

IN RE ARBITRATION BETWEEN:

SEIU LOCAL 113

and

FAIRVIEW UNIVERSITY HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 070713-58482

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December 27, 2008

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Fairview University Hospital.

APPEARANCES:

FOR THE UNION:

Brendan Cummins, Miller & O'Brien
Paula Macchello, Union Representative
Rene Burman, Union Steward
Diane Edwards, Union Representative
Debbie Nelson, Internal Contract Organizer

FOR THE EMPLOYER:

Jan Halvorsen, Felhaber, Larson, Fenlon & Vogt
Thomas Trachsel, Felhaber, Larson, Fenlon & Vogt
Mary Kay Roe, Human Resources Representative

PRELIMINARY STATEMENT

The hearing in the matter was held on November 27, 2007 at the Federal Mediation and Conciliation Service in Minneapolis, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on December 21, 2007 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from August 23, 2006 through February 28, 2009. The grievance procedure is contained at Article II. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

ISSUE

Whether the Employer violated the contract when it unilaterally began requiring information requests to be in writing from the Union? Did the Employer violate the contract when it refused to give a copy of the attendant expectations policy at a meeting held on November 13, 2006 for the investigation/processing of a grievance for a discharged employee? If so what shall the remedy be?

UNION'S POSITION

The Union took the position that the Employer violated the collective bargaining agreement, CBA, when it unilaterally required that information requests for the processing of grievances be in writing. In support of this position the Union made the following contentions:

1. That the contract grievance procedure implies and explicitly references an informal procedure for exchanging relevant information in order for the Union to properly process grievances.

2. That the past practice of the parties was to exchange simple document and other information requests without resort to the formality of a written request for information in all instances. The Union put on witnesses and evidence it asserted showed that there has traditionally been an informal exchange of information and that only after the most recent protracted and somewhat acrimonious round of bargaining for the new contract, did the requirement of a written request begin.

3. The Union argued that the Employer is engaging in a deliberate policy of slowing grievances by introducing these kinds of overtly dilatory tactics in an effort to delay the processing of grievances. This has resulted in far more grievances being filed and in a much longer time to resolve them. The Union has even filed charges with the NLRB about this resulting in a deferral of the matter to arbitration pursuant to the *Collyer* doctrine.

4. The Union asserted that getting information in an informal way is not only the parties' practice but implicitly referenced in the grievance procedure. Article II, C, Step 1 of the process calls for an informal meeting between the Union and management to try to resolve things early on. This is the basis of virtually all grievances processes; i.e. to resolve potential grievances early and as informally as possible. The Union noted that in some instances, having the proper information early might well alleviate the need to file a grievance and save everybody time and effort.

5. That the matter grew out of a grievance regarding an employee who was terminated for allegedly sleeping on the job. A meeting was held on November 13, 2006 in order to investigate this allegation. The Union requested a copy of the Attendant Expectations document at that hearing and was told that the request had to be made in writing. The Attendant Expectations and the alleged failure of the grievant involved in that meeting was the basis of the very discipline under investigation. It was therefore imperative to have that document in order to properly process the grievance.

6. The Union requested a copy of the 2-page document at that meeting but rather than simply making a copy of it at a copy machine some 10 feet away, the Employer's representative refused and requested that the request be in writing. Despite the Union's objection that this was a silly requirement given where they were, the Employer's HR person continued to refuse.

7. The Union then put the request in writing and the Employer still refused to make the copy that day. Instead, the HR person gave the Union a copy of the policy along with several other documents approximately 2 weeks later.

8. The essence of the Union's claim is thus that the requirement of a written request for literally everything requested in order to process a grievance violates the contract and the very spirit of the informality of processing grievances that has existed until now between these parties. Moreover, that in context, the refusal to provide a copy of a 2 page document that was the very basis of discipline in a case that the Union had already said it was going to grieve was unreasonable. The Employer could have easily made a copy of it but waited 2 weeks to provide a copy to the Union.

The Union seeks an award sustaining the grievance and ordering the Employer to cease and desist from requiring that information requests from the Union be in writing.

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation. In support of this the Employer made the following contentions:

1. That it has generally always required that information requests be made in writing in order to make sure it knows precisely what information is being requested and when it was requested. The Employer further argued that the past practice has been the opposite of that argued by the Union and that it has consistently required that requests for information for purposes of processing grievances be in writing.

2. Moreover, the Union has never until now objected or complained about this requirement. The Employer argued that there is a long established practice of requiring the Union's requests for information be in writing.

3. The Employer also asserted that the requirement of written information requests protects everyone so that there is clarity about what was requested from whom by whom and when. This requirement is not only reasonable but saves on confusion and misunderstanding later.

4. The Employer asserted too that the question at hand involves only the meeting of November 13, 2006. The Employer objected to a determination of anything beyond that.

5. The Employer also noted that the NLRB deferred the question of whether there was a violation of the contract regarding the November 13, 2006 meeting but actually dismissed the broader charge that the requirement of a written document request violates the contract somehow.

6. The Employer also noted that while Step 1 of the grievance process references an informal process, Steps 2 and beyond are quite formal and require everything pertaining to them to be in writing. Further, since this was a discharge matter the contract specifically calls for the process to commence at Step 2 of the grievance process, See Article II, B. Given that this was a serious charge and a serious consequence, i.e. discharge of an employee, it was imperative that the requests for information be made in writing.

7. The Employer noted that there was nothing unreasonable about the way the November 13, 2006 meeting was handled. The Union had in its possession for several hours the copy of the Attendant Expectations policy at that meeting and could have reviewed it in detail.

8. Moreover, the Employer was asked for more than just that document as a part of the Union's information request and wanted to provide everything in a single packet to make sure everything was provided.

9. Further, the parties discussed a Step 2 meeting at the November 13, 2006 meeting and, after comparing schedules, agreed that it would be held in early December 2006. The documents, including the Attendant Expectation policy was provided well in advance of that meeting in a Fax sent from the Employer's HR person to the Union's representative on November 30, 2006.

10. The essence of the Employer's argument is that there has always been a requirement of written document requests between these parties. Further there is nothing in the contract that prohibits this requirement and the fact that Step 1 of the grievance process references an informal process does not mandate any particular process beyond that. As noted above, this process started at Step 2 which does call for a much more formal process. The Employer argued emphatically that there is no hidden agenda to delay the processing of grievances nor any sort of nefarious policy to undermine the grievance process. The Employer complied with the Union's request for information in a timely fashion and that should be the end of it.

The Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

There were few disputes about the underlying facts of the case. The evidence showed that an employee was called in for an investigatory meeting with the Employer to determine the facts surrounding an allegation that he had been sleeping on the job. This meeting was held on November 13, 2006. There was some dispute about exactly how long this meeting lasted but it commenced at approximately 9:30 a.m. and lasted until sometime around 12:30 pm.

The grievant appeared along with Ms. Macchello, the Union representative, who appeared on the grievant's behalf. The grievant in that matter was accused of violating the terms of the Employer's Attendant Expectations policy. The Union representative was given a copy of this policy to review by Ms. Mary Kay Roe, the Employer's HR representative, at the meeting. There was again some minor dispute about how long this policy was in the possession of the Union but it was clear they had it for sufficient time to review it and discuss it amongst themselves.

At some point it was determined that based on the investigation and the various allegations against the grievant, the Employer was going to move to terminate him. This was apparently in part due to the allegation that the grievant had violated the terms of the Attendant Expectation policy. The Union representative made a request that Ms. Roe copy the 2-page form and give it to her. Ms. Roe refused to do so indicating that the Employer's policy was that any such request be in writing to be certain what was being requested and when. Ms. Macchello noted that there was a copy machine no more than a few steps away (she could see it from the office) and that pointed out the inherent silliness in making a written request for something that could have been copied in less time than it would likely take to write out the request. Ms. Roe remained adamant and would not make a copy of it without a written request.

At that point, the Union representative did make a written request, See Union exhibit 9, which listed the items requested, the date and that it was hand delivered on 11-13-06. Ms. Roe still did not honor the request for the attendant Expectations policy instead indicating that this would be processed along with the request for the other information in the written request.

The parties then discussed scheduling of a Step 2 grievance procedure as noted in Article II of the contract. That provision makes in clear at Article II, B that "any grievance based on the suspension or discharge of an employee shall be referred directly to Step 2 of this procedure within fourteen (14) calendar days following the actual date of such suspension or discharge." This was a discharge so it was clear that the terms of Article II sent this directly to Step 2.

The Step 2 meeting was set for early December 2006. The evidence showed that the requested documents were faxed to the Union on or about November 30, 2006 and that the Union had this in advance of the Step 2 grievance meeting.

The Union claims that the overall policy of requiring written requests for information violates the contract as well as the longstanding practice of simply granting informal requests for information between these parties. The Union acknowledged that while large documents or those that would require time to assemble and compile or to find are appropriate for a written request and asserts that these types of requests are not what they are talking about. The Union's claim is that the requirement that literally all requests must be in writing no matter how simple or how small is per se unreasonable and violates the terms and the spirit of the grievance procedure and the practices between these parties.

The Union introduced testimony that there are times when the parties simply exchange information informally without a written request and that this information is frequently given to stewards in order to even determine if a grievance should be filed. In some cases, having the relevant information quickly can alleviate the need to even file a grievance. Otherwise, the Union might file a grievance in order to avoid allowing time limits to pass. The Union claimed that this is unnecessarily burdensome for the stewards, who rarely have desks or a place to make written requests, and for the Employer who has to then process these formal grievances that may not be necessary.

The Union pointed to the informal steps of the grievance process and argued that the spirit of the grievance process essentially prohibits the sort of Draconian and unduly stringent policy now promulgated by the Employer.

The Employer asserted that it has always required written requests and that the Union has never objected to that. With regard to the November 13, 2006 meeting, the Employer noted that the Union got what it wanted well in advance of the Step 2 grievance meeting. The Employer also noted that the NLRB dismissed the Union's main claim here that the overall policy violated the contract and asserted that the Union's grievance as stated at the hearing is now overly broad and should be rejected.

Making a determination like this is on a par with asking people to just get along. As noted above, the NLRB deferred the matter of the November 13, 2006 meeting to arbitration under the *Collyer* doctrine. The Union however sought to have an award on the overall policy of requiring every request for information be in writing. The Union claimed that this violated the contract. The evidence on this issue showed several things. First, there was insufficient evidence to establish that the Employer has engaged in a systematic practice or policy to unduly delay grievances. The evidence showed that there are now more grievances filed since the execution of the parties' latest collective bargaining agreement but there was insufficient evidence to establish a nexus between that fact and some nefarious activity on the part of the Employer. Filing and processing of grievances is of course a two way street so to speak and on this record there was insufficient evidence to support a claim that the Employer's action amounted to an unfair labor practice within the meaning of the Act.

Further, there is nothing in the contract that prohibits a policy of requiring that document requests be in writing in order to process a grievance. The Union has a right to the information it feels it needs to properly defend its members or other wise enforce the terms of the collective bargaining agreement. There was no dispute about that. The question was whether the policy of requiring that the requests for information inherently violated the contract.

A review of the terms of the grievance procedure shows that there is not. The Union noted that some informality in the processing of grievances and in the normal give and take between Union and management in the administration and enforcement of a collective bargaining agreement is to be expected. Indeed it is. Without some level of informality and a spirit of cooperation between the parties the whole system would grind to a halt and industrial chaos might well result. At the very least if the same sort of formality required in legal or Court proceedings were to be imposed on the longstanding system of industrial justice and procedure, such could well undercut the very underpinnings of the way the labor relations community practices its trade. Nobody needs to see that.

In addition, the Union's claim is that there has been a systematic practice by the Employer to refuse to supply requested information. This was apparently the subject of the grievance dated January 25, 2007 and which formed the basis of a separate charge brought before the NLRB. Note that the Union filed a separate but similar grievance dated November 16, 2006, which led to this arbitration. The Employer objected to the consideration of anything beyond the November 16, 2006 grievances but it was clear that the two grievances were similar if not identical in nature. Both claimed that the Employer was engaging in a policy of refusing to supply needed information necessary for the Union to execute its duty to enforce the collective bargaining agreement. Regardless of whether these should be consolidated or not, the evidence did not support the charge/claim that there was a refusal to supply the information, either in this particular instance or as a general policy or practice. In fact, the information requested in the November 13, 2006 meeting was supplied in advance of the Step 2 grievance meeting. There was no violation of the agreement based on that claim.

Having said that however, the contract speaks in many places about the formality in the processing of grievances. Step 2 of the process begins with the phrase “ if the grievance is not resolved at Step 1, it shall be reduced to writing, ...” It goes on to require very specific details about what needs to be in that grievance and how it is to be presented to the Employer.

Step 3 again references quite specifically the need for a written appeal to arbitration. Obviously after that step the process becomes formal indeed. While there is nothing preventing the parties from engaging in an informal process to exchange information at any stage of this process, there is also nothing to prohibit the parties from requiring that information requests be in writing. Accordingly, that part of the grievance that seeks to require the Employer to cease and desist from requiring information requests to be in writing must be denied.

It should also be noted that such a remedy would have been impossible to enforce in any event given that the Union acknowledged that some information requests should be in writing. It was a bit unclear what this would entail but presumably large documents or ones that would require time to assemble, such as requests for all other disciplinary actions given to employees who engaged in the same or similar conduct over time. Such requests could not be done on the spot and would take time. Moreover, in those instances it would be essential that everyone was clear on what was required. Fashioning a remedy around such a request would be practically impossible and would likely result in more confusion than it would ever resolve.

Turning to the actual events leading up to the filing of the instant grievance and the meeting of November 13, 2006 however it was clear that in that instance the Employer's representative was unreasonable in her refusal to grant the requested document at that meeting. The evidence showed that there was a written request for the document. The document was well known to the parties and was a short document that could have been copied quite easily and given to the Union at that time. To refuse to provide those documents at that point was quite clearly a violation of the Employer's policy and a violation of the provisions of the grievance procedure and the practice that has existed over a long period of time between these parties to exchange documents and other information informally upon request.

Moreover, the evidence showed that there has been a practice of exchanging at least some information informally where that information was easily discernable and easily obtained. That practice is now very much a part of the grievance process in the contract. Thus while there is nothing inherently wrong with the requirement that the request be in writing; the way in which that request was handled at the November 13, 2006 meeting did violate the terms of the parties' practice. The Attendant expectation policy should have been copied and given to the Union's representative at that time given that there was a written request for it made at the meeting.

The difficulty here is that the Union did eventually get the information so no “remedy” can in effect be imposed as the result of that action. Moreover, fashioning a remedy for future cases would, for the reasons outlined above, be virtually impossible and might create more confusion than it would solve. Certainly, where there is a written request for information and that information is ascertainable at the time and can be provided with minimal cost and time by the Employer such information should be provided at that time. Certainly any request for information must be provided prior to the next meeting in the grievance steps. Here however that was done. Even though the parties gave explicit jurisdiction to the arbitrator to fashion a remedy no specific remedy can be ordered here since the Employer did provide the requested information prior to the Step 2 grievance meeting. Beyond that a remedy that requires the parties to “be reasonable” is without any real meaning for reasons that even a casual observer could imagine. Under these facts and circumstances, no further remedy can be ordered.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievance is denied insofar as it relates to the claim to order the Employer to cease and desist from requiring the Union to provide written requests for information for purposes of processing grievances. It is sustained insofar as the grievance relates to the claim that the Employer should have provided the Attendant Expectation policy at the November 13, 2006 meeting. No further remedy is imposed however as that request was eventually honored by the Employer prior to the Step 2 grievance meeting.

Dated: December 27, 2008

Jeffrey W. Jacobs, arbitrator

SEIU #113 and Fairview