

IN THE MATTER OF ARBITRATION BETWEEN

FAIRVIEW LAKES REGIONAL HEALTH CARE
(Employer)

And

MINNESOTA NURSES ASSOCIATION
(Union)

DECISION AND AWARD
FMCS Case No. 060811-58748-7
(Holiday Overtime)

NAME OF ARBITRATOR: Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: January 11, 2007 at Minneapolis MN

DATE OF RECEIPT OF POST HEARING BRIEFS: April 14, 2007

APPEARANCES

FOR THE EMPLOYER:

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FOR THE UNION:

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected in accordance with the provisions of Article XIX-C of the applicable collective bargaining agreement and that this matter is properly before him for decision.

The Parties have jointly waived a provision under that same Article for a tripartite Board of Arbitration and have agreed that the decision of this neutral Arbitrator shall be final and binding in this matter and further agreed to waive the contractual requirement that the Arbitrator's decision issue within 30 days of the close of the hearing or the submission of briefs.

Finally, the Parties have agreed that the Arbitrator may formulate the statement of the Issue.

THE ISSUE

Did the Employer violate the contract by not paying Registered Nurses Keeli Edwards (formerly Engels) and Sheree Eichton for overtime resulting from holiday work hours performed on Easter Sunday (4/16/06) and Memorial Day (5/29/06), respectively? If so, what shall the remedy be?

THE EMPLOYER

The Employer, Fairview Lakes Regional Health Care (FLRHC), is an operational entity within the Fairview Health Services (FHS) system. FHS currently provides medical and health care services through seven acute care hospitals, 50 primary care clinics, 37 specialty clinics and a wide range of specialty service centers located in Minnesota and Western Wisconsin. FHS currently employs about 18000 people.

FLRHC consists of an acute care hospital/medical center located in Wyoming MN and related clinics located in Lino Lakes, North Branch, Rush City and Chisago City MN. FLRHC currently employs about 1300 people.

THE UNION

Minnesota Nurses Association (MNA) was established in 1905 and operates out of its principal office in St. Paul MN. It functions as a professional organization representing the interests of Registered Nurses (RNs) employed in academic and health care systems within the State of Minnesota. As such, it facilitates the establishment and maintenance of nursing standards and practices and provides educational assistance and advice in nursing training. It also functions as the collective bargaining representative for those RNs who have chosen it as their designated representative. The MNA currently represents about 19,000 RN's within the State of Minnesota.

COLLECTIVE BARGAINING HISTORY

In 1999 the MNA was certified by the National Labor Relations Board as the exclusive collective bargaining agent for the following Unit at FLRHC:

“All full-time and regular part-time Registered Nurses (RNs) who average four (4) hours per week or more employed by Fairview Lakes Regional Health Care at the following facilities:

Fair Lakes Regional Medical Center, Wyoming, MN; Fairview Lakes Lino Lakes Clinic, Lino Lakes, MN; Fairview Lakes Rush City Clinic, Rush City, MN; Fairview

Lakes North Branch Clinic, North Branch, MN and Fairview Chisago Lakes Health Care, Chisago City, MN; including staff RNs, RN clinics, RN clinic leads, RN stress lab leads and RN triage; excluding office clerical employees, confidential employees, convalescent and non-convalescent care RNs, Home Care and Hospice RNs, CRNAs, nurse practitioners, clinic coordinators, house supervisors, infection control nurses, patient educators, patient review techs, Job Care RNs and other professional employees, managerial employees, technical employees guards and supervisors as defined in NLRA, as amended, and all other employees.”

The current contract bargaining unit at FLRHC consists of about 241 RNs.

The first formal labor agreement between the Parties for the FLRHC Unit was effective 11/14/00 and expired 7/31/02. The second contract was effective 8/1/02 through 7/31/05. The current applicable labor agreement was effective 8/1/05 and is scheduled to expire 7/31/08.

In addition to the bargaining unit at FLRHC, MNA also represents RNs in other bargaining units at the following FHS facilities:

- Fairview Southdale Hospital, Edina MN and Fairview University Medical Center – Riverside Campus, Minneapolis MN.
- Fairview Northland Regional Hospital, Princeton MN.

The general collective bargaining relationship between Fairview Health Services and the Minnesota Nurses Association dates back at least 30 some years.

BACKGROUND

As seen in the statement of the Issue, this matter involves contractual questions concerning Holidays and Overtime Pay. The relevant facts underlying the Issue are not in dispute.

Keeli Edwards (formerly Engel) has been employed as a RN at FLRHC since July, 2004. As such she is a member of the MNA bargaining unit and is covered by the current labor contract between MNA and FLRHC. She is classified as an “8/80” nurse. That means that she is considered Full-Time and works at least 80 hours within a two (2) week pay period. She receives overtime pay (1.5X) for hours worked in excess of 8 hours in a day or in excess of 80 hours in a pay period. She receives double-time pay for working in excess of 12 consecutive hours in a shift. She also participates in the contractual Paid Time Off (PTO) program.

On Easter Sunday, 4/16/06, she was scheduled to work her regular shift of 3PM to 11PM (8 hours), but due to a staffing shortage volunteered to work an additional shift from 7AM to 3PM (8 hours) that same day. The result was that

she worked a total of 16 hours on that day. Those hours also resulted in Edwards exceeding some overtime thresholds. Edwards stated at the hearing that it was her expectation that she would be paid “Holiday Pay” for all 16 hours worked on Easter, in addition to any other premium, incentive or overtime payments that would accrue to those hours.

Upon receiving her pay stub at the end of the two week pay period which included Easter, Edwards found that she had been paid according to the following rates:

Keeli Edwards Pay Rates for 16 hours worked on Easter Sunday, 4/16/06	Hours 1 – 8 (8)	Hours 9 – 12 (4)	Hours 13 – 16 (4)
Rates of Pay	1.5 X	1.5 X	2.0 X

Upon reviewing her pay stub, Edwards made an entry in the Timekeeping Edit Book and contended that she should have received the following “Holiday” pay rates for her Easter work hours:

Keeli Edwards contended pay rates for her Easter Sunday work hours	Hours 1 – 8 (8)	Hours 9 – 12 (4)	Hours 13 – 16 (4)
Rates of Pay	1.5 X	2.0 X	2.5 X

Staffing Representatives subsequently informed her that they could not accede to her requested pay adjustment because, according to Edwards, they said they were unable to process both overtime and holiday pay through their computer system. Edwards and MNA subsequently grieved the matter and after failing to resolve it through informal discussions with the Employer, MNA requested arbitration.

A related grievance involves Sheree Eichton, another RN employed at FLRHC. Like Edwards, Eichton is a participant in the contractual PTO program. She receives overtime (1.5X) for hours worked in excess of 40 in a work week and overtime (2.0X) for working over 12 consecutive hours in a shift.

On Memorial Day, 5/29/06, Eichton worked 13.1 hours. Earlier in that same pay period she had picked up an extra shift, so that by Memorial Day, she was working in excess of 40 hours for the week. According to her pay record, she received the following pay rates for her work hours on Memorial Day:

Sheree Eichton's actual pay for working 13.1 hours on Memorial Day	Hours 1 – 4 (4)	Hours 4 – 8 (4)	Hours 9-13.1 (5.1)
Rates of Pay	1.5 X	1.5 X	2.0 X

Her rates of pay for the various hourly segments were the same as those paid to Edwards for her Easter Sunday work. She, like Edwards, subsequently grieved her pay, contending that she should have been paid "Holiday" pay for all 13.1 hours worked on Memorial Day. The result would be as below:

Eichton's contended pay rates for her work on Memorial Day	Hours 1 – 4 (4)	Hours 4 – 8 (4)	Hours 9–13.1 (5.1)
Rates of Pay	1.5 X	2.0 X	2.5 X

When the Employer refused to adjust her pay as requested, Eichton and MNA filed a timely grievance on 6/10/06.

The Parties have agreed that whatever decision that results from the Edwards situation shall apply to Ms. Eichton and all other identical situations.

RELEVANT CONTRACT LANGUAGE

ARTICLE IV-A – Hours of Work and Overtime

For nurses working in the Hospital portion of the Medical Center, the basic work period shall be eighty (80) hours to be worked during a period of two (2) weeks (fourteen [14] consecutive days). The regular work day will be eight (8) hours. A nurse required to work in excess of eighty (80) hours during said two-(2) week period or in excess of eight (8) hours in any workday shall be paid at one and one-half (1½) times her or his regular rate of pay for all excess time so worked. The preceding sentence notwithstanding, a nurse required to work in excess of eight (8) consecutive hours will be paid at the rate of one and one-half (1½) times her or his regular rate of pay for the first four (4) hours of such overtime and will be paid double (2) time for all overtime in excess of twelve (12) consecutive hours. Overtime payments shall not be duplicated. PTO hours not taken as time off shall not be considered as hours of work for overtime purposes.

If determined by the needs of the department and for nurses working in the Clinics, the basic work period shall be forty (40) hours to be worked during a seven-(7) day work period. The nurses required to work in excess of forty (40) hours in a work week will be paid at the rate of one and one-half (1½) times his or her regular rate of pay for all excess time so worked.

ARTICLE VII – Paid Time Off (PTO)

A. - Eligibility for Paid Time Off: Nurses who are authorized forty (40) hours or more per pay period shall be eligible for paid time off consistent with Fairview's non-contract paid time off policy. Eligible nurses will accrue PTO at the following rates based upon full-time employment:

0 – 1 Years	24 days	7.4 hours per pay period
2 – 4 Years	29 days	9.0 hours per pay period
5 -14 Years	34 days	10.6 hours per pay period
15+ years	39 days	12.1 hours per pay period

B. – Annual Maximum: The amount a nurse accrues PTO each pay period may vary, but as long as the nurse is paid for two thousand fifty (2050) hours in a year, the nurse will accrue her/his maximum annual amount.

C. – Designated Holiday: The designated holidays are Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas and New Years. The designated holiday is observed on the actual date of the holiday, regardless of whether it falls on a weekday, Saturday or Sunday.

The designated holiday normally begins with the start of the night shift before the designated holiday and ends on completion of the evening shift on the designated holiday. However, the Christmas and New Years designated holiday period extends over thirty-two (32) hours beginning with the evening shift on Christmas and New Years Eve and ending with the completion of the evening shift on Christmas and New Years Day.

D. – Hours Worked on Designated Holidays For Nurses Authorized 40 Hours or More: For nurses authorized forty (40) hours or more per pay period, hours worked on Thanksgiving, New Years, Easter, Memorial Day, Independence Day and Labor Day shall be paid at time and one-half (1½). For nurses authorized forty (40) hours or more per pay period, hours worked on Christmas shall be paid at the rate of double time, including the 3:00 – 7:00 p.m. portion of the December 24 12-hour day shift, and the 7:00 – 11:00 p.m. portion of the December 25 12-hour night shift. PTO may also be claimed if desired up to the number of hours worked on each of the designated holidays. Subject to staffing requirements, nurses also have the option of having an additional day off when they work the holiday.

E. – Hours worked on Designated Holidays For Nurses Authorized 0 – 39 Hours: If a nurse is authorized 0 – 39 hours per pay period, hours worked on designated holidays shall be paid at straight time plus paid holiday hours equal to the number of hours worked.

F. – PTO On a Designated Holiday: *If a nurse authorized forty (40) hours or more per pay period is not scheduled to work on a designated holiday, he/she may claim PTO hours for the hours not worked, but not to exceed his/her FTE status, or he/she may elect to take the day unpaid.*

SUMMARY OF POSITIONS OF THE PARTIES

THE UNION:

The facts of this matter are not in dispute. Ms. Edwards worked a double shift of 16 consecutive hours on Easter Sunday, 2006. Pursuant to the Holiday Premium language in Article VII-D of the contract she presumed that she would receive “holiday pay” for all of the 16 hours worked that day. However, her pay records show that she was only paid Holiday pay for 8 hours that day.

When Edwards questioned a possible error in her pay for that day, she was informed by Staffing Representatives that their computer system could not process both holiday and overtime pay. She was told that it was the Employer’s practice not to pay both holiday and overtime pay.

In subsequent grievance discussions, Edwards and the MNA were told that this was the Employer’s longstanding practice, but had never previously informed the Union of this position. The Employer’s position is clearly contrary to the holiday and overtime language of the contract. Additionally, this practice is also contrary to the other MNA Fairview Contract hospitals which also had holiday and overtime language and previous arbitration involving the same Employer and analogous situations.

The Employer really didn’t contest these other examples as presented by MNA in the hearing, but argued that the examples weren’t relevant because the other contract situations involved “sick leave and vacation” systems; rather than Paid Time Off (PTO).

It is clear from a reading of Article VII-D that it does not provide a lesser benefit when a nurse works a double shift or works overtime on a holiday. If it actually did so, it would provide a less benefit for those benefit eligible nurses than provided for the non-benefit eligible nurses. According to Article VII-E, non-benefit eligible nurses are paid double (2X) time for working on a holiday.

The contract does provide in Article IV-A that “*Overtime payments shall not be duplicated*”. This prohibition does not apply to this situation in that it is clear that nurses can receive other premium payments and still receive overtime. Ms. Edwards did receive both a weekend premium and a weekend bonus for her work on that Easter Sunday. There was further uncontested testimony that nurses have received other premium payments such as shift differential pay, weekend bonus and charge nurse pay while still receiving overtime.

It is the duty of the Arbitrator to enforce the clear cut language of the contract and in this instance the holiday premium and overtime pay are separate payments for separate purposes. Other arbitrators have long accepted that employees are entitled to two separate premiums for separate purposes on the same set of hours.

There is nothing in the language of either Article IV or VII that prohibits the payment of holiday pay when a nurse is also receiving overtime pay. However, there is such an exclusion in Article VII-A, "*PTO hours not taken as time off shall not be considered as hours of work for overtime purposes.*"

The Parties clearly provided additional payment for working on certain specified holidays. The Employer's position, on the other hand, would negate the effect of giving full meaning to the clear language of the Holiday section of the contract. It would result in the illogical position of giving more holiday pay to a part-time non-benefit eligible nurse than to a full-timer working overtime. The whole purpose of the holiday premium is to provide additional compensation for nurses working the holiday shift, not to punish or discourage them from working overtime. Such reasoning does not make sense and would nullify payment of holiday pay in overtime situations, as called for by the contract language.

In defense of its current holiday pay practice, the Employer's first seems to rely on the fact that, as PTO-eligible nurses, Edwards and Eichton could have claimed up to the number of hours worked on the respective holidays to increase their compensation. This position ignores the fact that those nurses would be utilizing their PTO benefit; which would eliminate those hours from being available to them for use at another time. Even more surprising is that the Employer conveniently ignores the fact that an employee can utilize his/her PTO hours on the holiday, even if they are not scheduled to work (see Article VII-F). Thus, in the present case, the nurse is not receiving any additional holiday premium for working on the holiday; which is contrary to the whole notion of a holiday premium payment.

The Employer's next defense appears to be based on a misreading of the paid eligibility for Paid Time Off language in Article VII-A:

"Nurses who are authorized 40 hours or more per pay period shall be eligible for paid time off consistent with Fairview's non-contract paid time off policy."

This language says nothing about a nurse's inability or lack of eligibility to receive holiday pay when also receiving overtime. Clearly, the more specific holiday premium payment language in Article VII-D, E and F is controlling.

Finally, the Employer argues that going back to 1998, when FLRHC first opened its doors, the then non-contract nurses did not receive holiday pay when they received overtime. Apparently the decision not to pay holiday pay was a

conscious one by management and the nurses were not represented by a union at that time. The nurses had no representation on the management committee that made that decision.

Only after the nurses at FLRHC chose to be represented in 1999 was MNA able to negotiate contract language that provided additional payment for working on holidays. Easter was added as a 1½X pay holiday only in the second labor agreement (2002-2005) and that provision was continued into the current contract. This later language is controlling and the Employer's earlier decision not to pay holiday pay when nurses are paid overtime is not relevant.

Moreover, neither the nurses nor MNA have ever been informed by the Employer that it is and has been ignoring the holiday premium payment for nurses working overtime. The Arbitrator, therefore, should not interpret MNA current challenge of the Employer's holiday pay practice as acquiescence to the past years of such practice.

While the Employer may have the unilateral right to establish and change payments for other non-contract employees at FLRHC, there is nothing that gives that same broad right to decide if and when nurses are entitled to holiday premium payments in the face of clear contractual language.

If the Employer's position were to be upheld, it would leave a variety of premium payments subject to unilateral change and negotiation by the Employer through a revision in the PTO program.

For the above reasons, MNA urges the Arbitrator to respect our labor contract and rights as the certified bargaining agent and uphold the grievances of Edwards and Eichton and pay them the holiday pay. To uphold the Employer's position might allow the slippery slope of changing a whole host of other premium payments through the guise of PTO revisions. At the very least, it might lead to a situation where nurses would not be encouraged to work overtime on holidays.

THE EMPLOYER:

The Employer acknowledges the grievances filed by MNA on behalf of Keeli Edwards and Sheree Eichton alleging that they were not properly paid for their work on the specified designated holidays.

At the hearing the Employer introduced a graphic or schematic diagram (referred to as Employer Exhibit B) which we believe summarizes the pay rate disputes underlying the grievances. The Union apparently did not dispute the accuracy of that graphic summary.

In the hearing, the Employer provided detailed testimony as to the history of the Paid Time Off (PTO) program within FHS and at FLRHC. As was presented, the PTO program was implemented for non-contract employees within the Fairview

Health System in 1997. The PTO program when instituted did not cover employees who were in contract bargaining units within FHS. Those employees continued to receive separate and distinct categories of paid time off generally referred to as “vacation time”, “sick time” and “holidays”. When FLRHC opened in February, 1998 the newly hired registered nurses were unrepresented and were covered by no contract. As such, they were placed in the PTO program as formulated in 1997.

As testified by Beth Scheuble, FHS Compensation Manager, in 1998 the newly hired RN’s at FLRHC started in the PTO program with 24 days per year as the initial allocation of paid time off for a full-time status. She went on to describe how the figure of 24 days was developed. The package was based on ten (10) vacation days, seven (7) designated holidays, two (2) personal leave days and five (5) sick or medical days. She noted that the number of vacation days in the PTO package would increase with the appropriate increase in an employee’s length of service, but the holiday, personal day and sick day components would remain constant over time.

The important point, as indicated above, was that a portion of the PTO program bank or pool hours for the nurses contained pay for a total of nine days - seven designated holidays plus two personal days.

Under the original 1997 PTO program, a nurse at FLRHC who worked on any of the seven (7) designated holidays (a/k/a “Staffing Incentive Days”) – New Years, Easter, Memorial Day, July 4th, Labor Day, Thanksgiving and Christmas – were paid straight-time or overtime, if the nurse was otherwise in overtime status as a result of the holiday work hours. Additionally, a PTO eligible nurse, regardless of whether or not she worked on a particular holiday had the option of taking PTO hours (at the straight time rate of pay) for the holiday. For those nurses who actually worked on the holiday, this effectively raised their earnings for the day to at least double time.

In October, 1998, FHS implemented a change in the PTO program to increase the incentive for nurses to work on Thanksgiving, Christmas and New Years (particularly difficult holidays to staff). Instead of paying straight time for work on those holidays, nurses would receive pay at the time and one-half (1½) rate. For work on the remaining four designated holidays the rate of pay remained straight time. This change included the still non-contract nurses working at FLRHC.

With respect to the changes in the PTO program as implemented in October, 1998, Scheuble was asked if, during the planning of those changes, was there consideration given to a circumstance where a nurse worked on Thanksgiving, Christmas or New Years (at time and one-half) and also, went into overtime during those hours? She testified that situation had been discussed and the committee working on the changes had specifically decided that a nurse working on one of those three holidays would be paid at the holiday incentive rate of time

and one-half (1½), but if those hours also put that nurse into overtime, the nurse would not receive an additional 0.5X. If a nurse worked more than eight (12) hours on the holiday, all hours in excess of twelve (12) would be paid at the double time (2) rate, but would not receive an additional 0.5X.

Scheuble further testified that the basis of that decision was that paying time and one-half for those three holidays, coupled with the ability of nurses to match that pay with PTO hours was sufficient to provide staff for those days.

Jan Halverson, the Chief Negotiator for FLRHC, testified that in the year 2000 negotiations with MNA for an initial contract for the FLRHC nurses one of the major MNA proposals was to replace the PTO program. MNA clearly wanted the FLRHC contract to contain the classic “vacation”, “sick leave” and “holiday pay” model that existed in MNA’s contract at Fairview’s Southdale and Riverside hospital facilities. The Employer rejected that proposal and said that it wanted to maintain the PTO benefit program that was already in place at FLRHC and also wanted to maintain consistency with the non-contract employees. The MNA eventually agreed to accept the FHS PTO program with some additional language regarding requesting and scheduling PTO by the nurses. The term of this initial contract was November 14, 2000 to July 31, 2002.

In October, 2001 FHS made a change in its PTO program covering non-contract employees. It decided to extend the time and one-half holiday incentive pay rate from just the Thanksgiving, Christmas and New Year’s holidays to all seven of the designated holidays. FHS also continued its previous decision and rule that employees who worked on a designated holiday and who received the time and one-half incentive pay rate would only receive additional overtime pay if they worked in excess of twelve (12) hours on the holiday. They would not receive any additional pay for crossing additional overtime thresholds during those holiday work hours.

In the negotiations for a new FLRHC contract in 2002, MNA proposed that the PTO-eligible nurse at FLRHC be paid triple time (3X) for working on Christmas and New Years and time and one-half (1½X) for the remaining five designated holidays. The Employer again emphasized that FHS wanted to maintain consistency in the FLRHC contract with the other non-contract employees at that facility. While rejecting the MNA triple-time holiday incentive pay proposal for Christmas and New Years, the Employer and MNA did reach agreement to pay nurses time and one-half (1½X) for work performed on any of the seven designated holidays. This was consistent with the holiday incentive pay upgrade that had been instituted in the non-contract employee PTO program in October 2001. There were no other pay rate changes in the new contract for PTO or Holidays. The term of the new contract was August 1, 2002 to July 31, 2005.

As had been the rule and practice since October, 1998, the Employer continued to pay nurses the appropriate holiday incentive pay for work performed on the

designated holidays and also paid overtime for hours worked in excess of twelve (12), but did not pay overtime for any other overtime thresholds that a nurse might cross as a result of such work.

Negotiations for the third and current contract between the Employer and MNA for the FLRHC nurses commenced in early June, 2005. At the opening of those negotiations MNA presented several proposals to amend or change the PTO and Holiday pay provisions of Article VII. The Employer again responded to those proposals by noting that the PTO program had been in effect for both the non-contract employees and the nurses at FLRHC since 1998 and was essentially in effect throughout most of the rest of the Fairview system. It was again noted to MNA that the Employer thought that such consistency was very important and, therefore, wasn't going to agree to any proposals that would significantly alter that consistency.

However, in order to facilitate a new contract, the Employer did ultimately agree to an MNA proposal that PTO-eligible nurses be paid double-time (2X) for work performed during a 32 hour period covering the Christmas holiday.

During the hearing, Jan Halverson, the Employer's chief spokesperson in the 2005 negotiations, was asked if MNA had during those negotiations mentioned or discussed pay for nurses working on a designated holiday, including Christmas and also exceeding the normal overtime thresholds? He testified that "They didn't bring it up". Halverson was also asked if during those 2005 negotiations MNA made any proposals specific to the issue of compensation for nurses working holidays and also exceeding the overtime thresholds in the contract? He answered that "They did not".

During the hearing, the Employer introduced a list of some 140 instances, over a six year period, where 8/80 (eligible for overtime under the contract after 8 hours during a day and/or exceeding 80 hours during a two-week pay period) PTO-eligible nurses were paid consistent with the Employer's holiday pay rule and its interpretation of the contract. In each of those instances, those nurses were paid the required time and one-half (1½X) for working on a premium-paid holiday, but they were not given the additional 0.5X for exceeding other overtime thresholds. The number on that list actually understates the number of instances where PTO-eligible nurses have been paid in accordance with the Employer's interpretation because it only included nurses on the 8/80 overtime standard and did not include nurses on the 40 hour week overtime standard.

The contract does not contain any language stating that the holiday and overtime premium rates are to be piled-on top of each other for the same hours, much less clear and unmistakable language conferring this additional benefit on the nurses.

It is the Union's burden to establish that the PTO-eligible nurses are entitled to receive both premium rates on top of each other for the same hours, but the

Union's argument would place the burden on the Employer to prove that the nurses are not entitled to pile-on both premiums.

Among other factors relating to the contractual language support the Employer's interpretation of the contract rather than the Union's interpretation:

- a. The Arbitrator lacks authority to add to the terms of the contract, but has authority to interpret the existing language.
- b. The Union misconstrues the purpose and effect of the no-duplication-of-overtime language in Article IV-A of the contract.
- c. The bargaining history confirms that the contract cannot be interpreted in the manner advocated by the Union.
- d. The Employer's customary practice of paying the PTO-eligible nurses for hours worked on holidays further confirms that the Employer's interpretation of the contract is correct.
- e. The Union did point out in the hearing that under its current contracts for Fairview Southdale Hospital/Fairview University Medical Center – Riverside Hospital that nurses working a holiday do receive 0.5X in pay rate, if they cross an overtime threshold while receiving a holiday premium – unlike nurses at FLRHC. However, the manner in which Fairview Southdale and Fairview Riverside Hospitals pay their MNA nurses for working on holidays does not support the Union's interpretation of the FLRHC contract, inasmuch as the nurses at those two facilities are covered by a separate collective bargaining agreement; which has its own distinct bargaining history and surrounding past practice.

Finally, there is no language in Article IV or Article VII of the contract – much less clear and unmistakable language – stating that PTO-eligible nurses are entitled to both holiday and overtime premium rates on top of each other for the same hours. If, nevertheless, the Arbitrator concludes that the contractual language is ambiguous, both the bargaining history and the longstanding, frequent and consistent practice, demonstrate that the Employer's interpretation of the contract language must be upheld. For these and the other reasons discussed above, the Union's grievance must be denied.

ANALYSIS AND DISCUSSION

My initial challenge in this matter occurred as I reviewed the hearing transcript and briefs from the Parties. That challenge was getting a handle on the use of certain terminology being used by the Parties in relating the details of their dispute. I encountered terms like "Holiday Pay", "Holiday Premium Pay", "Staffing Incentive Pay", etc., but was unable to find those same terms in the contract language. Adding to the confusion were several instances in the hearing where the Parties and certain of their witnesses made reference to "Holiday Pay" and similar terms.

Although the Union presented testimony and evidence regarding other RN contracts that it has with FHS at the Southdale/Riverside Hospitals and Northland Regional Hospital, I find that material and information to be essentially irrelevant to the contractual situation in this matter. This matter specifically involves the Fairview Lakes Regional Health Care facilities (FLRHC) and the current contract covering the RNs at that location.

However, I found it interesting that at one point the Union seemed to be arguing that the nurses at FLRHC, unlike the nurses at the Southdale/Riverside hospitals, didn't receive "Holiday Pay". In reviewing the MNA contracts at the other FHS hospitals, relative to the Issue herein, I noted that, unlike the FLRHC contract, each of the other contracts contained provisions for the classic or traditional paid time off system of Vacation, Holidays and Sick Leave. In that system, a nurse earns specific amounts of paid time off in each of the three separate categories, based upon their accumulated hours of work and/or length of service with the Employer.

With specific reference to Holidays under the above system, a nurse not scheduled to work on one of the seven designated holidays receives paid time off for that holiday. Full-time employees whose schedules require them to work on a designated holiday can request a substitute day off. Those contracts also provide premium pay, ranging from 1½ X, up to 3X (depending upon the specific holiday worked) to nurses who are scheduled or otherwise choose to work on a designated holiday.

Under the FLRHC contract, nurses are on a different paid time off system; which has been referred to as the "PTO" program. Unlike the classic or traditional system of paid time off as described above, in the PTO system there are no labels or categories for Vacation, Holidays or Sick Leave. Instead, there is a single "pool" of paid time off hours which incorporates equivalent time for all three of those classic categories. Like the classic system, nurse earn hours for their personal PTO pool based on their work hours and length of service.

With respect to pay for holidays, the PTO-eligible nurses, unlike their counterparts in the classic paid time off system, do not automatically get paid for each designated holiday. If they wish, they can choose to request PTO hours for a specific holiday, for which they are not scheduled to work, and they will receive pay for those hours. On the other hand, such a PTO-eligible nurse, while not scheduled to work on a designated holiday, may choose not to request PTO pay for a holiday and take the day off without pay because s/he wants to use those PTO hours for vacation instead.

With respect to the problem of terminology, it is clear that the PTO-eligible nurses, who are not scheduled or choose not to work on a holiday at FLRHC, do not receive specifically-designated "Holiday Pay", as do their counterparts under the classic system in the other FHS contracts.

In comparing the FLRHC contract to the MNA's other contracts with FHS with respect to pay rates for employees who work on the designated holidays; I find considerable similarities. All of those contracts contain provisions within their "Holiday" sections and language which the Parties refer to as "Staffing Incentive Pay", "Holiday Premium Pay", "Premium Pay", etc. Each of the contracts provide for pay rates ranging from 1½ X to 3X to nurses who are scheduled or choose to work on designated holidays. The obvious purpose for the higher pay rates for holiday work hours is to encourage and reward those nurses, who are willing to forego the leisure and enjoyment of a non-work holiday, to come into work.

To provide some semblance of clarity and consistency in the remainder of this Analysis, Discussion and Decision, I am going to use the term "**Holiday Premium Pay**" to refer to the various pay rates set forth in Article VII – D and E of the FLRHC contract.

According to the record testimony and evidence, I find that there is no credible evidence to support an allegation or contention that Ms. Edwards or Ms. Eichton were not paid the specified one and one-half (1½ X) Holiday Premium Pay rate for their hours worked on Easter Sunday and Memorial Day, 2006, respectively. Accordingly, I find that both individuals were, in fact, paid the appropriate Holiday Premium Pay rate of one-and one-half (1 ½) time their regular rate of pay for all the hours that they worked on those holidays.

Although both individuals were PTO-eligible, there is no contention that they requested or were denied the opportunity to use their PTO hours to supplement their pay for those holidays.

Instead, the essence of this dispute centers around the question of overtime payments for the hours worked on the designated holidays by those two nurses. The following are the undisputed specific facts of each of their situations with respect to the Issue:

Keeli Edwards:

- Employed as a bargaining unit RN at FLRHC since July, 2004.
- Classified as a full-time "8/80" nurse, meaning that she receives overtime pay (1½X) for hours worked in excess of eight (8) within a workday or in excess of eighty (80) hours within a two-week pay period. She is also a participant in the contractual PTO program.
- She also receives overtime at a double (2) time rate for hours worked in excess of twelve (12) consecutive hours.
- During the two-week pay period ending 4/23/06, Edwards volunteered to work an extra eight (8) hour shift (7AM-3PM) on Easter Sunday. This was in addition to her regular shift (3PM-11PM) on the same day. Accordingly, Ms. Edwards worked a total of sixteen (16) consecutive hours that day.

- Both the Union and the Employer agree that Ms. Edward's extra shift hours on Easter Sunday placed her in excess of eighty (80) hours for the pay period and in excess of eight (8) hours during a work day and in excess of twelve (12) consecutive hours during a work day. Per the contract, each of these situations involved or triggered an overtime threshold.

Upon receiving her pay and pay slip for that pay period, Edwards raised a question with the Employer as to the accuracy of her pay for the 16 hours that she had worked on Easter Sunday. The alleged discrepancy, according to Edwards, revolved around payment for overtime and payment of the Holiday Premium rate. She testified that Staffing Representatives responded by telling her that they were "...unable to process both overtime and holiday pay through their computer time system".

Sheree Eichton:

- Like Edwards, Eichton is employed at FLRHC as a bargaining unit RN.
- Eichton is classified as a 40 hour per week nurse. She receives overtime at the time and one-half (1½) rate for hours worked in excess of forty (40) in a week. She is a participant in the contractual PTO program.
- She also receives double (2) time for work in excess of 12 consecutive hours.
- On Memorial Day, 2006, Eichton worked a total of 13.1 consecutive hours. The first four (4) of those hours completed her 40 hours for that week. The remaining 9.1 hours crossed the threshold for overtime for hours in excess of forty (40) in her work week and also crossed the overtime threshold for 12 consecutive hours during a work day.

In the absence of any definitive objections, questions or clarifications by the Union during the hearing, I am convinced that the graphics or schematics introduced by the Employer accurately portray the precise nature of the dispute as it relates to both Edwards and Eichton. With respect to Edwards, the graphic essentially is;

Keeli Edwards	Hours 1 thru 8	Hours 9 thru 12	Hours 13 thru 16
The Employer paid her as follows:	1.5X	1.5X	2.0X
The Union claims that she should have been paid as follows:	1.5X	2.0X	2.5X

The following is the graphic for Eichton:

Sheree Eichton	Hours 1 thru 8	Hours 9 thru 12	Hours 13 thru 13.1
The Employer paid her as follows:	1.5X	1.5X	2.0X
The Union claims that she should have been paid as follows:	1.5X	2.0X	2.5X

Apparently the key to the differences, as above, became clear as the Parties discussed the Edwards and Eichton grievances. The Employer argued that its pay calculation for Edward's work on Easter Sunday was in accordance with the relevant contract language, Article VII-D, and, furthermore, was commensurate with its standing policy and practice with respect to holiday pay under the FHS non-contract PTO program/policy dating back to October, 1998. With respect to the contended policy and practice, the Employer pointed out that in October, 1998 it decided to add a holiday premium payment of time and one-half (1½X) to its existing FHS PTO policy for non-contract employees for work performed on Thanksgiving, Christmas and New Years. FLRHC were unrepresented at that time and considered "non-contract" and were covered by the PTO policy. In consideration of its adopting the new holiday premium pay schedule, the Employer specifically decided that employees who otherwise crossed another overtime threshold during those holiday hours would not be paid that additional overtime. Accordingly, the Employer pointed out that both Edwards and Eichton had been paid at the holiday rate of one and one-half (1½) their regular rate of pay for the first twelve (12) hours of their holiday work and double (2X) time for the hours in excess of twelve (12), per Article VII-D and E of the contract. However, the Employer acknowledged that because of its policy and practice, as adopted and implemented in October, 1998, neither nurse was paid for additional overtime thresholds that may have been crossed, i.e. overtime for exceeding eight (8) hours in a work day or exceeding forty (40) hours in a work week or eighty (80) hours in a pay period, by virtue of their hours worked on the holiday.

The Employer points out that during the course of subsequent contract negotiations with the Union in the years 2000, 2002 and 2005 specific agreements were reached that increased the scope and pay rates for nurses who were scheduled or chose to work on designated holidays. Additionally, the Employer points out that during those negotiations and discussions concerning the PTO program and holiday premium pay, there was never a mention, request or proposal from the Union with respect to the Employer's policy and practice not to pay employees when they crossed an overtime threshold when working on a holiday for which they were receiving holiday premium pay.

The Union's response to that contention was that never during its history of bargaining at FLRHC did the Employer ever specifically inform either the nurse employees or Union officials of this policy and practice with respect to the

nonpayment of overtime thresholds for holiday work. Due to this alleged lack of knowledge, the Union vehemently denies that its apparent lack of diligence in challenging this situation should be construed as “acquiescence” to the policy and practice. Finally, the Union contends that, but for the Edwards grievance, it would have remained unaware of the policy and practice for some additional period of time.

In defense of its 1998 holiday pay policy and practice, the Employer introduced Employer Exhibit #11; which purported to list some 140 specific instances during the period from December, 2000 through January, 2006 where FLRHC bargaining unit nurses working on designated holidays had consistently been paid in accordance with that policy and practice. The obvious question being why was Ms. Edwards the first nurse in over six years to question or challenge the policy and practice? Apparently, there is no specific answer to that question, other than the Union contends that Ms. Edwards was the first nurse to bring this holiday pay situation to its attention. There was no evidence presented to challenge that contention.

I note that in the face of the Union’s contended lack of historical awareness and knowledge of all aspects of the Employer’s holiday premium pay policy and practice; the Employer offers no specific response as to specifically when or how the Union and/or the nurse employees had effective knowledge. Additionally, I have reviewed the various PTO Policy documents which the Employer entered into the record. The 1997 FHS PTO Policy document (Employer’s Exhibit #8), in the section concerning “Staffing Incentive Days” (a/k/a Holidays), makes no reference to any holiday premium pay rate for work performed on any of the seven designated “Staffing Incentive Days”. The pertinent language merely states that *“If you are in a non-exempt (eligible for overtime) position and work on a holiday, in addition to the hours paid for working you can choose to pay yourself from your PTO bank. You may use hours up to the number of hours you worked on the holiday shift.”* In the September, 1998 FHS PTO policy document (Employer Exhibit #9) there is no longer a section concerning work performed on “Staffing Incentive Days” and instead refers to “designated holidays”. It does note that work performed on Thanksgiving, Christmas and New Years is now paid at the time and one-half (1½) rate and uses the same language as the 1997 document, as previously noted, in referring to payment for hours worked on a holiday. In the October, 2002 FHS PTO Policy document (Employer’s Exhibit #10) the section concerning work performed on all designated holidays is paid at the time and one-half (1½) rate and, again, uses the same language as the 1997 document with respect to payment for hours worked on a holiday. In neither the 1998 nor the 2001 PTO Policy documents could I find any reference or notation advising PTO program participants that if they worked on a designated holiday for which they received holiday premium pay; that they would not be paid additionally for any overtime thresholds that might be crossed during those holiday work hours.

Based upon the foregoing and the record as a whole, I conclude that the preponderance of evidence is sufficient to indicate that it is more likely than not that neither the nurse employees nor the Union had effective knowledge of the existence of the Employer's 1998 policy and practice not to pay for overtime thresholds crossed by employees during the course of work on a designated holiday; until the situation became evident during the processing of the Edwards' grievance.

Next, let's examine specific contract language and see if it provides any specific enlightenment with respect to this dispute and the intent of the Parties. The Union argues that Article IV-A (Hours of Work and Overtime) is totally clear and unmistakable in its meaning and intent with respect to overtime work by nurses. It points out that the language clearly specifies that;

- Nurses referred to as "8/80" are scheduled to work a total of 80 hours during a two week pay period and work day consists of 8 hours. The language also specifies that;

"...A nurse required to work in excess of eighty (80) hours during said two-(2) week period or in excess of eight (8) hours in any workday shall be paid at one and one-half (1½) times her or his regular rate of pay for all excess time so worked (emphasis added). The preceding sentence notwithstanding, a nurse required to work in excess of eight (8) consecutive hours will be paid at the rate of one and one-half (1½) times his or her regular rate of pay for the first four (4) hours of such overtime and will be paid double (2) time for all overtime in excess of twelve (12) consecutive hours. Overtime payments shall not be duplicated."

- With respect to those nurses informally referred to as "40's", Article IV-A specifies that;

"...A nurse required to work in excess of forty (40) hours in a workweek will be paid at the rate of one and one-half (1½) times his or her regular rate of pay for all excess time so worked (emphasis added)."

The Union notes that there are no restrictions or limitations, in the above language, with respect to the payment of the specified overtime for hours of work performed on designated holidays.

Additionally, the Union contends that the language of Article VII-D and E (Hours Worked on Designated Holidays), while specifying premium pay for holiday work hours, does not contain any language restricting or limiting the payment of qualified overtime, per Article IV, routinely occurring during the course of holiday work hours.

The Employer's response is that neither Article IV or Article VII contain language that states, *if a PTO-eligible nurse working on a holiday crosses an overtime threshold, then the nurse is entitled to one .5X premium on top of the other for the same hours*. By the Employer's argument, if the Parties intended for a nurse to be able to pile-on the holiday and overtime premium rates for the same hours in these circumstances, it would have been very easy for them to add plain and simple language to the agreement saying so. Obviously, the Parties did not do so. Therefore, the absence of such language demonstrates that the Parties did not intend for nurses to be paid in accordance with the Union's current interpretation of the contract.

In reviewing the current contract language in Article IV-A, as set forth above, I also see that language has remained unchanged through the initial contract in 2000 and the second contract in 2002. As indicated by the "emphasis", the language clearly and unmistakably states that the specified overtime rates shall be paid "...for all excess time so worked". By its own admission, the Employer, during the negotiations for the initial contract at FLRHC in 2000, urged the adoption and incorporation of its FHS non-contract PTO program into that contract. The Employer further acknowledges that by that time it had previously adopted and implemented its policy and practice of not paying overtime to non-contract employees for thresholds crossed by employees working designated holidays and receiving holiday premium pay. In the face of the broad wording concerning the payment of overtime, as above, why didn't the Employer seek to restrict that language in Article IV-A to comport with its recently adopted holiday pay policy and practice? The answer or lack of an answer appears to be that the policy and practice was never brought up by the Employer in the course its proposal to incorporate the PTO program into the initial FLRHC contract and, as I noted above, it was certainly not mentioned in its September, 1998 PTO policy document.

In view of the foregoing, I find that the language of Article IV-A of the contract is clear and unmistakable in requiring that nurses be paid the rates of overtime specified therein for all excess time so worked, even if that excess time occurs while working on a designated holiday.

I further find that the clear and unmistakable contract language of Articles IV-A and VII-D and E contain no restrictions or prohibitions which prevent employees from receiving overtime pay for overtime thresholds otherwise crossed or achieved while working on designated holidays and while also receiving holiday premium pay.

There also seems to be a question as to whether "holiday premium pay", is also equated to "overtime pay"? According to the contract language in Article IV-A "overtime pay" is specifically paid for hours of work by employees in excess of their normal or regularly scheduled work week or work day. Separate and apart from "overtime pay", the contract provides for various forms of incentive or

premium pay to encourage or induce employees to volunteer for or to otherwise assume additional tasks such as Charge Nurse or less desirable schedules such as evening shifts, night shifts or weekend work. The testimony and evidence concerning holiday work and holiday pay rates, together with the contract language, clearly indicates that the holiday premium pay rates are not a form of “overtime pay”, but are a form of incentive pay to induce a necessary number of employees to choose to work on holidays, rather than take the day off. Obviously, employees who earn or qualify for the various forms of incentive pay, may or may not also earn or qualify for overtime pay for the same hours worked. Accordingly, I find that the receipt of holiday premium pay rates as set forth in Article VII-d and E of the contract do not constitute “overtime payments” and, therefore, do not violate the prohibition against duplication of overtime payments as set forth in Article IV-A.

FINDINGS AND CONCLUSIONS

Summary of Findings:

- Both Ms. Edwards and Ms. Eichton were paid the correct Holiday Premium pay rate, per Article VII–D and E, of one and one-half (1½) time their regular rate of pay for the hours that they worked on the Easter and Memorial Day holidays in 2006.
- Neither Ms. Edwards nor Ms. Eichton received the proper overtime pay, per Article IV–A, for the hours worked on those holidays.
- Until Ms. Edwards filed her grievance in 2006, neither the nurse employees nor the Union had effective knowledge of the Employer’s policy and practice, as adopted and implemented in September, 1998, to not pay employees for overtime thresholds otherwise crossed while working on designated holidays and receiving holiday premium pay rates.
- Notwithstanding the Employer’s past policy and practice of not paying employees for overtime thresholds otherwise crossed while working on designated holidays and receiving holiday premium pay rates; the contract language of Article IV-A clearly requires that employees be paid the specified overtime rates for all excess hours worked, including excess hours on a designated holiday.
- For whatever reason(s) the Parties have not adopted contract language in this or the two previous FLRHC contracts incorporating the Employer’s non-contract PTO policy and practice regarding the nonpayment of overtime thresholds crossed by employees working on a designated holiday and receiving holiday premium pay rates. Therefore, the existing language of Article IV-A regarding the payment of overtime includes hours worked on a designated holiday.
- Holiday premium pay rates, as set forth in Article VII-D and E, are incentive pay rates and are not overtime payments and, therefore, do not constitute duplication of overtime payments pursuant to Article IV-A.

In view of my Findings above, I conclude that the Employer's failure to properly pay Ms. Edwards and Ms. Eichton and other similarly situated employees for excess overtime hours worked on a designated holiday, specifically violates the clear and unmistakable language of Article IV-A of the current contract.

AWARD

The Union's grievances in the Edwards and Eichton matters are sustained, in accordance with this Decision.

THE REMEDY

1. Ms. Edwards and Ms. Eichton shall immediately be made whole for any loss of overtime wages they may have suffered by virtue of their holiday work on Easter Sunday and Memorial Day in 2006, respectively, and for any other holiday work that they have performed since August 1, 2005; as long as such overtime payments do not constitute duplication of other overtime payments pursuant to Article IV-A of the contract.
2. It is my understanding that the Parties have agreed that this Decision, Award and Remedy shall apply to any other similarly situated or affected FLRHC nurses.
3. Because my jurisdiction as the Arbitrator in this matter is restricted to this specific contract, I do not believe I have the authority to extend this Remedy to employees who may have suffered the same or similar losses as Ms. Edwards and Ms. Eichton, but during the term of previous contracts. Accordingly, this Award and Remedy shall apply only to employees similarly affected since August 1, 2005.
4. To facilitate the make-whole remedy and to forestall misunderstandings, the Employer shall, upon written request, provide the Union with appropriate payroll information or records to enable the Union to verify computations and payments pursuant to this Decision.

Dated this 15th day of June, 2007 at Minneapolis, Minnesota.

/s/ Frank E. Kapsch, Jr., Arbitrator

NOTE: I shall retain jurisdiction in this matter for a period of forty-five (45) calendar days from the date of issuance of this Decision to deal with clarifications, questions or problems.