

During negotiations for the instant contract, and subsequent to a PERC decision, the parties agreed to an innovative process, by Letter of Agreement, dated July 1, 2008, to resolve certain issues. The Letter reads:

Letter of Agreement

Mason General Hospital ("MGH") and the United Staff Nurses, Local 141, UFCW ("Union") agree that:

The language in Collective Bargaining Agreement ("CBA") Sections 8.9, Work Schedule, and 12.2., Earned Time Usage, shall not be changed at this time. During the month of January, 2009, the Hospital may refer to a "mediation-arbitration ("Med-Arb") process, the issues raised by it pertaining to Sections 8.9 and 12.2 (and subparts 12.2.1-12.2.7), as presented in its proposal with MGH's Letter of 6-16-08. If the arbitration process is used as part of Med-Arb, it is understood that no aspect of Section 12.1, Accruals, shall be submitted to such arbitration. The Med-Arb process shall proceed as follows:

The Hospital may invoke the Med-Arb process of the Letter of Agreement by sending a written notice to the Union Local 141 President during the month of January 2009. MGH and the Union shall see to agree on a neutral third party within twenty-eight (28) days of such notice, who shall be asked to serve as a special Mediator/Arbitrator. If the parties cannot agree on such a neutral third party, a roster of seven (7) qualified arbitrators shall be requested from the Federal Mediation and Conciliation Service (FMCS) for the States of Washington and Oregon. After receipt of this FMCS roster, the parties may mutually agree to select one of the individuals on the roster, or through coin-toss to deem first deletion the parties shall alternately delete names from the roster until one (1) individual is left to serve as the Mediator/Arbitrator. The Mediator/Arbitrator's expenses shall be jointly shared by the parties. A one (1) day facilitated/mediated session shall be held by the Mediator/Arbitrator to seek to mutually settle this matter. If it not mutually settled through this process, the Mediator/Arbitrator shall identify to the parties the specific unresolved issues related to the Work Schedule and Earned Time language (as limited above), and shall then request both parties to submit their "best position" in writing on each of the designated unresolved issues within twenty-eight (28) days to the Mediator/Arbitrator. **The Mediator/Arbitrator shall select either the entire best position of the Union or the entire best position of MGH on the designated unresolved issues.** The Mediator/Arbitrator's selection shall serve as a binding arbitration decision on the subjects for the parties regarding the CBA. (Emphasis added)

The Employer exercised its right to refer the selected articles to the Mediation/Arbitration process. In accordance with the terms of this

Letter, a mediation session was held on May 11, 2009 with the undersigned serving as mediator. After approximately 13 hours of negotiation and mediation, the parties were unsuccessful in reaching a mutually agreeable conclusion.

As required by the Letter of Agreement, the parties submitted their respective "best positions", on all the unresolved issues. Statements of Position were received, by e-mail on June 8, 2009. Mailed copies of these positions arrived on June 10, 2009. Upon receipt of these positions and the issuance of this decision, the matter is closed.

ISSUE

Does the Arbitrator select the Union or Employer's best position regarding Sections 8.9 and 12.2 (and subparts)?

The language in dispute was presented as a proposed contractual change by the Employer, by letter, on June 16, 2008, during the negotiations of the current contract. It forms the basis for the conflict herein. It reads as follows:

(1) Work Schedule:

8.9 Work Schedule. It is recognized and understood that deviations from the foregoing normal hours of work may occur from time to time, resulting from several causes, such as but not limited to, vacations, leave of absence, weekend and holiday, duty, absenteeism, employee requests, temporary shortage of personnel, low census, and emergencies. The Employer retains the right to adjust work schedules to maintain an efficient and orderly operation. Monthly work schedules will be posted at least ten (10) days prior to the beginning of the scheduled work period. Except for emergency conditions involving patient care and low census conditions, individual scheduled hours of work set forth on the posted work schedule may be changed only by mutual consent.

Any requests for **paid** time off, which are submitted by the 5th of the prior month, shall be granted based on the Employer making every reasonable effort to provide replacement coverage. Unless the requested leave is covered by another section of the Agreement, request made after the 5th of prior month may require the nurse to find her/his own replacement without placing the Hospital in an overtime situation.

(2) Earned Time Usage:

12.2 Earned Time Usage. Newly hired part-time and full-time employees will accrue earned time from their date of hire **for use a**fter they have satisfactorily completed their ninety (90) day probationary period. Earned time may be used for emergency doctor and dental appointment during regular working hours provided that leave for such an appointment has been cleared where possible with the Department Head one (1) day in advance. Nurses must provide the Employer at least ten (10) days' advance notice of non-emergency (routine) doctor and dental appointments. Such leave shall be considered sick leave. Earned time may also be used for illness or injury of a dependent, child, parent, or spouse. Nurses shall use earned time in hourly increments equivalent to the number of hours the nurse is regularly scheduled to work.

12.2.1 A nurse may request time off without pay, instead of using accrued earned time, if the nurse has already scheduled extra shifts that month so that the nurse will work up to the nurse's scheduled FTE status for that month even with the time off without pay. The Employer will grant such requests, subject to its determination of scheduling and staffing needs. (Such requests are to be submitted in writing to the Department Head with as much advance notice as possible.)

12.2.2 Requirement to Access Earned Time. Nurses are required to utilize earned time on any occasion when they request a scheduled day off , unless

a directed not to work by management due to low census in which event a nurse may choose to either utilize earned time or to take leave without pay (LWOP) up to the amount of hours being low censused that day, or

b. Section 12.2. 1 applies

(Nurses may not access earned time when they are off work due to a disciplinary suspension. Also, if a nurse does not have sufficient accrued earned time for a vacation because the nurse has used accrued earned time for low census hours, then the nurse may request that the vacation be granted by the Hospital as leave without pay (LWOP) pursuant to 13.10.

12.2.3 Negative Balances. Nurses may not access earned time that would result in a negative balance (A nurses (sic) will be denied vacation requests if **at that time of the request the nurse's** projected earned time balance would not contain sufficient earned time to cover the requested time off **at the time the leave is to be used.**)

12.2.4 Vacation Use During Peak Times. During peak vacation use times (June through August), vacation requests must be limited to two (2) weeks. This is intended to help all staff have some time off during this busy and preferred time.

12.2.5 Scheduling All earned time must be scheduled in advance in accordance with Hospital policies and be approved by the Director. The employer shall have the right to schedule earned time in such a way as will least interfere with patient care and work load requirements of the Hospital. Patient care needs will take precedence over individual requests. Generally earned time may not be taken in increment of less than the nurse's regular work day. Under special circumstances and only when approved by the Director, partial days may be granted. Once a vacation has been approved it will not be cancelled by the Hospital absent an emergency.

12.2.6 Earned time Request Procedure Requests for vacations involving overseas travel may be submitted up to a year in advance. The nurse and Director will work together for approval as far in advance as possible. Vacations involving holidays will be rotated annually. All requests for earned time will be submitted to the Director within a "rolling two (2) month period" by the date two (2) months before the start of the requested leave and reviewed for approval within one (1) month of that request. For example:

<u>PTO Start Date</u>	<u>Request Submitted By:</u>	<u>Approved By:</u>
<u>January 10</u>	<u>November 10</u>	<u>December 10</u>

12.2.7 Sick Leave: Earned time may be used as sick leave when the nurse in unable to work on account of a bona fide illness or injury, to care for a child under the age of eighteen with a health condition requiring treatment or supervision, the care of a child eighteen years or older who is incapable of self-care because of a mental or physical disability or the care of a spouse, parent, parent-in-law or grandparent of the employee who has a serious health or emergency condition. The hospital reserves the right to require reasonable proof of such illness or injury. Excessive absenteeism will be subject to appropriate counseling/disciplinary action.

BACKGROUND

Through the negotiating process, both before the contract was ratified and signed, as well as during the instant mediation process, the parties discussed, considered and modified previously held positions. Some formal changes were made to their respective positions; other changes were made, on an informal basis, and therefore, non binding, during the mediation procedure. Additionally, information exchanged,

in a written form, allowed for continual discussion of the outstanding issues and provided a foundation for rationalizing these exchanges. Implicit in the Letter of Agreement, the arbitration process allows for an analysis of each of the parties "best" position on the outstanding issues. The subsequent decision, therefore, will be based on the arguments, position(s) and conclusions of the parties in their submitted Statements of Position. Although the mediation process allowed for an appreciation of the underlying factors and relevant background surrounding the issues, none of the information gleaned nor positions taken during the informal process will be a part of the decision herein. However, documents provided during the mediation process, and uncontested as to accuracy, may be scrutinized, as appropriate, when analyzing the respective best position.

THE EMPLOYER'S POSITION

It is the Employer's contention that the changes proposed in Articles 8.9 and 12 (including subparts) are needed to allow for a more efficient operation of the Hospital's function of patient care, a reduction of overtime premiums, and a lessening of scheduling concerns. The Employer argues that they made a good faith effort to arrive at a mutually acceptable solution, fair to both parties, and repeatedly showed willingness to compromise and suggest alternatives during both the bargaining and mediation process. They assert that the Union did not make such efforts. The Union's lack of flexibility and sincere attempt to reach agreement over the issues in dispute should not be rewarded.

The Hospital argues that certain standards should be followed when deciding the best positions on the issues. Among these are the

application of prevailing area practices, at Healthcare facilities represented by both this Union and others; established internal practices at Mason General; management rights/patient care responsibilities; efficiency of operations; and cost considerations. Changes were made, upon submission of this Statement of Position, from positions taken during the mediation session, most specifically in Article 12.2.2.

THE UNION'S POSITION

The Union argues that the use of unpaid time off has been historically and traditionally used in lieu of the current sick leave bank and low accrual amounts available to the Mason General nurses. The Union contends that other area Hospitals, represented by this or other Unions, have greater numbers of days available for accrual of annual leave days, and have separate banks available for sick leave. Further, the Union contends that the issues raised here were achieved through the bargaining process. To ask the Union to accede to changes in perceived benefits, such as use of unpaid time off, concessions, by the Employer, should be made in other areas to accommodate "the giving up" of a current contractual right.

The Union asserts that the Hospital has given no compelling reason to make such a change. The data presented, according to the Union, was incomplete and not supported by specific information.

DECISION AND ANALYSIS

The accompanying arguments in support of each parties respective position, suggest a comparison of the area standards, an examination of the data presented in mediation, and a review of the bargaining history of the relationship. The Hospital asserts that a change or changes must be made to allow for a more efficient and cost effective operation. The Union contends that the *status quo* should be left undisturbed as the changes sought lack a *quid pro quo* and the Hospital offers no compelling reason to make such changes.

The Letter of Agreement precludes the Arbitrator (and mediator) from addressing issues beyond Article 8.9 and Article 12.2 (and subparts) of the current contract. The Letter further requires that "(The Mediator/Arbitrator shall select either the entire best position of the Union or the entire best position of MGH on the designated unresolved issues". An arbitration decision, with these particular prohibitions and limits, is neither rights nor interest arbitration. It is more akin to the process used by Major League Baseball in determining the annual salary for an arbitration-eligible player. It implies that the Arbitrator view the facts, arguments, and positions, weigh the potential for utility within the current collective bargaining contract, and render a decision that is appropriate within the facts presented. It requires the Arbitrator to choose one or the other position, on each issue, with no modification.

Article 8, 8.9

I am not persuaded by the Hospital's argument that the use of unpaid time off (UTO) by nurses is as significant a cost to the Hospital as suggested. Its submission, during the mediation process, showed that

the average, absent the top four users of UTO, is approximately 14.27 hours per year. This is little more than one full day for a 12 hour shift nurse and about a day and a half for an 8 hour nurse. The argument that this use caused the Hospital to incur substantial overtime costs was unsupported by specific data. Nor was information presented showing that the nurses who chose to take UTO worked shifts to insure their monthly schedule to fulfill their FTE, at either straight time or overtime hourly rates. To change a long standing practice without a commensurate modification to other negotiated benefits should be unexpected.

The Hospital argues that the other area healthcare facilities do not have the benefit of UTO in their contracts. A careful study of these contracts bears this out. The other facilities, however, have significant differences in both sick leave and paid time off (or vacation time) accruals. The range for sick leave "banks" appears to be between 400 hours to 960 hours². The contractual language covering paid time off varies to such an extent to be too cumbersome to repeat here. It is noted, however, that most exceed the bank of 320 hours contained in Article 12 of this contract.

The Letter of Agreement prevents changes, through negotiations, elsewhere in the contract. The Union's assertion of a *quid pro quo* for such an adjustment to UTO has merit. It is a well established axiom of the arbitration process that a party to a collective bargaining contract cannot expect to gain something through arbitration that they were unable to achieve through negotiations. Usually applied to grievance arbitration concerning interpretation of contractual terms, it has

² Some of these healthcare facilities have a category referred to as "Extended Time Off" or a bank of hours for long term absences. These are not included here.

applicability here. Revision of this article is more appropriate to future bargaining when the traditional give and take of that process is unlimited.

Article 8, Section 8.9 – I choose the Union’s Best Position – No change to the current contract.

The Hospital suggests that the second paragraph of 8.9 be moved to Article 12. I chose not to move it through this process. It is best left to future negotiations to modify such placement.

Article 12

12. 2³ Earned Time Usage – I choose the Hospitals Best Position

There does not appear to be any difference between the best positions of the parties regarding this Section of Article 12.

12.2.1

The Hospital suggests language here requiring a nurse, if she or he requests UTO, to ensure the nurse work up to the scheduled FTE status for the month in which the UTO is requested. This contradicts the language of 8.9 which does not require such a commitment when taking UTO. Therefore, it is rejected and will not be a part of the contract. The remainder of the sections will be renumbered in the final decision.

³ For discussion purposes, the numbering here will be as presented by the parties in their respective Statement of Position. A final, renumbered statement will be found at the end of this decision.

12.2.2

This suggested language likewise is contradictory to that of 8.9. It limits each nurse to three (3) scheduled shifts per calendar year of UTO. It is noted that this is a change from the position taken during mediation, but it still limits the number of shifts available to each nurse. It too, is rejected, and will not be part of the contract.

12.2. 3 – I choose the Hospitals Best Position

The Hospital offered this change, and referenced that agreement on this section had been reached during mediation. The Union did not address this in its Statement of Position. Therefore, it will be a part of the contract.

12.2.4⁴ Earned Time Request Procedure

It is to this section that the Hospital sought to move the second paragraph of 8.9. As noted above, this second paragraph will remain in 8.9. There is little variance between the parties concerning the request procedure. I choose the following to be a part of the contract:

Hospitals Position – first paragraph in proposed 12.2.4; section 12.2.4 (b)

Unions Position – Vacation use During Peak times

The Hospitals suggested change in 12.2.4 (d) regarding seniority will not be included in this section. Such modifications are more appropriate to Article 7, Seniority and are, therefore, beyond the scope of this decision.

⁴ This issues raised here are numbered differently in each Statement of Position.

12.2.5 (Union's 12. 2. 7) Sick Leave This addition was agreed to in mediation and will be a part of the contract.

AWARD

Based on the forgoing the following contractual language will be added to the present contract.

8.9 Work Schedule

It is recognized and understood that deviations from the foregoing normal hours of work may occur from time to time, resulting from several causes, such as but not limited to, vacations, leave of absence, weekend and holiday duty, absenteeism, employee requests, temporary shortage of personnel, low census, and emergencies. The Employer retains the right to adjust work schedules to maintain an efficient and orderly operation. Monthly work schedules will be posted at least ten (10) days prior to the beginning of the scheduled work period. Except for emergency conditions involving patient care and low census conditions, individual scheduled hours of work set forth on the posted work schedule may be changed only by mutual consent.

Requests for time off (paid or unpaid), which are submitted by the 5th of the prior month, shall be granted based on the Employer making every reasonable effort to provide replacement coverage. Unless the requested leave is covered by another section of the Agreement, request made after the 5th of prior month may require the nurse to find her/his own replacement without placing the Hospital in an overtime situation.

12.2 Earned Time Usage. Newly hired part-time and full-time employees will accrue earned time from their date of hire for use after they have satisfactorily completed their ninety (90) day probationary period. Earned time may be used for emergency doctor and dental appointment during regular working hours provided that leave for such an appointment has been cleared where possible with the Department Head one (1) day in advance. Nurses must provide the Employer at

least ten (10) days' advance notice of non-emergency (routine) doctor and dental appointments. Such leave shall be considered sick leave.

12. 3 Use During Low Census Nurses placed on low census may choose to either utilize earned time or take leave without pay up to the amount of hours low censused that day.

12.4 Earned Time Request Procedure The Employer shall have the right to schedule time off in such a way as will least interfere with patient care and work load requirements of the hospital. Patient care needs will take precedence over individual requests. Once a vacation has been approved, it will not be cancelled absent an emergency.

(a) Nurses may not access earned time that would result in a negative balance. A nurse will be denied vacation requests if at the time of the request the nurse's projected earned time balance would not contain sufficient earned time to cover the requested time off at the time the leave is to be used.

(b) During peak vacation time (June through August) vacation requests are limited to two weeks. Requests for more than two weeks may be granted by the employer based on the number of requests and staffing considerations.

12. 5 Sick Leave Earned time may be used as sick leave when the nurse is unable to work on account of a bona fide illness or injury, to care for a child under the age of eighteen with a health condition requiring treatment or supervision, the care of a child eighteen years or older who is incapable of self-care because of a mental or physical disability or the care of a spouse, parent, parent-in-law or grandparent of the employee who has a serious health or emergency condition. The hospital reserves the right to require reasonable proof of such illness or injury

Respectfully submitted,



Douglas P. Hammond
Arbitrator
June 29, 2009