

However, the final Award was adjudged, authored, and issued by the undersigned under his sole authority as the arbitrator of record.

APPEARANCES

For the Union:

Roger A. Jensen, Attorney-at-Law

Kathleen K. Fodness, Business Agent

Dr. Mitchell J. LaCombe, M.D., Grievant

For the Employer:

Dale L. Deitchler, Attorney-at-Law

Dr. Terril H. Hart, M.D., Chief Executive Officer

Dr. Patrick Rock, M.D., Supervisor

I. BACKGROUND AND FACTS

The Employer, the Indian Health Board of Minneapolis, Inc., is a stand-alone clinic with approximately 77 employees, 40 of who are represented by the Union, the Service Employees International Union, Local No. 113. The certified bargaining unit is a wall-to-wall unit, including all of the Employer's job classifications with the exception of confidential employees, guards, and supervisory personnel. The unit includes job classifications such as Driver/Janitor, Interpreter, Med/Den Lab Tech, LPN, Internal Med Physician and Family Practitioner among others. (Joint Exhibit 1). Further, to state the apparent, a job classification like Drive/Janitor is "non-exempt" under the Fair Labor Standards Act (FSLA); whereas, for example, the Family Practitioner and Internal Med Physician classes are "exempt".

The Union was certified by the National Labor Relations Board on February 6, 2002. The effective term of the parties' first Collective Bargaining Agreement was April 1, 2003 – March 31, 2005. (Joint Exhibit 4). The term of the parties' current Collective Bargaining Agreement is April 1, 2005 – March 31, 2007. (Joint Exhibit 1). These agreements differ in several respects, with two (2) differences being particularly relevant. First, the 2005 – 2007 Agreement contains the following new language in article 23:

Section 6. Exempt Extra Shift – Exempt employees shall have the option in conjunction with the Medical Director, to either receive extra shift pay or to adjust his/her schedule in lieu of when working minimally a half-day defined as Saturday morning, an evening clinic from 5:00 to 8:00, weekday mornings, or weekday afternoons. Compensation will be calculated by dividing such employee's annual salary by 520.

(Joint Exhibit 1).

Second, the 2005 – 2007 Agreement includes a new Letter of Agreement entitled, "Physician Administrator Time", which reads:

The current practice of Physician Administrator Time shall continue.

(Joint Exhibit 1).

The Employer is a 501 (c) (3) corporation that provides medical, dental, and mental health care, as well as nutritional and other support services to a largely underserved people, mainly Native Americans, whether or not insured. This is to suggest that external, third party grants fund a large share of the Employer's operations.

In 2000, the Grievant, Dr. Mitchell J. LaCombe, M.D., was hired by the Indian Health Board of Minneapolis, Inc., as an at-will employee. Once the Union organized the workplace, the Grievant became a bargaining unit member

covered by the above-referenced Collective Bargaining Agreements. The Grievant testified that when initially hired he was scheduled to work a four (4) day week comprised of ten (10) one-half day shifts. Specifically, he testified to working the following schedule:

- (a) Monday – two, one-half day shifts;
- (b) Tuesday – three, one-half day shifts, including a Night Clinic half day shift;
- (c) Wednesday – two, one-half day shifts;
- (d) Thursday – two, one-half day shifts; and
- (e) Monday through Thursday the Grievant would begin work approximately one (1) hour early, which amounted to another one-half day shift.

The Grievant testified that his early-in shift time was worked so that he could attend to physician administrator duties such as charting, calling patients, prescribing medications and refilling prescriptions, making and following up referrals and so forth.¹ There is nothing in the record evidence to suggest that the Grievant was assigned daily start/stop times. Nevertheless, uncontroverted testimony, Joint Exhibit 3 and Union Exhibit 2, suggests that the Grievant's actual clock-in/clock-out times were from approximately 7:30 a.m. to 5:30 p.m. on Monday, Wednesday and Thursday, and approximately 7:30 a.m. to 8:00 p.m. on Tuesday, when the Grievant was assigned to work the Evening Clinic.

¹ The Grievant's time at work was spent mainly on four (4) activities: seeing patients for 27 to 28 hours per week; meeting approximately three (3) hours per work with colleagues in regard to the clinic's diabetes prevention, diabetes treatment and depression collaborative programs; performing physician administrator duties; and taking meals.

Moreover, the Grievant testified that he continued to work this same schedule following the ratification of the parties' first and second Collective Bargaining Agreements. Union Exhibit 2 serves to partially document this testimony. A detailed report of the Grievant's time and attendance record from August 1, 2005 through January 31, 2006, Union Exhibit 2 shows that week-in-and-week-out the Grievant was at work for approximately 43 hours per week, as he customarily clocked-in at approximately 7:30 a.m. and clock-out around 5:30 to 6:00 p.m., except on Tuesday when he would clock-out sometime after 8:00 p.m. The Employer did not contest the Grievant's assertion that, in so many words, this same pattern would be reflected in his pre-August 1, 2005 time and attendance records, had they been available.

However, the Grievant testified that effective Friday, December 2, 2005, his historic work-schedule pattern changed. At or around that date, the Employer implemented a new work schedule with (1) specific and later start times throughout the week, and (2) required that he work a half-day shift on Friday mornings treating patients.²

Dr. Terril H. Hart, M.D. testified that the Grievant's work schedule was indeed changed in December 2005. Dr. Hart pointed out that (1) the total number of patients being seen at the Indian Health Board's clinic was in steep secular decline; (2) in 2005, the Bureau of Primary Health Care, a division of the U.S. Department of Health and Human Services and major source of Employer funding, found that the level of the clinic's physician (i.e., "hands-on") productivity

² The record evidence suggests that the Grievant was initially directed to work a one-half day shift every other Friday, but subsequent to January 13, 2006, the Grievant has been working a one-half day shift every Friday. (Union Exhibit 2).

was sub-standard; and (3) that the number of medical clinic hours the Grievant was putting in lagged behind the industry's average. (Joint Exhibit 3 and Employer Exhibits 1, 2 and 3). Further, Dr. Hart testified that in 2005 the clinic's Board of Directors registered its concern over this state of affairs. Hence, the Employer proceeded to install a new "practice management software system", which allowed a more timely and accurate tracking and matching of patient demand for health services and the clinic's supply of staff available to meet that demand. Ultimately, Dr. Hart concluded that the Grievant was not spending enough time in patient care *per se* and, as a consequence, he testified that he directed the change in the Grievant's work schedule, including the one-half day of clinical, "hands-on" work on Friday mornings. Specifically, Dr. Hart assigned the Grievant to work the following ten (10) one-half day shifts:

- Monday – 8:30 a.m. to 5:30 p.m.;
- Tuesday – 8:30 a.m. to 8:00 p.m.;
- Wednesday – 8:00 a.m. to 5:30 p.m.;
- Thursday – 8:30 a.m. to 5:30 p.m.; and
- Friday – 8:30 a.m. to 1:00 p.m.

Thus, under this assigned schedule, the Grievant was expected to be on the premises 43.5 hours per week. After subtracting five (5) hours per week for meal breaks, he worked a full-time schedule of approximately forty (40) hours per week. (Joint Exhibit 3).

On November 28, 2005, Dr. LaCombe filed a grievance alleging that absent "extra shift" payments for the one-half day of mandated Friday work, the

Employer is in violation of article 23, section 6. (Joint Exhibit 2). However, in its “Step Two” denial of the grievance, dated December 19, 2005, the Employer asserts that the Grievant’s new work schedule is no more than a “full-time” schedule, and, therefore, the “extra shift” provision in article 23, section 6 was not applicable. (Joint Exhibit 3). Ultimately, the parties were unable to resolve this grievance, and the matter was submitted to the undersigned for arbitration.

II. STATEMENT OF THE ISSUE

The undersigned’s phrasing of the issue is as follows:

Whether the Employer violated article 23, section 6 in the Collective Bargaining Agreement by assigning the Grievant to work a one-half day shift on Fridays without making “extra shift” payments or reducing his hours during the other days of the workweek” If so, what is an appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS AND GOVERNING RULES

Article 2. Definitions

Section 4

A full-time employee is one who is regularly scheduled and regularly works 80 hours per pay period after completion of the probationary period.

Article 3. Management Rights

Section 1

The management of the Clinic is reserved exclusively to management and the Clinic specifically retains any and all rights it has or had to any time, including those rights it had prior to the certification of election ...unless specifically modified by the provisions of this agreement ...to determine the ...number of hours to be worked by employees, including start and end times ...

Section 2

The only management rights which will be arbitrable will be those which are specifically limited by the provisions of this agreement, and then only to the extent of such limitation.

Article 23. Hours, Meals and Rest Periods

Section 1

The current work week shall be between the hours of 6:00 a.m. and 8:00 p.m., Monday through Friday and will also include for janitorial and maintenance the hours between 5:00 p.m. and 2:00 a.m. In general, with respect to full time employees, at least eight (8) hours shall constitute a day's work, but the Employer reserves the discretion to assign employees in excess of eight (8) hours per day as business needs dictate. Employees who desire full one hour (60 minutes) lunch period, must receive approval from their supervisor, and either make up time, take the time unpaid, or through the time off benefits, request paid time off. (Part-time employees working a full-day will follow the same procedure).

Section 2

Meal breaks for exempt employees shall be at the employee's discretion, subject to the needs of the business as determined by the Employer. If an exempt employee needs to work outside of Monday through Friday, such employee shall adjust their work week schedule, subject to supervisory approval.

Section 4

With respect to the terms "full-time" employees versus "part-time" employees, this Article is otherwise governed by the Definitions in Article 2.

Section 5

For non-exempt employees, any work in excess of forty (40) hours per week shall be paid at the overtime rate of one and one-half (1 ½ X) the employee's regular straight time hourly rate. Any employee working hours that would put such employee into overtime shall have the choice of being paid such overtime rates, or making a request to adjust their schedule (hour for hour) as time off. A request to adjust a schedule on a particular day must be approved by a supervisor but may not be unreasonably denied.

Section 6

Exempt Extra Shift – Exempt employees shall have the option in conjunction with the Medical Director, to either receive extra shift pay or to adjust his/her schedule in lieu of when working minimally a half-day defined as Saturday morning, and evening clinic from 5:00 to 8:00, weekday mornings, or weekday afternoons. Compensation will be calculated by dividing such employee's annual salary by 520.

Article 26. Entire Agreement

Section 2

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the complete understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and subject or matter not specifically referred to or covered this Agreement or with respect to any subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement

Letter of Understanding

The current practice of Physician Administrator Time shall continue.

(Joint Exhibit 1).

IV. POSITION OF THE UNION

The Union initially contends that the scheduled ten (10) one-half day shifts the Grievant worked from Monday through Thursday exceeded forty (40) hours per week, and that it remained unchanged from the inception of his employment in 2000 to December 2, 2005. In addition, the Union avers, the Employer knew and implicitly approved the Grievant's work schedule over these many years.

Next, the Union argues that the Grievant is a “full-time” employee as defined in article 2, section 4 of the Collective Bargaining Agreement since he worked in excess of forty (40) hours per week, as illustrated by time and attendance records like Union Exhibit 2. Continuing, the Union points out that on a daily basis the Grievant’s time at work was spent with patients, attending clinical meetings, performing physician administrator duties, and taking meal breaks, during which time he sometimes multi-tasked, performing clinical work.

In addition to the one-half day shift per week that is built into the Grievant’s schedule for physician administrator duties – from reporting to work one (1) hour early Monday through Thursday – the Union notes that the Grievant might also attend to administrative matters whenever patients would cancel or fail to keep a clinical appointment. This, the Union asserts, was the Grievant’s pattern of scheduled and performed work: a pattern that preceded and followed implementation of the parties’ current Collective Bargaining Agreement.

Effective December 2, 2005, the Union notes that the Employer added to the Grievant’s schedule an extra Friday morning shift for direct patient care and, simultaneously, altered the Grievant’s work schedule, effectively calling for later start times. The Union claims that through these combined perturbations the Employer was actually attempting to force a one-half day shift reduction in the amount of time the Grievant was spending on physician administrator duties, holding the Grievant to a “full-time” work schedule and thus, by construction, creating a basis for denying him the benefits promised by the newly bargained article 23, section 6.

Ultimately, however, the Union contends that the Agreement's Letter of Understanding holds that the Grievant's administrator duties "shall continue", and, as a result, the Employer's attempt to substitute a one-half day shift on Friday mornings for the Grievant's one-half day shift of administration time per week does not fly. Pointing to Union Exhibit 2, the Union notes that even after the December 2005 changes to the Grievant's work schedule, he has continued to clock-in/clock-out as before – continuing to perform physician administrator duties as provided in the Letter of Understanding – and, in addition, he has been working the extra shift of nearly five (5) more hours on Friday mornings. Therefore, the Union concludes, the Grievant is working an extra shift and is being wrongly denied article 23, section 6 benefits.

As remedy, the Union seeks retroactive compensation based on the extra shift pay formula in article 23, section 6; and, prospectively, the Union begs enforcement of the pay or time-off options in article 23, section 6.

V. POSITION OF THE EMPLOYER

Initially, the Employer maintains that it had sound business reasons for assigning the Grievant to work a one-half day shift on Friday mornings, seeing patients, and for setting forth explicit daily start/stop times. Moreover, the Employer argues, that its actions in this case are in compliance with its inherent management rights under the terms of article 3, section 1 of the Agreement.

Next, the Employer urges that the Grievant's newly assigned schedule requires that he be at work 43.5 hours per week, spending approximately 30 to 32 hours of that time in direct patient care, five (5) hours on non-paid meal break

time, and approximately 6.5 to 8.5 hours to attend clinical meetings and to perform physician administrator tasks. This, the Employer asserts, is no more than a full time schedule, and that it allows ample time for the Grievant to fulfill his non-patient care responsibilities. The Employer reasons that since the Grievant is not being assigned to work more than a “full time” schedule, he cannot be working an extra shift and, thus, he has no rights under article 23, section 6. In addition, the Employer requests an arbitral denial of the Union’s claim that article 23, section 6 of the Agreement is not conditional on an employee working more than a “full time” assigned schedule.

Further, the Employer contends that the Letter of Understanding reference to the “current practice” is ambiguous and does not guarantee the Grievant a one-half day shift of at least four (4) hours of administration time per week, as asserted by the Union. Dr. Hart testified that this phrase was not formally defined during the negotiations of the current Agreement, and that its intended meaning can be expressed as follows:

$$\text{[current practice, administrator hours]} = \text{[assigned clinic hours} - \text{patient care hours} - \text{break time]},$$

and that the Union incorrectly substitutes clock-in/clock-out clinic hours for assigned clinic hours in this equation, yielding an exaggerated account of the parties’ “current practice” regarding “Physician Administrator time”. Dr. Hart asserts that the Grievant’s past and present clock-in/clock-out hours were never assigned by the Employer and, to this day, they continue to exceed the Employer’s expectations regarding work hours in the clinic. For this reason, the Employer urges that the hours reported in the time and attendance record in

evidence, namely, Union Exhibit 2, are of limited probative value. Accordingly, the Employer urges that the Union has not met its burden of proving that either article 23, section 6 or the Letter of Understanding have been breached.

Finally, the Employer urges the undersigned to overrule the grievance.³

VI. OPINION

The fighting issue in this case boils down to whether the Grievant was working a full time schedule prior to December 2, 2005, and after that date began working on more than a full time basis (i.e., working an “extra shift”). Indeed, if the undersigned determines that the Grievant is working an extra shift per article 23, section 6, then his grievance will be sustained.

The Union contends that beginning in 2000, the Grievant has been a full time employee and that he has been paid as such. In addition, the Union contends that effective December 2, 2005, the Employer proceeded to add an extra Friday morning shift to his schedule, such that he is presently working an “extra shift”. The Employer disagrees, contending that prior to December 2, 2005, the Grievant worked a part-time schedule and that after that date he began to

³ At the hearing the Employer raised two (2) arbitrability issues, both of which appear to have been washed away in light of the Union’s case-in-chief. The first issue notes that Dr. LaCombe’s statement of the grievance alludes to an alleged violation of a verbal agreement between himself and the Employer, an agreement that pre-dates the parties’ collective bargaining relationship, and an agreement that is not arbitrable per article 3, section 2, and article 26, section 2 of the Collective Bargaining Agreement. The Union’s case of record neither relies on this aspect of the grievance statement, nor seeks relief based on the alleged verbal agreement. Thus, the undersigned considers this issue to be moot. Second, the Employer charges that the statement of the grievance fails to strictly conform to article 10, section 1 (d) in the Collective Bargaining Agreement because it does not identify each provision in the Agreement that has bearing on this case. However, the grievance does cite article 23, section 6, identifying it as the provision the Employer violated. While it is true that other provisions in the Agreement, such as the Letter of Understanding, must be construed in order to applying article 23, section 6 to the facts of this case, the latter is the only provision cited in the Statement of the Issue. Again, the undersigned considers this issue to be moot, as the record evidence in this case clearly establishes that the Union’s claim for relief is based on the theory that the Employer violated article 23, section 6.

work a full time schedule. The following is a discussion of these competing points of view.

Dr. LaCombe's Pre-December 2005 Work Schedule

With reference to article 2, section 4, both parties agree that “[A] full time employee is one who is regularly scheduled and regularly works 80 hours per pay period...”. (Joint Exhibit 1). Nothing in the record contradicts Dr. LaCombe’s testimony that from the onset of his employment at the clinic, until December 2, 2005, he would clock-in at approximately 7:30 a.m. and clock-out at approximately 5:50 p.m. on Monday, Wednesday and Thursday, and at approximately 8:00 p.m. on Tuesdays. These clock-in/clock-out times suggests that the Grievant was at the clinic for approximately 42 hours a week or 84 hours per pay period. In actuality, contemporary data for the August – December 2005 time period establish that on average the Grievant was at work for approximately 43 hours per week, which amounts to 86 hours per pay period. The record of this case, as well as the undersigned’s interpretation of articles 23, sections 1 and 2, suggest that meal breaks are unpaid and are not counted when applying article 2, section 4’s definition of “full time”. Under the above clock-in/clock-out schedule, the undersigned concludes that Dr. LaCombe was a “full time” employee. Subtracting four (4) hours per week for meals from the scheduled 42 hours yields a 38 hour work week. However, giving weight to the fact that the Grievant occasionally reported to work before 7:30 a.m. and left work after 5:30 p.m. and 8:00 p.m., whatever the case may be, would increase the 38 hours estimate. Moreover, the record also shows that Dr. LaCombe would sometimes

do clinical work during his meal times, and that occasionally he would take abbreviated meal breaks. Weighing these facts adds further to the estimate of his work hours, bringing the total number of hours he worked per week up to around 40.

While the record supports the conclusion that the Grievant “regularly worked” 40 hours per week (or 80 hours per pay period), the Employer argues that he was not “regularly scheduled” to perform said work, as required by the Agreement’s definition of “full time”. However, the Employer did not provide the Grievant with a formal stop/start time schedule, possibly because as a physician he is exempt from the FLSA’s overtime mandates and, therefore, he was granted discretionary latitude when it came to matters like scheduling.⁴ In any event, it is reasonable to conclude that if the Grievant’s clock-in/clock out times were at odds with the start/stop times envisioned by the Employer, the Grievant would have learned about it, as he did in the latter part of 2005 when the circumstances leading to the instant arbitration arose. Moreover, the record suggests that the Grievant was paid a full time salary. Accordingly, the undersigned finds that the Grievant was “regularly scheduled” to work the above-noted hours, at least implicitly so.

“Full Time” and Article 23, Section 6. Before examining whether the Grievant worked more than a full time schedule on and after December 2, 2005, it is important to inquire into the Employer’s contention that the “extra shift pay”

⁴ Supporting this conjecture is the language in article 23, section 2, which deals with meal breaks. That language states that exempt employees may take meal breaks at their “discretion”, distinguishing them from the meal break language that governs non-exempt employees. (See: article 23, section 1 in Joint Exhibit 1).

referenced in article 23, section 6 is conditional in the sense that it requires that to qualify employees must work more than full time schedules. Apparently, the Union demurs. Upon careful consideration of the evidence on point, the undersigned concurs with the Employer's construction of article 23, section 6, for two (2) reasons:

(1) Article 23, section 5 provides that non-exempt employees working overtime hours (i.e., over forty (40) hours per week) "...shall have the choice of being paid such overtime rates, or making a request to adjust their schedule (hour for hour) as time off." (Joint Exhibit 1). The very next section in the Collective Bargaining Agreement, article 23, section 6, similarly provides for pay or reduced hours flexibility where it states that exempt employees may "...either receive extra shift pay or to adjust his/her schedule ...". The juxtaposition of these two (2) sections – the first newly renegotiated and the second newly negotiated – strongly suggests that they were intended to provide parallel and comparable overtime-like benefits for unit members in both non-exempt and exempt job classifications, with the former to receive "overtime rates" and the latter to receive "extra shift pay". As if to corroborate the wisdom of applying this contextual standard of contract interpretation, the very next section in the Agreement, article 23, section 7, also pertains to overtime. It begins, "Overtime must receive supervisory approval prior to being worked...". Accordingly, reading article 23, section 6 in light of section 5's and section 7's contexts reasonably leads to the conclusion that section 6 is intended to apply to exempt employees who work more than full time schedules.

(2) Dr. Hart, the Employer's lead negotiator, essentially testified that the intent of article 23, section 6 was to provide additional benefits for exempt employees assigned to work beyond a "full time" effort. Kathleen K. Fondness, the Union's lead negotiator, was not as sure, stating that the "...issue never came up". (Tr. at p. 52). However, the language in the last sentence of article 23, section 6 is not ambiguous, and it too supports the finding that section 6 applies to exempt employees who work more than a full time schedule. It reads: "Compensation will be calculated by dividing such employee's annual salary by 520." Thus, according to this language,

$$\text{Pay For A One-Half Day Shift} = \text{Annual Salary} \div 520,$$

where $520 = 52 \text{ Weeks/Year} \times \text{Ten (10) One-Half Day Shifts/Week}$.⁵ Which is to say that this formula is keyed to the work schedule of a full time employee, one who works ten (10) one-half shifts per week. To qualify for "extra shift" benefits an exempt employee must work an "extra shift" (i.e., beyond his/her full time schedule of work). Currently, a full time, grade 6 Family Practitioner receives an annual salary of \$140,837.00. (Joint Exhibit 1). To apply this formula, if such a physician was assigned to work an extra four (4) hour shift and wished to receive "extra shift pay", he/she would be paid \$270.84 ($= \$140,837.00 \div 520$) for working the extra shift. Whereas, under this formula, a part time physician, one who works 5 one-half day shifts per week, would earn only \$135.42 ($= \$140,837.00 \times \frac{1}{2} \div 520$). This result makes little sense. To maintain parity between the full time and part time physician who work an extra shift, the part

⁵ This formula is discussed in Union Exhibit 3, where the Employer notes that whether an exempt employee's "extra shift" is less than a one-half day shift, a full one-half day shift or more than a one-half day shift, pay for the "extra shift" will be calculated at the full one-half day shift rate.

time physician's annual number on one-half day shifts worked should be pro-rated by ½ just as his/her annual salary was. However, the Agreement's formula does not provide for such an adjustment, which leads to the conclusion that article 23, section 6 was indeed intended to apply only to full time exempt employees who worked more than full time schedules.

Dr. LaCombe's Post-December 2005 Work Schedule

Turn now to an examination of whether, on and after December 2, 2005, the Grievant fulfilled the conditions spelled out in article 23, section 6, qualifying for its benefits. Ultimately, the undersigned concludes that Dr. LaCombe is working more than a full time schedule; is working an extra one-half day shift on "weekday mornings", namely, Friday mornings; and therefore, he was wrongly denied article 23, section 6 rights.

Referring to article 3, section 1, the Employer argues that it explicitly retained its inherent right to determine the "...number of hours to be worked by employees, including start and stop times...". (Joint Exhibit 1). Further, the Employer argues that when it changed the Grievant's work schedule in December 2005, it directed him to work ten (10) one-half day shifts per week, Monday through Friday, with explicit start and stop times. That is, he was "regularly scheduled" to be on clinic premises 43.5 hours per week. Therefore, the Employer concludes, after subtracting five (5) hours per week for meals from 43.5, the Grievant is working "full time", at most; and the fact that the Grievant did not follow his post-December 2005 "assigned" work schedule ought not to be held against the Employer. (Joint Exhibit 3 and Union Exhibit 2).

In rebuttal, the Union points out that during the pre-December 2005 years, the Grievant averaged approximately 27 or 28 hours per week in patient care and that post-December 2005, he averaged approximately 30 to 32 hours per week with patients. This increase of up to four (4) hours per week in direct patient care is equivalent to the one-half day shift that he was newly assigned to work on Friday mornings. Next, the Union argues, that the Grievant's *de facto* work schedule resulted in workweeks that were 43 hours in length, with up to four (4) hours for meal breaks, if taken.

Therefore, the Union continues, comparing the old weekly work schedule (with its four (4) for meals) to the newly "assigned" weekly work schedule of 43.5 hours (with five (5) hours per week for meals), establishes that the length of the Grievant's weekly work was basically unchanged, which proves that the Grievant is now spending approximately four (4) more hours on patient care and four (4) less hours on physician administrator duties.

Finally, the Union claims that the substitution of patient care time for physician administrator time is prohibited by the Agreement's Letter of Understanding, which holds that the "current practice" regarding physician administrator time "shall continue", and that it has not continued. The Union contends that since 2000, Dr. LaCombe has reported to work at approximately 7:30 a.m., Monday through Thursday, in order to work one (1) hour per day exclusively on administrative tasks before taking up his other clinical duties; and that the assigned December 2005 work schedule with its 8:00 a.m. and 8:30 a.m. start times is intended to force a deviation from the "current practice". Therefore,

the Union contends that the Grievant's newly assigned four (4) hours of direct patient care on Friday mornings is an "extra shift" and that article 23, section 6 benefits should have been forthcoming.

The Employer disagrees, arguing that the Letter of Understanding does not limit its right to assign work and work hours, and that, on its face, the Letter of Understanding is ambiguous and inapplicable in this case. With reference to Dr. Hart's testimony, the Employer points out that "hours" were never discussed during the negotiation of the "Letter of Understanding", and that its intent was merely to recognize that staff physicians are expected to attend to administrative duties when they are not seeing patients or on meal breaks. Moreover, the Grievant's newly assigned work schedule leaves him from 6.5 to 8.5 hours per week to attend to administrative duties, as required by the Letter of Understanding.

To resolve the above difference first requires that the undersigned accurately characterize the bargaining history that resulted in the Letter of Understanding. Without contradiction, both the Grievant and Ms. Fodness testified that the administrative time issue surfaced during bargaining because of the Union's concern that the Employer might reduce or eliminate from physicians' work schedules the time it takes to fulfill administrative duties. (e.g., Tr. pp. 32, 34 or 90-91). In response to the Union's concern, the record suggests that Dr. Hart proposed the following Letter of Understanding:

The parties agree that generally, work schedules for physicians, dentists, and psychotherapists will be arranged to allow for related administrative tasks, such as documentation, telephone calls, e-mails, and communicating with outside professionals.

This provision has no effect in specific clinical departments until the number of encounters per provider taken over the previous three months, exceeds 90% of the Bureau of Primary Health Care standards.

(Union Exhibit1). Although this proposal was rejected because the Union was “...absolutely not interested in bargaining schedules for physicians based on encounters”, the parties continued to negotiate over this issue and, ultimately, they simply agreed to continue the current practice; hence, the agree-upon Letter of Understanding, namely, “The current practice of Physician Administrator Time shall continue” was negotiated. (Tr. 33; Joint Exhibit 1).

Ms. Fodness testified that Dr. LaCombe, who was at the bargaining table, discussed what the “current practice” was and “...everybody was in agreement that the current practice was four hours”. (Tr. 35.) To contradict, Dr. Hart testified that the phrase “current practice” was not characterized in numerical terms during the parties’ negotiations. (Tr. 145 – 249).

From this record’s uncontroverted evidence, the undersigned concludes that Dr. LaCombe:

1. would report to work approximately one (1) hour early to perform administrative tasks;
2. would report to work approximately one (1) hour early to perform administrative tasks on a day-in-day-out basis;
3. reported to work approximately one (1) hour early to perform administrative tasks both before and after the Letter of Understanding was entered into; and

4. would also perform administrative duties, when time permitted, through out his work day both before and after the Letter of Understanding was entered into.

These conclusions beg the question: “Does it follow that, *via* the “current practice” language in the Letter of Understanding, in December 2005, the Employer wrongly denied the Grievant’s right to an early, 7:30 a.m., start time to attend to administrative tasks?” Answer: “Yes”.

The record suggests that the clinic apparently employs three (3) physicians, each of whom may work a different schedule. If so, the administrator time practices of each physician would be uniquely different. This observation is relevant to the undersigned’s interpretation of the single sentence Letter of Understanding. Note that the term “Physician Administrator” is singular, which implies that the “current practice” that is to be continued is unique to each physician on staff.

In this case, Dr. LaCombe’s practice has been to report to work one (1) hour early per workday, Monday through Thursday, in order to perform administrative tasks. Indeed, he testified that in batching his administrative work into dedicated hourly time blocks, he was more “productive”. (Tr. 74). The fact that the Grievant would check-in one (1) hour early on work days to attend to physician administrator tasks, that he did so daily, that his supervisor apparently acquiesced to this conduct by failing to object, that he has followed this practice for years, before and after the Letter of Understanding – including the parallel routine of attending to additional administrative tasks during the course of his

work day – are behaviors that, in combination, defines Dr. LaCombe’s “current practice” as that phrase is used in the Letter of Understanding.

During the negotiation of the 2005 – 2007 Collective Bargaining Agreement, Dr. Hart proposed language that would have enabled the Employer to regulate the amount of time exempt professional employees were spending on administrative tasks. The proposed language reads as follows:

This provision has no effect in specific clinical departments until the number of encounters (read as patients) per provider (read as physician) taken over the previous three months, exceed 90% of the Bureau of (Primary) Health Care standards.

(Union Exhibit 1, parenthetical interpretations added). The Union rejected this language and, in doing so, it rejected the Employer’s overall effort to increase physician productivity *via* the manipulation of administrative time allocations. Indeed, the Letter of Understanding shows that the parties agreed that, at least during the term of the current Agreement, physician administrator practices would continue. The fact that the Bureau of Primary Health Care gave the clinic a bad report is not grounds for altering said practices.

VII. AWARD

For the reasons set forth above, the grievance is sustained. The Employer wrongly constrained the Grievant’s work schedule to 8:00 a.m. and 8:30 a.m. start times in December 2005, because Dr. LaCombe’s practice of starting work early at 7:30 a.m. to perform physician administrator work is a protected practice under the terms of the Letter of Understanding. Thus, the assigned one-half day shift on Friday mornings are compensable work under article 23, section 6 in the Collective Bargaining Agreement.

As remedy, the Employer is directed to return the Grievant to his pre-December 2, 2005, *de facto* work schedule. If, prospectively, the Employer chooses to add the Friday morning shift to the Grievant's assigned work schedule, it may do so, provided that it follows the terms in article 23, section 6.

Moreover, the Employer is directed to either compensate the Grievant per the formula in article 23, section 6 for each of the challenged one-half day shifts that were worked on Friday mornings, or to provide him with time off in an amount equal to the Friday one-half day shifts he worked between December 2, 2005 and the date of this Award.

For a reasonable period, the undersigned shall retain jurisdiction over the matter for the limited purpose of overseeing the intended implementation of this Award.

Issued and ordered on this 30th day of
September, 2006 from Tucson, Arizona.

Mario F. Bognanno, Labor Arbitrator