IN THE MATTER OF THE ARBITRATION BETWEEN;

Hennepin County Association of Paramedics and E.M.T.'s

-and-

Hennepin County Medical Center

ARBITRATION OPINION AND AWARD

BMS Case No. 13-PA-0428

Arbitrator

Richard A. Beens

Appearances

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Date of Award: May 23, 2013

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement ("CBA") [1] between the Hennepin County Association of Paramedics and E.M.T.'s ("Union" or "HCAPE") and the Hennepin County Medical Center ("HCMC" or "Employer"). Ron Miller ("Grievant") is a paramedic, member of HCAPE, and an employee of HCMC.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render an arbitration award. The hearing was held on April 18, 2013 in Minneapolis, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Final, written briefs were submitted by May 21, 2013. The record was then closed and the matter deemed submitted.

ISSUE

It was left for the arbitrator to formulate the issue, which is found to be:

Did the Employer violate Article 16 of the collective bargaining agreement when on September 10, 2012, it assigned a street crew working on straight time to work a Twin's game instead of Grievant who would have worked on overtime?

FACTUAL BACKGROUND

The Hennepin County Medical Center is a public hospital with its own board of directors who, in turn, are overseen by the Hennepin County Board of Commissioners. The hospital's Emergency Medical Services division provides ambulance and paramedic services to a 266 square mile area containing over 700,000 people. They handled over 63,000 calls in 2012. HCAPE is an unaffiliated union which represents a majority of the

[1] Joint Exhibit 1.

paramedics working for the Employer. Current staffing includes 139 paramedics, 15 dispatchers and 12 to 13 support workers.

Scheduling Emergency Services personnel is a complex, fluid process. The optimum number of ambulances need for "street" shifts can depend on a wide number of ever-changing variables. Using past experience and a computer program, the employer has attempted to project needs for any given day or time of day and schedules accordingly.[2] Consequently, a "normal" day would begin with eight ambulances and crew at their posts in the early morning hours up to 5:00 AM. This compliment is gradually increased to a maximum of 19 crews on duty at midday. From there, the optimum staffing gradually decreases through the afternoon and evening hours, back to the eight crew minimum. However, a number of things can change the optimum complement from day to day. There are more calls for ambulance runs in summer than in winter months. Severe summer weather and winter snowstorms can temporarily increase the need for ambulance runs. Personnel who are unavailable due to sickness, injury, FMLA leave, or military deployment further complicates scheduling. The Employer's duty supervisors, taking into account the variables of the moment, ultimately determine the personnel needs for the day or days they work.

In addition to customary work, HCMC regularly contracts to provide standby ambulance and paramedic services to a variety of collegiate and professional sporting events. The issues in this arbitration involve the Minnesota Twins, but could have occurred in any of the contracted services.

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[2] Union Exhibit 6.

For a number of years, major league baseball has required its teams to have an ambulance and two paramedics present at every game. The Minnesota Twins contract with HCMC for this service. They also added a third paramedic to assist in their first aid facility at Target Field during home games. They pay HCMC over $300 per hour for the work, which usually lasts four to five hours. Similar services are provided to the Vikings, Timberwolves, Lynx and Minnesota Gophers. In a vast majority of cases, the employees staffing these services are working hours in excess of their normal shifts and are paid overtime wage rates.[3]

Since work at these venues is attractive to employees, lucrative, and apart from normal duties, HCMC and HCAPE have developed a procedure for awarding the jobs. Viking and Gopher football games are covered by Article 15 of the CBA.[4] All other sporting events, including the Twins, are covered by Articles 14 and 16 of the CBA which are the focus of this arbitration.[5]

Article 16 provides:

> ***Article 16. SPECIAL EVENT ASSIGNMENTS, ALL INTERCOLLEGIATE AND ALL PROFESSIONAL SPORTING EVENTS NOT COVERED BY ARTICLE 15, VIKINGS/GOPHERS REGULAR SEASON AND POST-SEASON FOOTBALL GAMES.***
> ***Section 1.*** *The Employer shall determine the need for overtime. If the Employer determines the posting of overtime is required, the overtime will follow the long notice overtime procedure. If the agency requesting the service has notified the employer less than 72 hours in advance of the event, the event will be awarded by Short Notice Overtime (SNOT).*

Article 14 states:

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[3] Employer Exhibit 7.
[4] Joint Exhibit 1.
[5] Ibid.

ARTICLE 14 -- LONG NOTICE OVERTIME

Section 1. *This is defined as the need for overtime seventy-two (72) hours or more in advance of the overtime shift. When overtime is posted, the posting is made with the shifts and dates needed and spaces available for sign-up. Posting is brought down forty-eight hours before start of an overtime shift. At this time, those who have signed up may call the supervisor or view the electronic overtime system to find out who will work the overtime. If no one has signed the posting, the overtime is assigned.*

Once the Employer learns who has signed up, the overtime is awarded by seniority.

The specific incident giving rise to this arbitration occurred in September, 2012. Since the Twins play 81 home games, the Employer assumes overtime employees will be needed on each occasion. Therefore, the entire Twins home game schedule is posted for overtime assignment pursuant to Article 16 as soon as it is known. In this case, all were posted on March 19, 2012.[6] Emails are sent to each employee notifying them of the available long notice overtime shifts.[7]

Grievant, a 31-year HCMC employee and number seven on the seniority list, signed up on September 3, 2012, for an overtime assignment to the Twins game scheduled for September 10, 2012. As directed by Article 16, he checked for the assignment several times within the period 48 hours prior to the event. Despite having worked 6 or 8 prior Twins games in 2012, Grievant was not assigned to this particular overtime shift. A supervisor later told him that, while one paramedic senior to Grievant had been assigned to the game at overtime rates, the other two positions were assigned to excess, lower seniority, "street" paramedics who had already been scheduled for a regular

[6] Employer Exhibit 5.
[7] Union Exhibit 5.

shift that day. In relating this to Grievant, the shift supervisor commented, *"Why would we pay you overtime when we have extra staff we can send from the street?"*

Miller immediately filed a grievance, contending the Employer has posted the overtime shift, he had applied for it, and, as the second most senior applicant, should have been given the work.[8] This grievance was denied six days later by Operations Manager Doug Gesme, who argued, *"Article 14 addresses the posting of overtime and the method by which it may be posted and awarded. It does not obligate the employer to award overtime when normal staffing meets the demand for special events, and normal staffing may be used to cover these events to avoid the expense of unnecessary overtime."*[9]

A few days later, the Union filed the present grievance alleging HCMC misinterpreted and violated Article 16 of the CBA (and its incorporation of Article 14 procedures) when using a street crew at the Twins game after posting it as an overtime job.[10]

APPLICABLE CONTRACT PROVISIONS

In addition to Articles 14 and 16, set out above, the following provision is relevant:

ARTICLE 5 - MANAGEMENT RIGHTS

> **Section 1.** *It is recognized by both parties that except as expressly stated herein, the EMPLOYER shall retain whatever rights and authority necessary for it to operate and direct the affairs of the County in all its various aspects, including but not limited to, the right to direct the working forces; to plan, direct and control all the operations and services of the department, to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign and transfer employees; to schedule*

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[8] Joint Exhibit 2.
[9] Joint Exhibit 3.
[10] Joint Exhibit 4.

working hours and to assign overtime; to determine whether goods or services should be made or purchased; to hire, promote, demote, suspend, discipline, discharge or relieve employees due to lack of work, misconduct, incompetence, or other legitimate reasons; to make and enforce rules and regulations; and to change or eliminate existing methods, equipment or facilities. It is also recognized by both parties that the EMPLOYER shall retain the authority and prerogatives to:

A. Operate and manage its affairs in all respects in accordance with existing and future laws and regulations of appropriate authorities including Personnel policies and work rules;
B. Maintain the efficiency of the government operations; and
C. Take whatever actions may be necessary to carry out the missions of the County in emergencies.

OPINION

The instant case involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement. Indeed, the validity of the award is dependent upon the arbitrator drawing the essence of the award from the plain language of the agreement. It is not for the arbitrator to fashion his or her own brand of workplace justice nor to add to or delete language from the agreement.

In undertaking this analysis, an arbitrator will first exam the language used by the parties. This objective approach "…holds that the "meaning" of the language is that meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the operative usages and knowing all the circumstances prior to and

contemporaneous with the making of the integration."[11] If the language is clear and unambiguous, that is the end of the inquiry. A writing is ambiguous if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning.[12] Parol evidence cannot be used to create an ambiguity.[13] However, if the language is ambiguous, an arbitrator will assess comments made when the bargain was reached, assuming there is evidence on the subject. When direct evidence is not available, circumstantial evidence may be determinative. In either case, it is important to examine the context in which the language arose.

Article 16 in its present form first appeared in the CBA adopted by the parties in late July, 2012. In bargaining sessions leading up to adoption of the contract, the Union proposed a slight change in the previously existing Article 16.[14] New and considerably altered language proposed by the Employer was subsequently adopted verbatim.[15] Significantly, the new Article 16 begins with, *"The Employer shall determine the need for overtime."* This would appear to be a clear reaffirmation of an Employer right set out in Article 5, Management Rights. There, the Employer specifically retains the right, *"…to schedule working hours and to assign overtime…"*[16] Article 16 goes on to provide that, once the need for overtime has been decided, the long notice overtime provision in Article 14 is followed. Long notice is, *"…defined as the need for overtime seventy-two*

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[11] Elkouri & Elkouri, *How Arbitration Works,* Seventh Edition, (2012), Chapter 9.1.B.i.
[12] See *Metro Office Parks Co. v. Control Data Corp.,*205 N.W.2d 121 (1973).
[13] See *Instrumentation Servs., Inc. v. Ben. Res. Corp.,* 283 N.W.2d 902 (Minn. 1979).
[14] Union Exhibit 3.
[15] Union Exhibit 4.
[16] Joint Exhibit 1 and Employer Exhibit 2.

(72) hours or more in advance of the overtime shift."[17]

The vast majority of arbitrators follow the view of the National Academy of Arbitrators:

> *"In the absence of contractual restriction, management has the right to determine whether work will be performed during regular working hours or on overtime."*[18]

Do Articles 14 and 16 constitute a contractual constriction on management's right to determine overtime in the current CBA? The Union contends they do. In their view, the new language of Article 16, when read in conjunction with Article 14 constricts management's overtime determination rights only in the sense only in that they cannot be allowed to withdraw the decision that overtime is needed once they are within the seventy-two (72) hour window set out in Article 14.

The Employer adamantly rejects the Union interpretation. They point out that they have jealously guarded and preserved management right to schedule employees -- for either regular or overtime shifts. They have maintained the same position in prior grievances.[19] Further, the Employer asserts that the assignment of overtime was *"an inherent management right under Article 5."*[20]

In my view, the Employer has a far stronger argument. In order to accept the Union view, one has to draw inferences that are not explicitly stated in the language of Articles 14 and 16. First, we would have to infer that management is locked into an

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[17] Joint Exhibit 1, Article 14.
[18] , National Academy of Arbitrators, COMMON LAW OF THE WORKPLACE, Theodore J. St. Antoine, Editor, Second Edition, (2005), § 7.19.
[19] Union Exhibit 2 and Employer Exhibit 9. In the Booth grievance (Union Exhibit 2), the Employer allowed grievant to work an initially denied overtime shift on the grounds of undue hardship, not because they had violated the CBA. The initial award of overtime in the Jacobs grievance (Employer Exhibit 9) was a mistake that was rectified within fifteen minutes. Neither circumstance apply in the present case.
[20] Employer Exhibit 1.

overtime assignments once within the seventy-two (72) hour window. However, the plain language of Articles 14 and 16 are silent on that point. In other words, we have to create ambiguity where none currently exists. If that had been the parties' intent, it could and should have been plainly stated in the Articles' language.

Further, it flies in the face of the Employer's specific reservation of the right to determine overtime contained in both Articles 5 and 16. Accepting the Union interpretation would limit the Employer's right despite plain language to the contrary.

Last, there is nothing in Articles 14 and 16, or anywhere else in the CBA, limiting Employer's right to change its mind about awarding a particular overtime shift. They have frequently exercised this right in the past.[21] Base on the plain language of the CBA I see no restrictions on the Employer's rights in this instance.[22]

Also implicit in this grievance is the question, "Can the employer unilaterally change work schedules to avoid payment of overtime?" While some arbitrators would answer, "No,"[23] the vast majority would say "Yes," so long as there is no contractual restriction.[24] Once again, based on the plain language of the CBA, I see no restrictions on the Employer's right to change work schedules to avoid overtime. Management has the right and obligation to, *"Maintain the efficiency of Hennepin Medical Center operations."*[25] Absent a clear contractual duty to do so, ordering overtime when straight time workers are available would be a derogation of Management's duties.

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[21] Employer Exhibits 6 and 7.
[22] It would be reasonable to carve out a "hardship" exception as the Employer did unilaterally in the Booth grievance. However, the facts of the Booth case are unique and not present in this case.
[23] See Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition (2012), Chapter 13.13.B.
[24] National Academy of Arbitrators, COMMON LAW OF THE WORKPLACE, Theodore J. St. Antoine, Editor, Second Edition (2005), pp. 297-298.
[25] Joint Exhibit 1, Article 5, B.

It is significant to note that Grievant was never actually awarded the overtime shift in question. He simply acknowledged his availability for the work -- as did four of his co-workers. Until an overtime shift is actually awarded, it would be unreasonable for an employee to alter his schedule in anticipation of a shift that may or may not occur. Although the issue is not precisely before me, I would note that Employer's witnesses acknowledge their belief that an overtime shift could not be changed once awarded. At that point, the employee has altered his or her schedule in reliance on the award.[26]

Finally, both sides testified about the bargaining sessions leading up to adoption of Article 16. Neither Employer nor Union witnesses had any clear recollection of ever discussing the precise issue raised in this arbitration. Consequently, there was no "meeting of the minds" between the parties. Based on what I regard as clear language in the CBA, I must deny the grievance. If the Union desires to constrict Employer's rights on awarding overtime, it will have to do so at the bargaining table.

AWARD

The grievance is DENIED.

Dated:_____ _____

Richard A. Beens, Arbitrator

[26] An exception to this principal was apparently made in the Jacob's grievance. However, in that case the Employer rectified a mistaken award of overtime within 15 minutes and before Jacobs could reasonable argue he had relied on the overtime shift.