

IN THE MATTER OF THE ARBITRATION BETWEEN

THE AMERICAN FEDERATION	)	FEDERAL MEDIATION AND
OF STATE, COUNTY AND	)	CONCILIATION SERVICE
MUNICIPAL EMPLOYEES,	)	CASE NO. 12-03279
COUNCIL 65,	)	
	)	
	)	
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Union,	)	
	)	
	)	
and	)	
	)	
	)	
FARIBAULT ALLINA MEDICAL	)	
CLINIC, A CLINIC OPERATED	)	
BY ALLINA HOSPITALS	)	
AND CLINICS, INC.,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

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On May 30, 2013, in Faribault, Minnesota, and on July 2, 2013, by telephone conference call, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning two grievances brought by the Union against

the Employer, in behalf of two grievants, Deborah Smits and Marcia Speiker. The grievances allege that the Employer violated the labor agreement between the parties by failing to pay the grievants wages for the time they spent traveling to a training facility operated by the Employer. Post-hearing written argument was received by the arbitrator on September 22, 2013. On November 12, 2013, the parties provided clarification to arguments made by the Employer 1) that the present grievances should be considered barred because a previous similar grievance was withdrawn by the Union, and 2) that the present grievances were not processed as required by the labor agreement's grievance procedure.

#### FACTS

Allina Hospitals and Clinics, Inc., (the "Employer" or "Allina") is the largest provider of health care in the extended metropolitan area that includes Minneapolis and St. Paul, Minnesota. It employs about 26,000 people in its network of hospitals and clinics. About 120 of these employees work at the Faribault Allina Clinic, (the "Faribault Clinic"), which is one of sixty clinics the Employer operates.

The Union is the collective bargaining representative of about eighty of the employees who work at the Faribault Clinic. Twenty-eight of these employees are classified as Licensed Practical Nurses ("LPNs"), and the remainder, as Certified Medical Assistants, Laboratory Technicians or Radiology Technicians. The Union and the Employer are parties to a labor agreement that establishes terms and conditions of employment for these

employees. The stated duration of the labor agreement is from January 1, 2011, through December 31, 2013.

The Employer operates a training facility for employees (the "Allina Commons") in Minneapolis, near its principal hospital facilities. For many years, the Employer has required newly hired LPNs who work at the Faribault Clinic to attend initial training classes at the Allina Commons. In addition, the Employer has required LPNs to attend annual training classes at Allina Commons about two to four times per year -- though some LPNs, those who volunteer to become "Super Users" (employees with special knowledge in the use of technical equipment, primarily computers used in charting) or "Preceptors" (employees trained to orient new employees to clinic operations), may be required to attend a greater number of training classes, in order to retain those designations.

The Faribault Clinic is located in Faribault, Minnesota, about fifty miles south of Allina Commons. Most of the Union employees who work at the Faribault Clinic reside in or near Faribault. It takes employees about an hour, or slightly more for some, to travel from home to Allina Commons and about the same amount of time to return home. It takes less time for employees to travel from home to the Faribault Clinic and to return home.

Molly E. Van Binsbergen testified that she has been the Clinic Manager of the Faribault Clinic since about May of 2011. She has worked for Allina for about eleven years, first as a Nursing Supervisor and then for two and one-half years

as the Clinic Manager of Allina's clinic at Bloomington, Minnesota.

The First Grievance. On April 19, 2012, the Union served a written "Step Two" grievance, on the Employer in behalf of three LPNs, Deborah Smits, Heather Rein and Stephanie Franek. As I describe below, this grievance was withdrawn by the Union and is not before me. Hereafter, I refer to it as the parties do -- as the "First Grievance." It alleges that the Employer violated the parties' labor agreement, the Fair Labor Standards Act and a binding past practice by refusing to "pay employees for travel time." The written Step Two grievance does not expressly state that the "travel time" for which it seeks pay was spent by the grievants in traveling from home to Allina Commons and back for a required training, but the evidence shows that it sought such pay.

On May 3, 2012, Van Binsbergen sent to Franek, who is the Union's Steward, a Step Two response to the First Grievance. The response asserted two substantive reasons for denying the grievance -- 1) that the "decision not to pay for drive time" to the training was in compliance with Allina policies, which are reasonable work rules, and 2) that past practice did not require payment for such travel time. In addition, Van Binsbergen's Step Two response to the First Grievance asserted that the Union had not complied with the grievance procedure established by Article XI, Section 11.1, of the labor agreement by having a written form prepared that noted the occurrence of a Step One discussion of the grievance between the grievants and their

immediate supervisor. Though the evidence shows that such a discussion had occurred, the parties agree that no written form was prepared to document that discussion.

On May 14, 2012, Jim Dahling, a Union Field Representative, sent Van Binsbergen a letter stating that the Union was withdrawing the First Grievance "without prejudice in recognition of the technical issue raised in your Step 2 grievance response about procedural issues related to the Step 1 grievance." Dahling's letter stated that the Union "reserves the right to file another grievance based on the substantive issue should the Clinic fail to pay travel time in the future . . . ."

The Present Grievances. On May 24 and 25, 2012, the two grievances now before me (the "Present Grievances") were started at the Step One level, when grievants Smits and Speiker met with their immediate supervisor to discuss the Employer's refusal to pay them for travel time to the Allina Commons for training that occurred on May 8, 2012. A Step One written form was prepared that noted those Step One discussions.

On May 31, 2012, Van Binsbergen sent the following Step One response directly to Smits:

This letter is our formal response to the Step 1 Grievance received on 5/24/12 regarding paid travel time. We are denying the grievance, as we believe that our decision not to pay for drive time associated with training at other locations unless it is in the course of an employees work day was correct under Allina policy.

We would also like to note that this grievance is directly related to the step 2 grievance that was filed in April 2012 and withdrawn. Should you have any questions or concerns, please feel free to contact me directly at [telephone number].

The evidence does not include a similar letter to grievant Speiker, whose Step One meeting with her immediate supervisor occurred on May 25, 2012. I do not consider the lack of that response as relevant, and the parties have not argued that it is.

On June 1, 2012, the Union served on the Employer two Step Two grievances, prosecuting the Present Grievances, one in behalf of each of the grievants. Each of these Step Two grievances is in substantially the same text as the Step Two grievance issued in processing the First Grievance, described above. They allege that the Employer violated the parties' labor agreement, the Fair Labor Standards Act and a binding past practice by refusing to "pay employees for travel time."

Van Binsbergen sent Franek, the Union's Steward, a "Step 2 Formal Grievance Response" covering both of the Present Grievances. Though this response is not dated, I assume that it was sent promptly, soon after June 1, 2012, the date of the Union's Step Two grievances. Van Binsbergen's Step Two grievance response is set out below:

This letter is our formal response to Step 2 Grievances received on June 1, 2012 filed on behalf of Marcia Speiker and Deb Smits regarding paid travel time. We are denying the grievance, as we believe that our decision not to pay for drive time associated with training at other locations unless it is in the course of an employees work day was correct under Allina policy.

Additionally, as stated in the contract (Article V, Management Rights), we have the ability to establish a reasonable work rule. Our travel time policy is a reasonable work rule. Also, while the union alleges that a past practice exists in support of its position, we do not feel that the legal standards of a past practice have been met. Should you have any questions, please feel free to contact me directly at [telephone number].

Article XI of the labor agreement establishes the parties' grievance procedure. The following provisions from Section 11.1 are relevant to a decision of two preliminary issues raised by the Employer:

Section 11.1. Any dispute relating to the interpretation of or the adherence to the terms and provisions of this Agreement shall be handled as follows:

STEP ONE - The Employee shall discuss the grievance with his/her immediate Supervisor within ten (10) calendar days following the date of the occurrence. The Supervisor and the Employee shall sign and date a Step One form at the time of their meeting. The Supervisor shall give the Employee a response within ten (10) calendar days.

STEP TWO - If the grievance is not resolved in Step One, it shall be submitted in writing. The grievance shall specify in detail the alleged violation of the contract, and shall be received by the [Faribault Clinic] no later than ten (10) calendar days following the Supervisor's answers in Step One. Grievances relating to wages shall be timely if received by the [Faribault Clinic] no later than ten (10) calendar days following the date of receipt of the check by the Employee. Within ten (10) calendar days following receipt of the grievance by the [Faribault Clinic], administrative representatives of the [Faribault Clinic] and the Union shall meet in an attempt to resolve the grievance. Within ten (10) calendar days of the meeting between representatives of the [Faribault Clinic] and the Union, [the Faribault Clinic] will present a written answer to the grievance. . . .

STEP THREE - If the grievance is not resolved in Step Two, either party may refer the matter to arbitration [in writing and within ten calendar days]. . . .

#### DECISION

##### Two Preliminary Issues.

The Employer makes the following arguments. First, it argues that the Union's withdrawal of the First Grievance bars the Present Grievances. It argues that, by that withdrawal, the Union conceded, with prejudice, that the substantive

allegations made by the First Grievance were without merit -- thereby barring any subsequent grievance based on the same allegations.

The Union responds that it informed the Employer by Dahling's letter of May 14, 2012, that withdrawal of the First Grievance was done "without prejudice" and that the withdrawal was done "in recognition of the technical issue raised in your Step 2 grievance response about procedural issues related to the Step 1 grievance." The Union argues that Dahling's letter refers to the Union's determination that the First Grievance lacked a written form describing the grievants' discussion with their immediate supervisor -- something that in the past had been waived by the parties in practice, but which, the Union acknowledges, is required by the text of Section 11.1.

I make the following ruling. Dahling's letter of May 14, 2012, informed the Employer 1) that withdrawal of the First Grievance was not based on the concession of any substantive issue, 2) that the withdrawal was based on a concession that the Step One grievance process was lacking, and 3) that the withdrawal was without prejudice. Thus, the letter clearly informed the Employer that the Union did not concede the substantive grounds for its allegations and clearly informed the Employer that it intended to pursue the allegations in the future -- that the Union "reserves the right to file another grievance based on the substantive issue should the Clinic fail to pay travel time in the future." The Employer did not suffer a substantial detriment by the Union's concession of a

procedural fault, which, as such, could apply only to that particular grievance. Accordingly, I rule that withdrawal of the First Grievance does not bar prosecution of the Present Grievances.

Second. The Employer argues that, in prosecuting the Present Grievances, the Union did not comply with the time limit established by Step One of the grievance procedure. The training for which the grievants claim travel time pay occurred on May 8, 2012. A Step One meeting between grievant Smits and her immediate supervisor occurred on May 24, 2012, and between grievant Speiker and her immediate supervisor, on May 25, 2012. The Employer argues that, because the Step One meetings occurred more than ten calendar days after May 8, 2012, both of the Present Grievances failed to meet the ten calendar day time limit for a discussion between the grievants and their immediate supervisor.

I make the following ruling. Van Binsbergen's Step One response to Smits' Step One grievance did not raise an issue of timeliness in initiating the Step One grievance. There is no record of a Step One response to grievant Speiker's Step One grievance. The Union initiated Step Two grievances in behalf of both grievants on June 1, 2012. Van Binsbergen's Step Two response (which is undated, but apparently promptly made) to the Step Two grievances in behalf of both grievants did not raise an issue of timeliness in initiating the Step One grievance for either grievant. The Employer's argument that the Present Grievances did not meet the Step One time limits was made for the first time at the hearing.

I rule that the Employer has waived the issue of timeliness by not asserting it before expenditure of substantial time and money in preparing for presentation of this case. Dismissal of the Present Grievances on a procedural basis that was asserted late in the process would waste a great effort by both parties -- a waste that might have been averted by prompt argument that a procedural defect should preclude the Present Grievances.

Substantive Issues.

Van Binsbergen testified that for many years the Employer has had a "travel time policy" that defines whether time spent by an employee in traveling to a work site will be considered as hours worked and, thus, hours for which the traveling employee will be paid wages. Van Binsbergen testified that this policy is accurately expressed in the following excerpt from "Instructions to Managers" in the form of "frequently asked questions":

When does travel time need to be paid?

Normal home to work (and vice versa) commuting time is unpaid. However, time spent by employees going from job site to job site during the work day must be counted as hours worked. This is true whether or not the employee is traveling to his or her regular work location or to another Allina site to attend a meeting, training, etc.

Travel for overnight trips must be counted as hours worked to the extent that the travel occurs during normal working hours, even if the traveling is done on weekends and holidays. In addition, travel between an employee's home and an assignment involving a one-day out-of-town trip by an employee who normally works at a fixed location constitutes hours worked.

Van Binsbergen testified that, though the excerpt above is circulated among management employees, non-management employees have access to Allina's website (the "Allina Knowledge

Network" or the "AKN"), where they can obtain information relating to their employment, including work rules and policies relating to wages. In the following excerpt from the AKN, which relates to payment of wages for "travel time," I have underlined the sentence that states the policy primarily at issue:

Non-Exempt Pay (Origination date 1-1-07; Effective Date 9-15-11). . .

You will be paid for all of the time that you work. Travel[,] training and study time are paid as follows:

Travel time from work site to work site during your normal work hours is considered worked time. Time spent traveling to and from your home and your assigned work place for the day is not worked time. In the case of out-of-town travel, please contact your HR Representative for an explanation of the applicable rules. [Underlining added.]

I note the following. In the Present Grievances, both grievants were required to go to Allina Commons on May 8, 2012, for periodic updating of their knowledge of medical procedures. This training was not needed by the grievants to maintain their LPN licensure. Though the purpose of this travel was for "training" to update their medical knowledge, the parties agree that the Employer sometimes requires travel to Allina Commons or nearby Allina facilities for what they refer to as "meetings" of Allina committees or work groups. In their presentation of this case, neither the Employer nor the Union has argued that there should be a distinction between travel for "trainings" and travel for "meetings" Accordingly, I use the word "trainings" to include meetings that the Employer requires employees to attend. I also note that there is no dispute that the Employer is obligated to pay employees wages for the time spent in

attendance at required trainings. This dispute relates only to the payment of wages for time taken to travel from home (and back) to the place of such trainings.

The Union presented the testimony of Speiker and Franek that they had difficulty finding this policy when, in preparing for the hearing in this case, they searched the AKN for a policy relating to wages payable for travel time to work.

The evidence shows and, indeed, the Employer has stipulated that for many years LPNs at the Faribault Clinic were paid wages for the time they spent traveling from home to the Allina Commons and back for trainings, that the wage-claim vouchers these employees presented for approval by their immediate supervisors included claims for such wages, and that those vouchers were routinely approved by their immediate supervisors.

The evidence also shows that in April of 2012, when the practice of paying wages for travel time from home to Allina Commons trainings was brought to Van Binsbergen's attention, she, as Clinic Manager, disallowed the wage claims for travel time that were put at issue in the First Grievance. Van Binsbergen also testified 1) that, only at the time of the First Grievance, did she discover the practice that had been followed by the immediate supervisors of LPNs at the Faribault Clinic, 2) that the practice was contrary to Allina's travel time policy, 3) that the practice had occurred because of the error of the immediate supervisors responsible for approving wage-claim vouchers, and 4) that none of the other Allina clinics followed the practice.

The parties cite the following provisions of the labor agreement as relevant to the substantive issues raised by the Present Grievances:

Article V. Management Rights. The management of [the Faribault Clinic] and the direction of the work force shall be in the sole discretion and the full responsibility of [the Faribault Clinic] and, except to the extent expressly abridged or limited by a specific provision of this Agreement, [the Faribault Clinic] reserves and retains, solely and exclusively, all of its rights, functions and prerogatives of management, except as specifically limited or modified herein or by an agreement in writing executed by the parties, including, but not limited to, the right to direct the workforce, . . . to establish reasonable rules, . . . Any dispute to the application of this Section is subject to the grievance procedure, and [the Faribault Clinic's] reliance on this Section shall specifically be considered by any arbitrator in defense of any grievance.

Article VI. Hours of Work. Section 6.3. [The Faribault Clinic] agrees to abide by all State and Federal laws referring to maximum hours and minimum rates of pay and any Employees who are required to attend a meeting called by Management shall be paid his/her regular straight time rate of pay for time necessarily devoted to such meeting, except when the Employee works more than forty (40) hours per week, including time at meetings when their attendance is required, they will be paid in accordance with applicable law.

The Union's arguments raise two primary substantive issues. I refer to the first of these arguments as the "Past Practice Argument" and, to the second, as the "Section 6.3 Argument."

First - Past Practice. The issue raised by this argument is the following:

Whether the Faribault Clinic's longstanding payment of wages to employees for travel time from home to the Allina Commons (and back) has, by practice, created a binding contractual obligation to continue such wage payments, notwithstanding the Employer's travel time policy.

As I have described above, the sentence of the travel time policy (as expressed on the AKN website) that states its essence is the following:

Time spent traveling to and from your home and your assigned work place for the day is not worked time.

The Employer would apply this statement to disallow wage claims for travel time to Allina Commons trainings on the ground that Allina Commons becomes an employee's "assigned work place" when the employee is required to go there for training rather than to the Faribault Clinic to provide nursing care.

The Union's Past-Practice Argument,\* discussed here, is that the longstanding practice of paying wages for such travel time has become a binding obligation of the Employer to continue those payments, notwithstanding the Employer's assertion that, by its travel time policy, Allina Commons becomes the employee's "assigned work place" when the employee is required to go there for training.

The Employer argues that those past payments were approved in error by immediate supervisors who were unaware of the travel time policy and that, though those supervisors had authority to approve wage-claim vouchers, they had no authority to create contractual obligations in addition to or in modification of those established by the the labor agreement.

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\* I discuss below the Union's similar but slightly different argument, one that is also based on practice, which urges that Section 6.3 of the labor agreement, requires payment of the travel time at issue here, despite the Portal to Portal Act, which allows employers to treat home-to-work travel time as time not worked.

Accordingly, the Employer argues, those supervisors could not make their erroneous practice binding in the future.

The Employer argues that, if the Union is to prevail in this case, it must do so by showing that express language of the contract supersedes the Employer's travel time policy, i.e., that the Union must show that the requirement of Section 6.3 to pay wages in accord with state and federal law negates the Employer's travel time policy.

I rule as follows. On its face, the travel time policy has the meaning (and in this case, the effect) the Employer ascribes to it -- 1) that, when employees are required to go to trainings at Allina Commons, Allina Commons becomes their "assigned work place" and 2) that, as such, the time spent traveling there from home (and back) is not "worked time." The question raised by the Union's Past-Practice Argument is whether the nursing supervisors' past practice of approving wage-claim vouchers for such travel time has created a contractual obligation that supersedes the travel time policy.

The labor agreement states in writing the terms and conditions of employment of bargaining unit employees. American labor law recognizes several ways in which a longstanding practice may affect such a written agreement -- first, by using a mutually accepted practice to show a mutually accepted definition of ambiguous contract language, second, by finding from practice an agreement to change an otherwise clear contract provision, and third, by finding from practice an agreement to add an entirely new provision to the contract.

For either of the last two uses of past practice -- to amend existing clear contract language or to create an entirely new contract obligation -- the evidence must show that the parties reached an agreement to give the practice at issue binding, contractual effect in the future. To do so, evidence must show that the practice is unequivocal, clearly enunciated and acted upon, readily ascertained over a reasonable time, and accepted by both parties. As stated in Control Data Corp., 69 LA 665, 669 (Hatcher 1971), a practice "to be enforceable, must be supported by the mutual agreement of the parties. Its binding quality is due not to the fact that it is a past practice, but rather to the agreement on which it is based." In other words, a practice can rise to the level of a contractual obligation only if both parties show that they accept it as such. There must be evidence that the party to be bound by the practice intends to be bound by it in the future.

In the present case, the Union seeks to elevate to contractual status the practice of approving wage-claim vouchers covering travel time from home to Allina Commons (and back). -- notwithstanding the Employer's travel time policy, which on its face means that when employees are required to go to Allina Commons for training, Allina Commons becomes their "assigned work place" -- thus excluding from "worked time" the time spent traveling there from home (and back).

The evidence shows that the immediate supervisors who approved wage-claim vouchers for travel time from home to Allina Commons had authority to approve wage-claim vouchers, but they

did not have authority to enter into a binding contractual obligation in behalf of the Employer that would supersede the travel time policy. Accordingly, I rule that the practice at issue did not amend the labor agreement, thus overriding the Employer's travel time policy.

Second - Section 6.3 and the Portal to Portal Act. The issue raised by this argument is the following:

Whether the Employer's travel time policy is superseded by Section 6.3 of the labor agreement, which, paraphrased, requires the Employer to "abide by all State and Federal laws" affecting "maximum hours and minimum rates of pay" and provides that any employees "who are required to attend a meeting called by Management shall be paid his/her regular straight time rate of pay for time necessarily devoted to such meeting" or overtime rates for an employee who "works more than forty (40) hours per week, including time at meetings when their attendance is required."

The essence of the Union's argument is the following. Section 6.3 of the labor agreement imports the requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. 8, (the "FLSA") into the labor agreement. As described in 29 C.F.R. Section 785.7), the FLSA provides that an employee must be compensated for "all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business." The Union urges that this requirement includes time spent by an employee in traveling from home to the Allina Commons for trainings.

The Employer makes the following responsive argument. At one time, the FLSA was interpreted as requiring the payment of wages for time "commuting" from home to work and back, but that

interpretation was expressly negated by adoption of the Portal to Portal Act of 1947, (29 U.S.C. 251-262), which, as described in 29 C.F.R. Section 785.9, eliminates "from working time certain travel and walking time and other similar 'preliminary' and 'postliminary' activities performed 'prior' or 'subsequent' to the 'workday' that are not made compensable by contract, custom or practice."

As I understand the Employer's argument, the time spent by employees when they are required to go to Allina Commons for trainings (and meetings) should be considered as "workday" time because the knowledge employees gain at such trainings and meetings is necessary to the skillful performance of their functions as LPNs. According to this argument, the time spent traveling from home to (and back from) the "workday" activities at either location (learning at Allina Commons or giving medical care at the Faribault Clinic) is ordinary commuting time for work at a fixed location where such workday activities are performed -- as is indicated by the Employer's payment of wages for the time spent learning at Allina Commons and for the time spent giving medical care at the Faribault Clinic.

The following excerpt from 29 C.F.R. Section 785.34, is relevant:

Effect of Section 4 of the Portal to Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any

particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." . . . Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. . . . [Case citations omitted.]

The evidence shows that the activities engaged in by LPNs at Allina Commons are routinely required, paid workday activities, essential to the skillful performance of their functions as LPNs, just as are the care-giving activities they perform at the Faribault Clinic. I find that the learning activities performed at Allina Commons are essential and integral to the medical-care activities performed at the Faribault Clinic and that each kind of activity is a principal activity. At least preliminarily (subject to consideration of several arguments of the Union, discussed below), this finding supports the Employer's argument that time spent traveling to either work location is commuting time and, by force of the Portal to Portal Act, not compensable.

The Union, however, makes the following additional argument. Even assuming, arguendo, that my ruling above is correct -- that the supervisors of LPNs who approved wage claims for travel time to Allina Commons did not have authority to assent to a new contractual obligation to continue those payments -- the practice should, nevertheless, be recognized as a binding contractual obligation created through the importation of federal law, in accord with Section 6.3 of the labor agreement.

The Union argues that 29 C.F.R. Section 785.9 (as well as 29 C.F.R. Section 785.34, set out above) describes the kind of travel time that is eliminated from working time by the Portal to Portal Act, as "certain travel and walking time and other similar 'preliminary' and 'postliminary' activities performed 'prior' or 'subsequent' to the 'workday' that are not made compensable by contract, custom or practice." The Union urges that, even if the practice of paying employees for the time spent traveling to Allina Commons did not rise to the level of a new contractual obligation by force of supervisors' assent (as I have ruled), the longstanding payment of such wages should be recognized as activities that were "made compensable by contract, custom or practice" and should, therefore, be recognized as FLSA workday obligations that are not exempted by the Portal to Portal Act.

I make the following ruling based on my interpretation of 29 C.F.R. Sections 785.9 and 785.34. A "custom or practice" proposed as justification for making home to work travel time a compensable workday activity must not be based upon the error or ignorance of the agents (here, supervisors of LPNs) who are responsible for the practice, but who have no authority to create policy. As I interpret the regulations, errors in recognizing or interpreting a contrary policy cannot create a "custom or practice" that makes the travel time at issue part of a compensable workday activity.

The Union also makes the following argument, based on interpretation of 29 C.F.R. Section 785.37, set out below:

Home to work on special one-day assignment in another city.

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in Section 785.36) or like travel that is all in the day's work (see Section 785.38). All time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. . . . [Underlining added.]

The Union argues that the travel time at issue should be recognized as a "special one-day assignment" made compensable, or at least partially so, by this provision of the regulations. I agree with the responsive argument of the Employer -- that the travel time at issue does not fit the description in this regulation because the requirement that LPNs attend trainings and meetings at Allina Commons is not an "unusual assignment," as specified in the sentence I have underlined above. As I have found above, the evidence shows that the activities engaged in by LPNs at Allina Commons are routinely required, paid workday activities, essential to their skillful performance of the functions of LPNs, just as are the care-giving activities they perform at the Faribault Clinic. Accordingly, I find that the requirement that LPNs attend trainings and meetings at Allina

Commons does not create a "special one-day assignment," travel time to which is made compensable by 29 C.F.R. Section 785.37.

I conclude that the time the grievants spent traveling from home to Allina Commons (and back) on May 8, 2012, was not made compensable "hours worked" -- either by force of a binding past practice raised to the level of a contractual requirement or by force of Section 6.3 of the labor agreement, which incorporates provisions of the FLSA and the Portal to Portal Act.

AWARD

The grievances are denied.

January 12, 2014

  
\_\_\_\_\_  
Thomas P. Gallagher, Arbitrator