 because of using 3.0 PTO hours for vacation on February 25, 2009. For the pay period of February 15-28, 2009, the Employer paid her compensation for only 5.5 hours of overtime. She should have received 8.25 hours of overtime for the pay period. The Employer denied her the overtime premium for 2.75 hours. She received only the regular rate for the 2.75 hours. She was penalized \$30.28 because of the Employer's interpretation of the contract the week of February 15-21. The week of February 22-28, 2009, the Employer properly interpreted Article 9, Section 4. She used 3.0 hours PTO time for vacation on February 25, 2009 and that 3.0 hours was treated as hours worked for "...the purpose of determining eligibility for overtime premium."

Combs testified that he has had numerous complaints from many paramedics about overtime not being properly calculated. The contract was negotiated based on the understanding that the opportunity will be available to make significant compensation from overtime when

calculated correctly. Due to the confusion in implementing PTO time, the Union attempted to communicate with the Employer about the problems that had arisen with regard to the calculations of overtime. After the Union's grievance, Joint Exhibit 2, the Union filed an amended grievance, Joint Exhibit 4, on April 28, 2009, in order to outline an example of what was occurring and how it occurred. In Joint Exhibit 4, the Union requested that proper overtime be paid to the members denied their overtime. In Joint Exhibit 4, the Union requested an audit for each member that participates in the "Paid Time Off" (PTO) provision. The Union requested that this audit apply to the payment of overtime subsequent to January 1, 2009. Joint Exhibit 5, a letter from, the Employer dated May 21, 2009, indicates that significant negotiation occurred. In an effort to resolve the dispute, the Union utilized a mediation provision under Step III of Article 7 of Joint Exhibit 1. The parties agreed to use the Minnesota Bureau of Mediation Services. That mediation occurred on July 7, 2009, but did not resolve the dispute.

The evidence with regard to the negotiation for the PTO provision in Article 19 supports the Union. Combs was involved in negotiations for the contract from January 1, 2008 to December 31, 2009, as were Wade Johnson and Peter Narow. There were 8-10 negotiation sessions. The negotiator for the Employer, Jack Dobier, proposed the provision with regard to PTO (Flex PTO) for the present contract. Articles 18 and 19, include the reference to paid time off (PTO). Combs testified that the Union initially resisted PTO time. Dobier told the Union negotiators that he had to have some version of PTO in the contract.

The Employer offered Employer's Exhibit 5 entitled "Management Proposal, 12/28/07, HCAPE/HCMC Contract, 2008-2009." Combs testified that Employer's Exhibit 5 was prepared with Wade Johnson typing it up on the computer. Johnson, the secretary for the Union, typed the first five pages of Employer's Exhibit 5 and the article entitled "Article New Flexible Paid Time Off (Flex PTO)." The fifth page of Employer's Exhibit 5, Section 9, provides, "Language contained in this agreement governing the approval and use of sick leave and vacation shall be applicable to the use of Flex PTO." The Union included the above language on Page 5 of the Employer's Exhibit 5 because it wanted to preserve its contract rights. In Article 9, Section 4, which includes the provision, "Holiday leave and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium."

The above language had been in the contract for more than 25 years. The 1983-85 collective bargaining agreement contains the same language under Article 9, Section 4. Not only does the language of the contract, Joint Exhibit 1, include "Holiday leave and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium," but the Union officers held a side bar with Dobier outside during negotiations. A firm understanding was reached that PTO time would be included like vacation time had been included in the past. No attempts by the Union was made to expand the meaning of PTO time. Sick time used for PTO would not be included as hours worked in order to calculate overtime.

Johnson explained that during the course of negotiations the Union made a proposal marked Exhibit 8, "HCAPE Proposal." On the fourth page of Union Exhibit 8, the provision entitled "Article 14, Flexible Paid time Off (Flex PTO)" starts. On the sixth page, Union Exhibit 8, Section 8, contains the following provision: "Language contained in this agreement governing the use of sick leave and vacation shall be applicable to the use of Flex PTO." Johnson testified

that he and Jack Dobier met to check over the provisions and agreed to remove the word “approval” from Article 19, Section 9. Johnson testified that he did not, himself, opt for PTO because of his personal situation. The Union came up with the language in Union Exhibit 8 and discussed the issue of overtime with Dobier. Union members wanted a guaranty that Article 9, Section 4, would provide the guarantee for overtime for vacation and holiday time. The Union also discussed the fact that there would need to be a different pay code for sick time as compared to vacation time. Dobier said there would be no problem.

Stephanie Secrest, Human Resources Director, testified that Dobier’s employment ended as of April, 2008. She testified that PTO was conveyed to Dobier as a priority. She identified Employer’s Exhibit 7, the January 22, 2008 memo from Dobier. On the third page of Employer’s Exhibit 7, with reference to HCAPE, Dobier communicates that the Union is recommending this to their membership. With regard to the recommended tentative agreement, he states “...the recommended tentative agreement is huge.” He references problems in negotiating with AFSCME. In the last paragraph of Employer’s Exhibit 7, he advises the administration that the Union members of HCAPE will be voting on the agreement the week after January 9, 2008. The Bylaws for the Hennepin County Medical Center indicate that the HHS Board is the Board of Directors for the Hennepin Health Care System, Inc., which is the statutory name for the Hennepin County Medical Center. The HHS Executive Committee has been delegated authority to approve the contract by the Employer and did approve the contract. The President of Hennepin Healthcare System, Inc. signed the contract on February 11, 2008.

The only document Ms. Secrest produced at the hearing was prepared by Dobier (Employer Exhibit 7). She testified that the same language was put into the agreements with other unions. She testified that there were no other claims and grievances from the other unions about overtime. However, her claim about the same language in other collective bargaining agreements is not true. The language concerning work schedules and premium pay in the Collective Bargaining Agreements with the other unions does not contain the language from Joint Exhibit 1, Article 9, Section 4.a, which provides “Holiday leave and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium.” The provision concerning work schedules/premium pay from the contracts with other unions with HCMC are covered in Affidavit of Dennis Combs.

In order to support Seacrest’s testimony, the Employer called Doug Gesme, Operations Manager for EMS and Martin Van Buren, EMS Director. Gesme said his main concern was that the paramedics had to ask for time off in application of the PTO provision and that Dobier, and the Union officers, did not discuss the overtime application of Article 9, Section 9. Van Buren testified that Dobier wanted the PTO provision that placed into Joint Exhibit 1. Van Buren testified that the overtime application of the PTO provision, Article 19, was not discussed in his presence.

Article 9, Section 4.A., including the “holiday leave and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium” should be interpreted based on its plain meaning. This language determining overtime involves continued use of certain key terms in successive agreements. It justifies a party’s assumption

that no change in meaning was intended by the other party that had failed to state otherwise in negotiations.

An agreement was reached with Dobier. The contract affirms the agreement. The Collective Bargaining Agreements with other unions do not contradict the agreement. The Employer's Exhibit 7, the memo from Dobier, does not contradict Article 9, Section 4.A.

The Arbitrator cannot disregard Article 9, Section 4.A. "It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect."

Article 9, Section 4.A. of Joint Exhibit 1 has been in effect for more than 25 years. The Employer claims that the Union has waived the impact of that language. Overtime involves compensation of the members of the unit. It is denied as a term and condition of employment. The Employer has the obligation to negotiate over such a provision and has no authority to unilaterally modify it. The courts advise "In order to waive a statutory right to negotiate on a mandatory subject of bargaining, a union must express its intention to waive in clear and unmistakable language." See *West St. Paul Teachers v. Independent School District 197*, 173 N.W.2d 366, 374 (Minn. App. 2006). Waiver of such rights must be "clear and unmistakable." Employer in the case at bar has presented no evidence of a clear and unmistakable waiver.

The Employer's interpretation of Article 19, Section 9 leads to a harsh and absurd result when considered with Article 9, Section 4.A. When one interpretation of a contract would lead to a harsh or absurd result, and an alternative interpretation would lead to a just and reasonable result, the latter interpretation will be used. It would be a harsh result to adopt the Employer's interpretation and ignore language that has been applied by the Employer for more than 25 years.

When practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice. See Elkouri and Elkouri, *How Arbitration Works*, 6th Ed., p. 623, *Polaris Industries*, 72 L.A. 1104, 1106 (Kapsch, Sr., 1979).

DISCUSSION AND OPINION

Both parties argue that the exact same provision clearly support their competing and mutually exclusive interpretation of the CBA. The Union claims that the express statement "A. Holiday leaves and vacation leave shall be considered worked hours for the purpose of determining eligibility for overtime premium."

The Employer contends for the opposing view that, by dint of its absence of mention among items listed, Flex PTO cannot be treated as hours worked for purpose of determining eligibility for overtime period.

While each party asserts that this provision contains “plain language” which clearly and unambiguously supports its respective position, the very fact of such conflicting claims demonstrates the ambiguity of Article 9 – Work Scheduled – Pay Section A. The well understood meaning of ambiguous in reference to a contract provision refers to language susceptible to different interpretations by impartial and informed readers.

Arbitrators called on to resolve contractual ambiguities are advised in the professional literature and in judicial decisions to consult “other sources of enlightenment.” United Steelworkers of America vs. Enterprise Wheel and Car, U.S. Sup Ct. 596 2nd Fed (1960). Traditional sources of enlightenment frequently cited include standards of interpretation taken from contract law, bargaining history, past practice, and company and industry-wide comparisons.

The resolution of the instant dispute requires resort to several such sources of enlightenment in view of the vexing anomalies contained in the contractual language here under review and of the contradictory actions taken by either party at various times. Perhaps the most troubling contradiction posed between what appears to be the unassailably plain language of Article 9, Section 4.A. and the actions of those employees who elected the Flex PTO program while accepting its sick leave payout and disability premium payment by the Employer.

These benefits, according to the record, were presented by the Employer as a quid pro quo but the message of the Grievant’s’ claim is that they accept the quid of the benefit package for signing up in the Flex PTO but they want to reject the pro quo of letting go of the overtime eligibility reward of the original contract coverage.

This kind of collision course permeates the entire dispute no matter the point at which the anomalous arguments are engaged. For further example, the Employer argues that HCAPE could have made its position on inclusion of Flex PTO within coverage of Article 904 A. absolutely clear had it succeeded in adding this program to the sentence “Holiday leave, vacation leave and Flex PTO shall be considered worked hours for the purpose of determining eligibility for overtime premium.”

The same result would have been obtained, argues the Employer, if in the alternate the Union had succeeded in adding to Article 19, Section 9 the concluding phrase, or words to the effect that:

Language contained in this AGREEMENT governing the use of Sick Leave and Vacation shall be applicable to the use of Flexible Paid Time Off (Flex PTO) as worked hours for the purpose of determining eligibility for overtime premium.

A similar line of argument could be used, however, in regard to the contractual ambiguities resulting from certain conspicuous absences of clarifying mention in provisions authored by the Employer. Without doubt, the most glaring omission is the lack of a simple declaration in the CBA which would have avoided the dispute now here for resolution. That simple sentence which would have said, in effect, Flex Paid Time Off (Flex PTO) shall not be considered as time worked for purposes of determining eligibility for overtime premium.

With the acuity of hindsight, the entire dispute could have been averted, of course, by a routine statement of waiver by the employee at time of electing the Flex PTO option attesting to the understanding that such Paid Time Off would not be considered as time worked for purposes of determining eligibility for the overtime premium. While it may be disingenuous to offer such after-the-fact observations on what could have been, should have been done, the real point here is that the dichotomous arguments of the parties over a relatively straightforward proposition strongly suggests that there may not have been a clear meeting of the minds in the first place.

This supposition is reinforced by the parties' reciprocal and unavailing reliance of hearsay regarding what the absent declarant Jack Dobier had expressed in separate conversations with Union and Employer witnesses. These discussions, as reported in the flatly contradictory testimony of HCAPE Negotiators Dennis Combs and Wade Johnson regarding a side bar with Dobier, and HCMC negotiator Doug Gesme and Martin VanBuren about the same issue.

According to the HCAPE witnesses, Dobier had agreed in this side bar and subsequently in preparing the new CBA draft that the Union had preserved its treatment of PTO hours as to overtime eligibility with its new language in Article 19, Section 9 that specifies:

Language contained in this AGREEMENT governing the use of Sick Leave and Vacation shall be applicable to the use of Flexible Paid Time Off (Flex PTO).

HCMC witnesses Gesme and VanBuren, however, refuted this version of the bargaining history, stating that the only discussion of this Union-sponsored language had to do with requesting time off for vacation and notifying supervision when sick. Both testified that Dobier never reported back to the other HCMC team any such side bar agreement on retention of overtime eligibility relating to PTO.

It is critical to pose the dispositive question at this juncture in the review -- in view of the facts showing that:

- Neither party has succeeded in citing plain, unambiguous contract language to support its position.
- Bargaining history designed to clarify terms in dispute consists merely of unreliable hearsay.
- Payroll evidence presented show that past practice, often a major guide to contractual intent, was highly inconsistent – sometimes favoring HCAPE's and other times HCMC's version of correct "procedure."
- What principles of interpretation can be brought to bear on the resolution of the instant grievance?

Arbitrators have fashioned several ways to deal with industrial disputes where the more favored means have proven inadequate – as in this case where neither contract language, bargaining history or, indeed, past practice provides a satisfactory answer. Among those alternative interpretive tools are the following:

1. At times the ancient adage “actions speak louder than words,” in fact reveals the will and intent of the grievant, i.e., constitute consent, better than does the language of a CBA.

Comment and Conclusion: The record discloses that every employee had ample opportunity to read the explanatory materials and attend informational sessions about Flex PTO before their election to be enrolled in the new program, or to remain with the old terms (which undisputedly provides for holidays and vacation time to count towards overtime eligibility). The HCMC Handbook Update (Employer Exhibit 2) which was sent to all employees states clearly on Page 6:

If the information in this handbook in any way conflicts with the terms and provisions of applicable collective bargaining agreements...the collective bargaining agreements...supersede...

The Handbook goes on to state on Page 14:

Time that is paid but not worked (such as the Flex PTO...vacation...) is not considered as time worked in determining eligibility for overtime pay.

It is significant to the concept of informed consent that every employee was required to sign off on the Employee Acknowledgement Form which states, in relevant part:

I understand that this Employee Handbook provides guidelines on the policies, procedures and programs that affect my employment at HCMC. It is my responsibility to familiarize myself with the information in this Handbook and to seek verification or clarification of its terms or guidance where necessary. I understand that I am responsible for the contents of this handbook.

**

...I understand that I should consult my supervisor, manager or Human Resources if I have any questions that are not answered in this handbook.

I acknowledge that I have received a copy of HCMC’s Employee Handbook.

Print Name _____ Date _____

Signature _____

Please read this form, sign it, and return it in person or through office mail to Human Resources, P1-1, or give it to your manager or supervisor.

In November of 2008, the Employer distributed an information sheet as part of its information series which was entitled: ANSWERS TO YOUR QUESTIONS ABOUT FLEX PTO:

Overtime

Q: If I elect PTO, do hours that I’m paid but I do not work (IE: PTO and EML) count toward overtime?

- A: No, those hours do not count toward overtime. For example, if you are on an “Over 40” overtime standard and you take PTO Monday through Friday, and then pick up a shift on Saturday, that shift will be paid at straight time. Currently, eligibility for overtime pay after calling in sick or taking vacation varies by union contract.

The conclusion follows that the Grievants themselves relied on the Handbook primarily and neglected to consider the CBA, however.

The Union correctly argues that the parties’ CBA trumps the Employee Handbook whenever the provisions may conflict. It must be emphasized that the foregoing analysis concludes that HCAPE’s evidence and argument in regard to Articles 9 and 19, relative to crediting time not worked in determining eligibility for overtime, has not prevailed by a preponderance of the evidence over that of the Employer’s.

In plain truth, the competing cases presented in this matter more closely approach equipoise as in any dispute within memory. Equipoise, as these experienced advocates know, refers to those legal contests where neither case clearly prevails over the other. In arbitration as in law, the principle determining the outcome in such uncommon cases holds that the moving party loses by dint of failing to meet its burden of proof.

This finding, standing alone, should suffice to deny the grievance but in recognition of how vigorously and skillfully the Union’s case was argued, there are additional grounds which need to be stated for this conclusion.

2. Arbitrators may consider traditional principles of equity when the more familiar tools of plain language, negotiating history, and past practice did not suffice to resolve a dispute.

Comment and Conclusion: Under the facts of this case the most prominent principles of equity applicable are caveat emptor and equitable estoppels. As to the buyer beware concept, it is surprising that no employee affected by the choice to sign up for Flex PTO or to remain in the established program ever asked the critical question – What do I trade off to get the sick leave payout and the disability benefit under PTO?

It certainly is not overly critical to reflect on the truth of the well-known adage that there is no such thing as a free lunch. As a former local union president in the Steelworkers who knows what happens when new terms are presented to the members for ratification, I find it remarkable that when Flex PTO was discussed by HCMC staff at informational sessions and the sick leave and disability benefits described the pregnant question of “What’s the catch?” was never posed.

The closest query on point was the generalized response the effect of Flex PTO would vary with the terms of the different CBA. This response comes as close to a non-answer as can be imagined. The significant question, again, apparently was never posed, i.e., “How does Flex PTO affect the terms and application of my CBA?”

The parallel principle of equitable estoppels – which refers to the duty to speak when silence can be taken as acquiescence resulting in another’s disadvantage – applies because after its conscientious efforts to educate employees at Flex PTO, HCMC had the right to believe those who chose the program understood they would have to trade off the former system of determining overtime eligibility. Instead, of their failure to ask the significant questions and to make a properly informed choice, those employees now claim both ends of a quid pro quo.

The principles of estoppels precludes securing such an advantage by silence when it was the duty of the Grievants to seek the information which would have saved HCMC, and their Union, the time and expense of pursuing their grievance. Who says so? – The Grievants themselves when they signed their Employee Acknowledgement forms attesting, among other things, that:

It is my responsibility to familiarize myself with the information in this Handbook and to seek verification or clarification of its terms or guidance. I understand I am responsible for the contents of this handbook.

Lest any doubt remain for the Grievants to have sought out information that may not have been covered in the Handbook, the concluding affirmations read:

...I understand that I should consult my supervisor, manager, or Human Resources if I have any questions that are not answered in this handbook.

I acknowledge that I have received a copy of HCMC’s Handbook.

DECISION

On the basis of the foregoing Discussion and Opinion, the grievance is denied.

2/19/2010
Date

John J. Flagler, Arbitrator