

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

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**SEIU Healthcare Minnesota**

**AND**

**MAYO CLINIC,  
d/b/a St. Marys Hospital  
d/b/a Rochester Methodist Hospital**

**FMCS Case No. 14-55677-8**

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**OPINION AND AWARD OF ARBITRATOR**

**Richard A. Beens  
Arbitrator  
1314 Westwood Hills Rd.  
St. Louis Park, MN 55426**

**APPEARANCES**

**For the Employer:**

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**For the Union:**

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**Date of Award:**

**January 15, 2015**

## **JURISDICTION**

This arbitration arises pursuant to two collective bargaining agreements (“CBA”), the first between St. Marys Hospital (“St. Marys”) and SEIU Healthcare Minnesota<sup>1</sup> (“Union”) and the second between Rochester Methodist Hospital (“Methodist”) and SEIU.<sup>2</sup> Both hospitals are owned and administered by the Mayo Clinic (“Employer”).

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on November 18, 2014 in Rochester, Minnesota. No procedural objections were raised by the parties and, therefore, the matter is properly before the arbitrator. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted simultaneously by January 9, 2015. The record was then closed and the matter deemed submitted.

## **ISSUES**

The parties stipulated to the following issues:

1. *Whether the Employer violated Articles I, II or XVII of the contract concerning St. Marys Hospital or Articles I, II, or XVII of the contract concerning Rochester Methodist Hospital when the Employer unilaterally increased the waiting period for employees to seek short-term disability benefits?*
2. *What is the appropriate remedy?*

## **FACTUAL BACKGROUND**

The Mayo Clinic owns and operates both St. Marys Hospital and Rochester Methodist Hospital located in Rochester, Minnesota. SEIU Healthcare Minnesota is a

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<sup>1</sup> Union Exhibit 1.

<sup>2</sup> Union Exhibit 2.

Union which represents a large number of employees at both Hospitals. Although the hospitals have separate collective bargaining agreements, many provisions in the respective CBA's are nearly identical. This grievance involves the short-term disability ("STD") sections of both CBA's. Each requires a 16 hour waiting period before an employee is eligible for benefits.<sup>3</sup> In addition, Article XVII, Section 1 of both CBA's contains similar "me-too" provisions:<sup>4</sup>

**St. Marys Hospital:** *THE EMPLOYER reserves the right to amend or change this plan at the time it makes similar changes to the Hospital's disability plan for nonunion, nonexempt employees.*<sup>5</sup>

**Rochester Methodist Hospital:** *THE EMPLOYER reserves the right to amend or change this plan at the time it makes similar changes to THE EMPLOYER'S disability plan for nonunion, non-exempt employees.*<sup>6</sup>

In July, 2013, the Employer announced its intent to increase the wait period for STD coverage from 16 to 40 hours, effective January 1, 2014. The policy change was disseminated to employees via the Employer's online Mayo Clinic News Center.<sup>7</sup> The Employer reiterated the upcoming policy change via the same channel in November, 2013.<sup>8</sup> The Union, contending the STD waiting period change violated both the St.

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<sup>3</sup> Article XVII, Section 7 of the St. Marys CBA, Union Exhibit 1 and Article XVII, Section 2 of the Rochester Methodist CBA, Union Exhibit 2.

<sup>4</sup> A "me-too" clause in a CBA is a provision that stipulates the benefit in question is linked to that provided to another bargaining unit or group of employees. Consequently, when a particular benefit of the other bargaining unit or group of employees is changed, the same provision in the "me-too" CBA is changed correspondingly. See Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition, Chap. 17-16.

<sup>5</sup> Union Exhibit 1, p. 35.

<sup>6</sup> Union Exhibit 2, p. 30.

<sup>7</sup> Employer Exhibit 10.

<sup>8</sup> Employer Exhibit 9.

Marys and Rochester Methodist CBAs, filed the present grievance on August 1, 2013.<sup>9</sup>

### **THE UNION POSITION**

The Union contends the “me-too” provisions contained in Article XVII, Section 1, of both CBA’s cannot form the basis for the Employer’s unilateral change in STD waiting time from 16 to 40 hours. In support of their contention, the Union makes the following arguments:

- The CBAs have no generally applicable reservation of rights article, so reservations of rights in the CBAs apply only to specifically identified provisions.
- Both CBAs expressly prohibit the adoption of employment terms that conflict with existing CBA terms.
- The “me-too” clauses in Article XVII of both CBAs do not apply to the STD wait period.

To demonstrate the difference between the clauses at issue in this grievance and those they acknowledge as comprehensive, the Union points to the following: the St. Marys contract Article XIII, Section 3 (HOLIDAYS) and ARTICLE XVIII, Section 2 (BENEFIT PROVISIONS)<sup>10</sup> has “me-too” provisions located at the end of the Articles and introduced with the language, “*Notwithstanding the foregoing--.*” The Rochester Methodist contract has parallel provisions in ARTICLE XIII (HOLIDAYS), Section 6 and ARTICLE XVIII (INSURANCE BENEFITS) Section 9.<sup>11</sup> The Union asserts this prefatory language is needed to clearly define the scope of “me-too” language.

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<sup>9</sup> Union Exhibit 3.

<sup>10</sup> Union Exhibit 1.

<sup>11</sup> Union Exhibit 2.

## **THE EMPLOYER POSITION**

The Employer contends the plain language of the applicable CBA provisions allows them to change the short-term disability waiting period to coincide with similar changes made to the same benefits for nonunion and exempt employees. They also contend the “me-too” language was bargained for and has been understood by all parties for over 20 years. Last, the Employer points out that numerous other benefit changes have been made in reliance on “me-too” CBA clauses in the past without Union grievance. They assert these actions amount to past practices that are now binding on the Union.

## **APPLICABLE CONTRACT PROVISIONS**

### **St. Marys Hospital Collective Bargaining Agreement**

#### **Article I**

#### RECOGNITION

Section 1. *THE EMPLOYER here recognizes THE UNION as the sole and exclusive bargaining representative under the labor laws applicable to THE EMPLOYER with respect to the employees in the job classifications listed on Wage Schedule attached hereto...*

#### **Article II**

(5) *THE EMPLOYER and THE UNION agree that neither shall adopt rules or regulations or engage in practices that will conflict with this agreement...*

#### **Article XVII**

#### SHORT-TERM DISABILITY

Section 1. *All employees regularly scheduled to work twenty (20) or more hours per week shall be eligible for THE EMPLOYER'S short-term disability plan. Employees will be eligible their first day of employment and will receive*

*120 hours at full pay plus 400 hours at half pay (50% of salary). Employees with more than five (5) years seniority shall receive 520 hours at full pay. Employees will have their short-term disability account reinstated on their anniversary date of employment, provided the employee is not on long-term disability and is actively back at work in their regular assignment. Coverage will be prorated for part-time employees. THE EMPLOYER reserves the right to amend or change this plan at the time it makes similar changes to the Hospital's disability plan for nonunion, nonexempt employees. (Emphasis in original)<sup>12</sup>*

## **Rochester Methodist Hospital Collective Bargaining Agreement**

### **Article I**

#### **RECOGNITION**

*THE EMPLOYER hereby recognizes THE UNION as the sole and exclusive bargaining representative of all employees of THE EMPLOYER employed in the units of the Hospital in Rochester, Minnesota, with respect to wages, hours and all other working conditions, excluding...*

### **Article II**

#### **UNION SECURITY**

*(1) THE EMPLOYER and THE UNION agree not to enter into any contracts or agreements with the employees herein, individually or collectively, which conflict with the terms or provisions hereof.*

### **Article XVII**

#### **SHORT TERM DISABILITY**

*(1) Employees shall be eligible for the employer's short-term disability plan based on the following: Employees classified as Regular or Part-time 2 will be eligible their first day of employment and will receive 120 hours at full pay plus 400 hours at half pay (50% of salary). The benefit amount is prorated for part-time employees. Employees with more than five (5) years seniority shall receive 520 hours at full pay. The benefit amount is prorated for part-time employees... Employees will have their short-term disability account reinstated on their anniversary date of employment, provided the employee is not on long-term disability and is actively back at work in their regular assignment. Coverage will be prorated for part-time employees. Employees classified as Part-time 1, Part*

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<sup>12</sup> Union Exhibit 1, pp. 34-35.

*time On-Call and Temporary are not eligible for the employers short-term disability plan. THE EMPLOYER reserves the right to amend or change this plan at the time it makes similar changes to THE EMPLOYER'S disability plan for nonunion, non-exempt employees.*<sup>13</sup>

## **OPINION AND AWARD**

The instant case involves a contract interpretation in which the arbitrator is, in part, 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 CBA 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 CBA 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."<sup>14</sup> 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

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<sup>13</sup> Union Exhibit 2, pp. 29-30.

<sup>14</sup> Elkouri & Elkouri, *How Arbitration Works*, Sixth Edition, (2003), Chapter 9.1.B.i.

than one meaning.<sup>15</sup> Parol evidence cannot be used to create an ambiguity.<sup>16</sup>

While the Union advances a plethora of arguments, ranging from various arbitral maxims to refutation of past practices, they do not confront the central, threshold question: Is the “me-too” language contained in Article XVII of both CBAs ambiguous? For a variety of reasons discussed below, I disagree and find that it is clear and unambiguous.

Most arbitrators would agree that a contract provision is ambiguous if it is reasonably susceptible to more than one meaning.<sup>17</sup> The STD clauses in both CBAs contain the phrase, “...*THE EMPLOYER reserves the right to amend or change this plan* ..” (Emphasis added) What do the words “*this plan*” reference?

The Union contends the Employer has only reserved the right to modify provisions contained in that first section of Article XVII. This willfully ignores the repetition of the word “*plan*” in the first and last sentences of the article. In my view, the second use of “*plan*” clearly refers back to the first sentence in the “me-too” clause; “*All employees regularly scheduled to work twenty (20) or more hours per week shall be eligible for THE EMPLOYER’S short-term disability plan.*” (Emphasis added) “The Plan” is a broad, inclusive phrase and cannot reasonably be read to refer to anything less than the entirety of the STD plan. In other words, the plain meaning of the “me-too” clause reserves the Employer’s right to change either all or a part of the STD plan.

Acceptance of the Union interpretation would render the last sentence of Article

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<sup>15</sup> See *Metro Office Parks Co. v. Control Data Corp.*, 205 N.W.2d 121 (1973).

<sup>16</sup> See *Instrumentation Servs., Inc. v. Ben. Res. Corp.*, 283 N.W.2d 902 (Minn. 1979).

<sup>17</sup> National Academy of Arbitrators, *The Common Law of the Workplace*, (2<sup>nd</sup> Ed, 2005), §2.4.

XVII, Section 1 meaningless. In fact, the Union characterization would create ambiguity where none presently exists. It would no longer be at all clear what rights the Employer had reserved. Both the National Academy of Arbitrators<sup>18</sup> and Elkouri<sup>19</sup> hold that an interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces a nonsensical result.

The Union also attempts to draw a distinction between the clauses at issue here and other “me-too” clauses in the respective CBAs. Articles XIII Section 3 and XVIII, Section 2 of the St. Mary’s contract and Articles XIII, Section 6 and XVIII (9) of the Methodist contract all have “me-too” clauses beginning with the phrase, “*Notwithstanding the foregoing...*” The Union asserts of those words are required to specifically preserve the Employer’s right to change any and all portions of benefit in question. I disagree.

The “*Notwithstanding the foregoing...*” *verbiage* has far more to do with the physical placement of the “me-too” clause within the benefit provision rather than evidence of a differing contractual intent. The provisions at issue here are contained in the first paragraph of their respective STD provisions and reserve management’s right to later change the plan provisions which, by happenstance, are contained in that or following paragraphs. Both the St. Marys and Methodist CBA Articles XIII and XVIII provisions are constructed with the details of the benefits first set out and then limited by the “me-too” clause. When the “me-too” clause is placed at the end of a provision, it is perfectly understandable why the drafter used the “*Notwithstanding the foregoing...*”

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<sup>18</sup> Ibid., §2.13.

<sup>19</sup> Elkouri & Elkouri, *How Arbitration Works*, (Seventh Edition, 2012), §9-40 xv.

introductory phrase. It is a matter of syntactical clarity, not an indicator of differentiation from other “me-to” clauses.

Last, I see no evidence that the relative placement of the various “me-too” clauses in these contracts are nuanced signals of differing Employer rights. As anyone familiar with the collective bargaining process knows, contract language may or may not be well thought out. The skills of CBA draftsmen vary and are often exercised in the heat of contentious bargaining. Some problematic language is reviewed with every new CBA. Other provisions become ossified and remain unchanged for multiple contracts -- largely because they didn’t pose a present problem for either side. The differing “me-too” clause placements in these CBAs is likely no more than a serendipitous result of this unruly collective bargaining process. Even given that likelihood, I find Article XVII, Section 1 of both CBAs to be clear and unambiguous.

Both the parties’ bargaining history and past practices also support the Employer’s position. Mayo’s Director of Labor Relations, a member of the 1991 to 1993 negotiating team, testified that St. Marys CBAs have contain both STD plans and the present-day “me-too” language continually since 1991.<sup>20</sup> Similarly, the Methodist CBAs have contained STD and “me-too” provisions continually since 1992.<sup>21</sup> He and other Employer witnesses further testified that the parties bargained over the “me-too” language and that everyone understood that it gave the Employer the right to change the STD plans without any prior negotiations or agreement from the Union. It was further understood at the time that any modifications applied to Union employees were also applied to non-

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<sup>20</sup> Union Exhibit 1, Article XVII, Section 1.

<sup>21</sup> Employer’s Exhibit 4.

union personnel. The Union presented no evidence to the contrary.

The original STD plans for both Methodist and St. Marys contained no waiting period for STD benefits. On December 1, 1992 the Employer notified the Union that it would be amending the Methodist STD plan to provide for a 16-hour waiting period between the onset of disability and eligibility to receive benefits. The Union was also informed that the waiting period modification was done pursuant to Article XVII, Section 1 and would also apply to non-union employees.<sup>22</sup> In March, 1993 a similar notification was sent to the Union regarding the St. Marys STD plan.<sup>23</sup> Both the Methodist and St. Marys plans were unilaterally modified to provide for a 16-hour STD waiting period on April 23, 1993.<sup>24</sup> Neither modification was contested or grieved. No Union witness addressed or contested this history.

Mayo witnesses further testified that, over the years, the Employer has made numerous modifications and amendments to a variety of employee benefits provided for in the St. Marys and Methodist CBAs in reliance on “me-too” language. All were done without prior negotiation or agreement with the Union.<sup>25</sup> The Union acquiesced in each change without filing grievances. Again, the Union presented no evidence to the contrary.

The National Academy of Arbitrators defines Past Practice as:

*“...a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.”<sup>26</sup>*

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<sup>22</sup> Employer Exhibit 5.

<sup>23</sup> Employer Exhibit 3.

<sup>24</sup> Employer Exhibit 7.

<sup>25</sup> See Employer Exhibits 11, 12 and 13.

<sup>26</sup> National Academy of Arbitrators, *The Common Law of the Workplace*, (Second Edition, 2005) , §2.20.

The preceding paragraphs outlining the bargaining history and subsequent conduct of the parties demonstrate a common understanding that applicable “me-too” clauses allow the Employer to make certain benefit changes without prior Union consultation or agreement. The widely acknowledged standards for a valid past practice set out by Arbitrator Richard Mittenthal are also met: 1) there is a clear and consistent pattern of conduct, 2) it has been repeated for over 20 years, 3) the pattern of conduct has been previously accepted by both parties, and, 4) the pattern of conduct has been acknowledged, if tacitly, by both.<sup>27</sup>

While past practices can be altered or eliminated in appropriate circumstances, in this instance the bargaining table, not the grievance process, is the proper forum. The reservation of Employer rights in the subject “me-too” clauses should not be overturned by grievance when such a long history of contrary common understanding exists. Until the present case, the Union has consistently acquiesced in benefit changes made by the Employer in reliance on the collectively bargained CBA language.

The change from a 16-hour to a 40-hour STD waiting period is dramatic and significant. The Union’s concern is understandable. There is no question the change will work to the detriment of some affected employees. They will now be forced to use more of their individual earned and contractual paid time off before attaining STD eligibility. Nevertheless, I find the contractual language to be clear and unambiguous. The Employer acted within the ambit of that language. Under the evidence before me, I find that the Employer did not violate the respective CBAs by making the change.

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<sup>27</sup> Ibid. and Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).

**AWARD**

The grievance is DENIED.

Dated: \_\_\_\_\_

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Richard A. Beens, Arbitrator