

**IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

UNION OF PHYSICIANS OF WASHINGTON,

and

WASHINGTON STATE DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, WESTERN STATE HOSPITAL.

RE: Contract Interpretation - Aziz; FMCS Case No.
11-58889-6

OPINION AND AWARD

of

**LUELLA E. NELSON,
Arbitrator**

July 30, 2012

This Arbitration arises pursuant to Agreement between UNION OF PHYSICIANS OF WASHINGTON (“Union”), and WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, WESTERN STATE HOSPITAL (“State” or “WSH”), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on April 24, 2012, in Lakewood, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. A certified shorthand reporter attended the hearing and subsequently prepared a verbatim transcript. Both parties filed post-hearing briefs on or about May 31, 2012.

APPEARANCES

On behalf of the Union:

Rhonda J. Fenrich, Esq.
Fenrich & Gallagher, P.C.
423 Lincoln Street
Eugene, OR 97401

On behalf of the State:

Andrew Logerwell, Esq.
Assistant Attorney General
Washington State Labor Relations
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504

ISSUES

The parties were unable to agree fully on a statement of the issue or issues to be decided. The parties agreed to formulate the substantive issue as follows:

Whether the State violated Article 7.9 of the Collective Bargaining Agreement and its subsequent agreement on the flexible schedule demand to bargain, by eliminating Dr. Aziz's flexible schedule? If so, what is the remedy?

The State would formulate additional issues as follows:

1. Is the grievance arbitrable?
2. Is the grievance timely?

The parties stipulated that the Arbitrator would formulate the issue or issues to be decided. On brief, the Union incorporated the State's proposed issues. Having reviewed the record, the Agreement, and the parties' statements of the issues, the Arbitrator formulates the issues as follows:

1. Is the grievance substantively arbitrable?
2. Is the grievance timely?
3. If the grievance is arbitrable and timely, did the State violate Article 7.9 of the Collective Bargaining Agreement and its subsequent agreement on the flexible schedule demand to bargain, by eliminating Dr. Aziz's flexible schedule? If so, what is the remedy?

RELEVANT SECTIONS OF THE AGREEMENT

Article 7 Hours of Work

7.1 Definitions

...

E. Work Schedules

The number of days and hours an employee is scheduled to work in a work week as established by the Employer in order to meet business and customer service needs, as long as the work schedules meet federal and state laws.

...

7.2 Determination

...

D. UPW

Physicians are expected to work as many hours as necessary to accomplish their assignment or fulfill their core responsibilities. However, because DSHS has a unique situation that requires physicians to work hours over and above those necessary to accomplish their assignment and fulfill their core responsibilities, physicians will receive additional straight time pay at their regular rate of pay for working these "extra duty" hours.

"Extra Duty" is defined as work hours that are hours over and above those necessary to accomplish the physician's regular assignment and fulfill their core responsibility. These "extra duty" hours

typically include covering hours/shifts not regularly assigned to any other physician, on-call work, covering patient loads due to vacancies or working hours that are not covered because of leave usage by the regularly assigned physician. When seeking to fill the extra duty hours, the Employer retains the right to assign any physician who has the appropriate skills and abilities required for the extra duty to create equitable distribution of work. Management will ask for volunteers for the extra duty, but retains the right to select any physician for the extra duty regardless of whether there are volunteers or not and retains the right to restrict the number of extra duty assignments that any one position works.

...

7.9 Overtime-Exempt Employees

The Employer's policy for all overtime-exempt employees is as follows:

...

B. Overtime-exempt employees are expected to work as many hours as necessary to accomplish their assignments or fulfill their responsibilities. Full-time overtime-exempt employees are expected to work a minimum of forty (40) hours in a workweek and part-time overtime-exempt employees are expected to work proportionate hours. Overtime-exempt employees may be required to work specific hours to provide services, when deemed necessary by the Employer.

...

F. If they give notification and receive prior approval from the Employer, overtime-exempt employees may adjust their work hours. Employees are responsible for keeping management apprised of their schedules and their whereabouts.

...

Article 31 Grievance Procedure

...

31.2 Terms and Requirements

A. Grievance Definition

A grievance is an allegation by an employee or a group of employees that there has been an act that violates this Agreement which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants."

..

C. Computation of Time

Days are calendar days, and will be counted by excluding the first day and including the last day of timelines. When the last day falls on a Saturday, Sunday or holiday, the last day will be the next day which is not a Saturday, Sunday or holiday. Transmittal of grievances, appeals and responses will be in writing, and timelines will apply to the date of receipt, not the date of postmarking.

D. Failure to Meet Timelines

The time limits in this Article must be strictly adhered to unless mutually modified in writing. Failure by the Union to comply with the timelines will result in the automatic withdrawal of the grievance. Failure by the Employer to comply with the timelines will entitle the Union to move the grievance to the next step of the procedure.

...

31.3 Filing and Processing

A. Filing

A grievance must be filed within fifteen (15) days of the occurrence giving rise to the grievance, or the date the grievant knew or could reasonably have known of the occurrence.

The employee may first discuss the issue with the immediate supervisor in an attempt to informally resolve the issue. The employee may elect to have a union representative or union steward present.

Even when informal discussions occur, the written grievance must be filed no later than the fifteen (15) days described above.

...

C. Processing

...

Note: The Departments of Corrections, Fish and Wildlife, Social and Health Services and the Washington State Patrol will bypass Step 1.

Step 2: Appointing Authority or Designee:

...

For agencies bypassing Step 1: If the issue is not resolved informally, the Union may file a written grievance with the employee's Appointing Authority or designee, with a copy to the Human Resources Office within the fifteen (15) day period described in 31.3 A.

...

Step 5: Arbitration:

...

D. Authority of the Arbitrator

...

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. ...

....

**Article 36
Management Rights**

36.1 Except as modified by this Agreement and applicable law, the Employer retains all rights of management, including, but not limited to, the right to:

...

C. Direct and supervise employees;

...

H. Establish or modify the workweek, daily work shift, hours of work and days off;

...

**Article 47
Entire Agreement**

...

47.5 The Employer will satisfy its collective bargaining obligation before changing a matter that is a mandatory subject. The Employer will notify the Union of these changes and the Union may request discussions about and/or negotiations within the notice period. In the event the Union does not request discussions and/or negotiations within the notice period, The Employer may implement the changes without further discussions and/or negotiations. There may be emergency conditions that are outside the Employer's control requiring immediate implementation, in which case the Employer will notify the Union as soon as possible.

The parties will agree to the location and time of the discussions and/or negotiations. Each party is responsible for choosing its own representatives for these activities.

FACTS

BACKGROUND

WSH is a state psychiatric hospital. Its patients include both civil and criminal (forensic) commitments. Of its 67 doctors, most are psychiatrists; 16 are internists or family medicine physicians (“physicians”). Physicians provide only the most basic medical services to patients; anything more requires sending the patient to a local hospital. Each of WSH’s 28 wards has about 30 beds. Most physicians are assigned to multiple wards; most work weekdays. Those designated as Officer of the Day (“OD”) cover evenings, nights, and weekends, and receive extra duty pay for those periods.

Grievant is an internist. He has spent most of his career at WSH working on two forensic wards, one of which is designated as a medical ward (i.e., a ward where forensic patients with ongoing medical conditions, such as diabetes or heart conditions, are housed). This grievance involves the rescission of permission for him to work a split shift, described below.

SPLIT SHIFTS AND OTHER FLEXIBLE SCHEDULES

For more than three years, Grievant worked a split shift, with WSH’s approval. On that shift, he worked from 6 to 9 a.m., and again from 3 to 8 p.m. In the intervening hours, he operated a private practice but remained available by phone or pager. Dr. Michelle Morrison covered for any medical issues that arose on his wards during those hours. She estimated she got a call for that purpose once or twice a month, and saw one of his patients about once every three months. She testified she saw other physicians’ patients as often, for various reasons. As a condition of the flexible schedule, Grievant had agreed at the outset to revert back to a standard schedule whenever Dr. Morrison took time off.

Prior to the events giving rise to this grievance, three physicians worked shifts that began at 6:45 a.m. While working a split shift, Grievant covered for them after their shifts ended at 3 p.m. In late 2010 or early 2011, their shifts were changed to begin at 7:30 or 8 a.m. and end at 4 or 4:30 p.m.; one physician whose shift was changed later resigned.

THE REDUCTION IN STAFF AND CHANGE IN GRIEVANT'S SHIFT

In late 2010, the Hospital anticipated reducing its staff due to budget cuts. The initial plans included laying off three physicians. Physician Supervisor Dr. Donald Liteanu notified Grievant and other physicians who had flexible shifts in October 2010 that, due to the planned reductions, they would no longer be able to work those shifts. He gave a deadline of mid-November to change their schedules. Grievant asked for extra time to wind down his practice, and was given an extension until December 6.

The Union demanded to bargain about the layoffs, as well as about the change in working conditions. The parties completed effects bargaining on December 21, 2010. They agreed to abolish two physician positions, and to fund one physician's position by using a vacant psychiatrist position. They further agreed that two physicians, who had been working part-time while occupying full-time positions, would work full-time. The net loss in physician hours was roughly one FTE. As to the flexible work schedule, Karl Nagel, Deputy Director of the Labor Relations Office, confirmed in an e-mail the agreement that WSH "would remain flexible on scheduling, reviewing each circumstance on a case-by-case basis." Nagel testified the decision was to be based on the criteria in Article 7.1 of the Agreement.

In a December 29, 2010, memo, Dr. Liteanu reiterated his earlier directive that Grievant was to change to "a more regular schedule" by January 5, 2011, stating that "business needs" did not allow continuation of the split schedule. He added, "Preference is given to a regular work schedule 8AM – 4:30PM or 7:30AM – 4PM." He offered a temporary alternative of working 9 a.m. to 5:30 p.m.

Union attorney Rhonda Fenrich contacted WSH, noted the agreement resulting from the demand to bargain, and protested the requirement that Grievant "normalize" his work hours. She asked that the order be "rescinded pending negotiations on this matter so that a ULP is unnecessary." Nagel and Fenrich agreed to meet, but agreed that in the meantime Grievant would comply with the directed schedule change. Nagel notified Liteanu and other managers of this development, and made the following suggestion:

We suggest that you meet locally and discuss whether his desire for a unique schedule meets the needs of the hospital given the reduction in internist positions and the allocation of ward assignments. Hopefully the discussion with the union will result in a resolution that meets

the needs of the hospital. If not, the hospital should articulate its reasons again for the new schedule and proceed with the new schedule under the contract.

In a January 6, 2011, e-mail to the physicians, Dr. Liteanu advised them:

Special work schedule remains an active topic.

Having less of us doing more, combined to a work environment where business is conducted mostly between 7A-4P does not allow much flexibility in this regard.

However, I could be open to examine a couple of reasonable requests (7A-7P) based on seniority and will see if it could be worked out without causing additional burden to the rest of the group or interference with patient care and ancillary services.

Grievant's work schedule was officially changed to 8 a.m. to 4:30 p.m., effective January 5, 2011. In a January 11 memo, Dr. Liteanu informed Grievant that he would not approve short notice requests for annual leave due to difficulty in coverage; that a part-time weekend OD position was not available; and that he was expected to work from 8 a.m. to 4:30 p.m. on January 17. At some point thereafter, Grievant began serving as night OD on four full shifts plus a short shift. He testified he continued to request a flexible schedule.

THE GRIEVANCE AND RESPONSES

The Union filed a grievance dated January 27, and received by WSH on February 1. It reads, in relevant part, as follows:

... The issue of flexible schedules was addressed during a demand to bargain over the hospital's intent to layoff three physicians. The resolution of this issue was that the hospital supervisory staff committed to retaining flexible schedules. Right after that meeting, Dr. Liteaneau issued an order to Dr. Aziz to work 8-5 instead of the split schedule. Dr. Liteaneau provided no rationale for this order, but when pressed stated it was for lunch coverage (that other doctors had been complaining) and so that Dr. Aziz could attend monthly medical staff meetings. The doctor responsible for covering for Dr. Aziz' lunch coverage does not mind covering for him and Dr. Aziz has offered to attend the meetings.

Dr. Liteaneau still refused to allow Dr. Aziz to return to his flexible schedule. ...

The actions of hospital administration violate the contract, which provides that the Agency will take into consideration personal needs when approving flexible and alternative work schedules. The Agency has no proof that Dr. Aziz' prior schedule does not meet hospital and patient needs; nor any basis for the change other than retaliation for the union's actions in bargaining the physician layoffs.

After a Step 2 grievance meeting, WSH issued a grievance response denying the grievance and reading, in relevant part:

... Most care and treatment services occur during daytime hours. ...

Management told me that there were multiple reasons that management deemed it necessary to change Dr. Aziz work schedule. Management acknowledged that they had discussed reasons for the decision with Dr. Aziz and the Union over the past weeks and that the Union disagreed with every reason shared. Although Management considered the viewpoints, Management still deems that the schedule change is necessary.

Although I understand that the Union and Management disagree about whether the alternate work schedule should be maintained, the CBA provides that the ultimate decision rests with Management.

At our demand to bargain meeting December 21, 2010 on the impacts of budget reductions, Management stated that Physician alternate work schedules, including Dr. Aziz's schedule, needed to be reconsidered to assure coverage given the loss of two Physician employees. Our agreement was captured in Karl Nagle's December 23, 2010 email to you, regarding work schedules was that each alternate work schedule would be evaluated on a case by case basis:

A last item the parties covered in the meeting was the scheduling of bargaining unit members. Management stated that it would remain flexible on scheduling, reviewing each circumstance on a case-by-case basis.

Management understood the agreement to be that it would not totally disallow all alternate work schedules. After our meeting, Dr. Aziz's schedule was reconsidered, and yielded the outcome that the split schedule would be discontinued. ...

The CBA in Article 36 Management Rights provides the authority for management to decide work schedules for employees. [quoted provision omitted]

The CBA in article 7 Hours of Work provides work schedule detail for overtime exempt employees. ... [quoted provision omitted]

Management deemed it necessary to require a work schedule for Dr. Aziz to cover dayshift hours. The business reasons that Management and the Union disagreed about included:

Fewer Physicians being employed to provide coverage necessitated schedule changes to support hospital coverage. Although the hospital had planned to lose three Physician positions when the schedule change was proposed, the Hospital ended up losing two Physicians, and the work schedules of remaining Physicians needed to assure coverage.

Coverage is especially desirable in daytime hours because admissions occur and most other hospital services occur in the daytime hours. Some important clinical services are not readily available outside dayshift hours. It is also considered helpful to have Physicians available during the day to more easily cover for each other during absences and breaks.

Dr. Aziz's split shift was a barrier to communications. While Dr. Aziz had an established work schedule, the flexibility he exercised sometimes meant that WSH staff needed to page Dr. Aziz during hours he was expected to be on his assigned ward. Dr. Aziz needs to be on

campus for predictable work hours that promote accountability and communication. Dr. Aziz typically missed important staff meetings held during daytimes and the schedule change makes him more available to attend the meetings.

...

Dr. Aziz received substantial advance notice that Management planned to end his split shift, and had opportunity to grieve about his notice well before it went into effect. Dr. Aziz provided me a memo containing references to his being informed on or before December 6, 2010 that his schedule was ending. Instead of grieving, the Union chose to demand to bargain over the change. The grievance over the change in the work schedule is untimely, based on the timeframe requirements agreed in our CBA. I also observe that the grievance over the January 11, 2011 memo is untimely. The grievance was received by the appointing authority at WSH on February 1, 2011, after the agreed grievance period had expired.

[quoted provision omitted]

It is not apparent to me that the email summarizing bargaining is appropriately grievable given the definition of a grievance contained in Article 31.2. The applicable statement in the resolution email did not amend or supplement our CBA.

[quoted definition of grievance omitted]

In the spirit of problem solving and respect for you and your members, I am replying to you with this good faith assessment of the claims of the grievance, and reserve the right to assert these procedural issues if this grievance is placed before an arbitrator.

....

WSH's Step 3 response incorporated its Step 2 response and read, in relevant part:

- 1) As a long term care facility, the workload is variable, with unanticipated admissions, medical issues, etc.; therefore, these variables cannot be planned in advance. To meet business needs, most of the care and treatment services provided to patients, (i.e., lab, nursing, social work, etc.) are provided during the daytime hours, therefore, the need for physicians is during the day. Most of the medical activity occurs between the hours of 7:00 am – 5:00 p.m. Other discipline staffs work those hours and as part of the treatment team, physicians need to be available to meet with those other disciplines in order to develop/modify patient treatment plans.
- 2) In response to the Union's question whether the split shift worked previously for Dr. Aziz, Dr. Liteanu indicated there have been changes due to staff cuts (elimination of two full-time doctors) and several physicians on extended absences. This has resulted in the necessity to distribute workloads to account for absences and loss of two positions. The business need for medical services as stated above is greater during the day between 7 am and 5 pm.

...

There is no evidence or material fact provided by the Union at Step 2 or Step 3 that would indicate a violation of the demand to bargain resolution dated December 23, 2010 demand to bargain; therefore, I find no violation. The resolution stated in relevant part "*A last item the parties covered in the meeting was the scheduling of bargaining unit members. Management stated that it would remain flexible on scheduling, review each circumstance on a case-by-case basis.*" Management articulated at Step 2 (refer to the Step 2 response) and at Step 3 the business needs requiring a schedule change of Dr. Aziz. I understand management offered other scheduled starting and stopping times to Dr. Aziz, however, those were not acceptable. Management retains the right pursuant to the Collective Bargaining

Agreement Article 36 Management Rights and Article 7 Overtime to determine business needs and adjust schedules in order to meet those needs. Since management reconsidered Dr. Aziz's schedule at an earlier step in this process and made an attempt to suggest other starting and stopping times that would meet business needs and address Dr. Aziz's preferences, I find no violation of the December 23, 2010 demand to bargain resolution.

There is no evidence or material fact provided by the Union to refute business needs articulated by management. Article 7.9.B states in relevant part [quoted provision omitted]. It's clear from the information provided by management that given business needs to include staff shortages, it is necessary that Dr. Aziz work day shift hours. The Union has provided no material fact to support that these needs do not exist. Statement from a nursing staff there were no concerns with Dr. Aziz's previous split schedule does not represent a management perspective on business needs. The nursing staff would not know what workload needs that must be addressed when the hospital is working with physician shortages due to reductions or absences; variable changes in client care or treatment needs, admissions, etc.; or other business needs such as working with discipline staff on treatment teams, changes needed for treatment plans, etc. Therefore I find no violation of Article 7.

...

While Dr. Aziz asserted that he saved the agency thousands of dollars in overtime costs by being available for admissions that occur after the other physicians leave for the day when he worked the 3 pm – 8 pm split shift, management was not able to verify any such savings. Dr. Aziz was also not able to provide any evidence to support this claim.

In response to Dr. Aziz's assertion he is wasting time when patients are not available during the day, I understand from management that patients may attend treatment malls between 9 am – 11 am and 1 pm – 3pm, not the entire day. All physicians, not just Dr. Aziz, must adapt to these hours. If the physician needs to bring a patient back from the treatment mall for an evaluation, this can be done. Patients may be excused from the treatment malls if they aren't feeling well which means they will remain on the ward and can be seen by the physician. There is work to be done whether meeting with patients who have returned or are not at the treatment mall, meeting with other treatment team disciplines, etc.

...

EVIDENCE REGARDING DESIRABILITY OF THE SPLIT SHIFT

Most patients leave the ward during the day to attend the psychiatric treatment mall. They return to the ward for lunch, but are otherwise out of the ward from around 8 or 8:30 a.m. to around 2:30 p.m. If a physician needs to see a patient during the day, the patient must be escorted back to the ward; forensic patients require two escorts. According to Grievant, unless a patient is too ill to report for psychiatric treatment, there are no patients on the ward during the day, and there is little for physicians to do there.

Grievant testified that working a split shift allowed him to maximize his time with patients while they were on the ward, and also allowed him to supplement his income, see a broader variety of patients, and

remain current on developments in his field. Being available in the evening allowed him to handle extra admissions at no extra cost to WSH; had he not been on that shift, he believes he would have received between two and four hours' additional pay for staying late to handle those admissions. On three occasions, when the OD could not be reached in emergencies, he saved patients' lives by being on duty in the evening.

Forensic Psychiatrist Dr. Margaret Dean, who is President of the Union, testified Grievant's split shift allowed her to work with his patients without conflicting with internal medicine visits. It also allowed him to provide double coverage with the OD during early mornings and evenings.

Dr. Morrison testified Grievant's schedule provided good patient care for the subset of the population that required more medical follow-up. In her view, it was more consistent with the standard of care in the community, where doctors got a night report and a morning report, saw patients, did assessments, ordered tests, received the test results, then made treatment decisions based on the tests. In hospitals, doctors typically do morning rounds, see patients, do assessments, order reports, review reports in the afternoon, and modify treatment plans accordingly.

Dr. Dean testified some psychiatrists worked flexible schedules before the reduction in staff, and continue to work flexible schedules; others have had their flexible schedules rescinded. Dr. Dean is unaware of any articulation of the specific business or patient care reason to rescind Grievant's flexible schedule. Grievant testified that Dr. Liteanu once mentioned that, if he allowed Grievant to have a split schedule, everyone would ask about it, and that he could not accommodate everyone with a different schedule. Dr. Morrison testified Dr. Liteanu told her Grievant's split shift was a "scheduling nightmare" and that, if he did it for Grievant, other doctors would want shift modifications; he said that was too much to schedule or conceive of. He also told her other doctors had approached him about shift modifications.

After Grievant became night shift OD, Drs. Liu and Xu were initially assigned cover the two forensic wards to which Grievant formerly was assigned, in addition to their own wards. They were authorized to receive overtime for covering the additional wards; the record does not reflect whether they actually received overtime pay. Dr. Dean testified their other wards are among the busiest wards, so she would expect them

to have to work overtime in order to provide adequate patient care with this additional assignment. Another physician, Dr. Sprague, later transferred from Eastern State Hospital and now covers the wards to which Grievant was formerly assigned, plus extra hours in the morning and evening for which he receives overtime. Dr. Morrison testified that, while assignments to other wards changed, Grievant's former assignment did not change, and that it was the heaviest assignment.

One physician, Dr. Khalighi, works Monday through Thursday and every other Saturday. He maintains a private practice on Fridays and every other Saturday. A second physician, Dr. Pacio, occupies a full-time position but works part-time, covering the same wards where Dr. Khalighi works on Fridays plus working two nights weekly; the remainder of the salary for Dr. Pacio's position is used to pay for the weekend OD. Grievant testified he asked Dr. Liteanu why Dr. Khalighi was allowed to have a flexible schedule when he was not, and that Dr. Liteanu's only response was to laugh. Dr. Morrison testified Dr. Khalighi once told her he was asked to work that schedule because there was a problem covering wards.

POSITION OF THE STATE

ARBITRABILITY

The decision to require Grievant to work a non-split shift is reserved to management, and therefore not arbitrable. Arbitrators are confined to interpretation and application of the Agreement. Arbitrators look to many sources, but the award must draw its essence from the Agreement.

The duty to arbitrate must be founded in the Agreement. The fact that this Agreement has a standard arbitration clause does not mean every disagreement is arbitrable. The presumption of arbitrability does not extend beyond the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of an Agreement. Arbitrability is governed by federal law. The key principles are found in the "Steelworkers Trilogy."

The first *Steelworkers* principle is that arbitration is a matter of contract. There is a jurisdictional limitation, because arbitrators derive their authority from the parties' agreement to submit disputes to

arbitration. The second *Steelworkers* principle is that, unless the Agreement provides otherwise, the question of whether the parties agreed to arbitrate must be decided by the court without ruling on the merits. The final *Steelworkers* principle is that courts interpreting questions of arbitrability in contracts with an arbitration clause employ a “presumption of arbitrability,” meaning an order to arbitrate should not be denied “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

Although this arbitration clause is broad, it does not eviscerate the core principle that parties may contractually determine and limit the issues they will submit to arbitration. Arbitration is a matter of contract. Under the presumption of arbitrability, even in the face of a presumably broad arbitration clause, arbitrators must determine whether the parties specifically excluded the merits of certain classes of disputes from arbitration.

The Agreement specifically reserves to management the right to establish or modify the work week, daily work shift, hours of work and days off. Those rights can only be modified by “this Agreement,” i.e., other clauses within the Agreement. There is no reference to e-mails, oral agreements, or effects bargaining. Nothing in the Agreement changed or modified those rights.

Following effects bargaining, the State agreed to “remain flexible on scheduling, reviewing each circumstance on a case-by-case basis.” Dr. Liteanu explained at length the problems with direct and cross-coverage he looked at prior to telling Grievant on December 29, 2010, that he needed to return to a regular schedule. Not only was WSH losing two doctors, but that resulted in fewer people to provide cross-coverage to handle emergencies. An e-mail commitment to “remain flexible” does not alter the scope of management rights under Article 36, particularly when it just notes that management will do what it has done all along. There is no contractual basis for this to be arbitrated. For this reason, as well as timeliness, the grievance should be denied.

TIMELINESS

The grievance was not filed within 15 days of when Grievant knew or should have known of the decision. Clear contract language controls.

Starting in October, Grievant was repeatedly notified he would need to return his schedule to normal. He was told to do so by early November 2010. At his request, Dr. Liteanu extended that to December, 2010. He was then notified he was to change his schedule by January 5, 2011 at the latest. Under Article 31.3(A), he was required to file the grievance within 15 days, even if “informal discussions occur.”

At the outside, the grievance should have been filed within 15 days of December 29, 2010, when Dr. Liteanu informed Grievant that he was required to return to a normal schedule on January 5, 2011. The grievance was not received until February 1, 2011.

There is no support for the theory that, once denied, a grievant can create a new timeline by asking for the same thing again even if the conditions leading to the denial have not changed. Under that theory, a grievant could always revive even stale disagreements by asking the employer to change its mind. A new violation would occur every day the employer did not invite a discharged employee to return to work; every day an employer did not promote a demoted employee; or every day an employee asked for a raise that had been denied. All a union would have to do is ask the employer to change its mind on any grievable decision that was not timely raised; when management said no, it would create a limitations period. That theory is not supported by law or contract.

This is not a “continuing violation.” Grievant was informed he needed to return to a normal schedule by January 5, 2011. He elected instead to work a night schedule that did not interfere with his private practice. The State allowed that request. There is no merit to the notion of a continuing violation for every day the State did not unilaterally change its position and allow give Grievant an opportunity to return to his former schedule.

THE MERITS

Grievant bears the burden of proving, by a preponderance of evidence, that the State violated the Agreement. He must prove a grievable obligation. Assuming *arguendo* that Nagel's e-mail creates a grievable obligation, the commitment was solely to remain flexible and review requests case by case.

Grievant wanted to remain on a schedule that had him away from WSH from 9 a.m. until 3 p.m. or later, to pursue outside employment, despite the fact that WSH had two fewer doctors. The Union has to prove that the effects bargaining agreement modified the terms of the Agreement, stripped from management the right to decide hours of work and shift schedules, and that the determination was made without reviewing the schedule on a case by case basis.

Article 7.1(E) does not create a grievable obligation to only deny a flexible schedule when management provides a reason in writing driven solely by business necessity. It merely defines the term "work schedule;" it does not grant a right or create an obligation. The State only agreed to remain flexible and review schedules case by case. Dr. Liteanu was not required to substantiate his reasons in writing with some modicum of proof. Had the Union wanted such an obligation, it should have bargained for it in December 2010. It did not because the Union cannot demand to impasse something that is a permissible subject of bargaining, such as a management right in the Agreement.

There is no evidence to contradict Dr. Liteanu's testimony that he looked at coverage in light of Grievant's request and determined the split schedule was no longer feasible. Although the e-mail recapping the effects bargaining did not create a grievable right, if it did, the State lived up to its commitment to review each request on a case by case basis.

POSITION OF THE UNION

ARBITRABILITY

The grievance is arbitrable. The State's arbitrability argument is more of an affirmative defense. The State has the burden of proof. It offered no testimony or evidentiary support for its position.

The grievance is based on the State's violation of Article 7.1, which requires scheduling based on business needs. The contract language is bolstered by the parties' agreement after the Union demanded to bargain upon learning of Dr. Liteanu's intention to eliminate flexible scheduling. The parties resolved the demand to bargain by agreeing the State would remain flexible in scheduling and, where a schedule change was contemplated, would review each situation on a case-by-case basis.

Article 36 does not establish an absolute right to establish the work week and modify Grievant's schedule. Article 36.1 clearly specifies that those rights are retained except as "modified by this Agreement and applicable law." The State agreed in Article 7.1(E) to schedule employees based on operational necessity. In negotiations after the demand to bargain, the State also agreed to retain flexible schedules unless it could articulate a business necessity to eliminate the flexibility. By immediately ordering Grievant to cease working a flexible schedule, and failing to articulate a business need for the change, the State violated both Article 7 and the agreement following the demand to bargain.

TIMELINESS

The grievance was timely. Timeliness is an affirmative defense. The State carries the burden of proof. Doubts regarding procedural defenses, including timeliness, are resolved against forfeiture.

After the November order to cease working a flexible schedule, the State accepted the demand to bargain, and ultimately bargained the issue of flexibility in schedules. This nullified the need to file a grievance after the November order. The order was held in abeyance until January 11, 2011. Dr. Liteanu renewed the order in January 2011. On January 4 and 5, 2011, Nagel articulated his understanding of the resolution of the demand to bargain, and advised hospital managers to discuss Grievant's schedule with the Union before changing it. The Hospital did not fulfill this directive. Grievant continued to request a flexible schedule.

The fact that the State initiated this ongoing dispute in November 2010 does not render the grievance untimely. The State accepted a demand to bargain and attempted to fulfill its agreement to bargain. It suspended all attempts to remove Grievant from a flexible schedule while negotiations took place. Failure to

do so would have been an Unfair Labor Practice, unilaterally changing a mandatory subject of bargaining without first exhausting its duty to bargain.

Even if original knowledge dated back to November 2010, this was an ongoing and continuous harm; each day there was a new “occurrence.” The timelines run from each discrete violation of the contract. Each day the State failed to schedule Grievant based on its business needs, and ignored his continued requests for a flexible schedule, it violated Article 7. The grievance described the date of occurrence as “ongoing” as the Union believed this was a recurring contract violation. There were and should have been additional meetings concerning the particulars of Grievant’s schedule. The State produced no evidence that it fulfilled the agreement, as it did not articulate a business reason for the change.

This was a continuing dispute. Grievant’s former schedule was being covered by two doctors in extra duty status, and was not permanently filled for a year after the contract violation. During this entire time, Grievant requested that he be returned to his schedule.

THE MERITS

The State violated Article 7 and the flexible schedule demand to bargain agreement by eliminating Grievant’s ability to work a flexible schedule. Article 7 and the demand to bargain agreement require the State to honor a request for a flexible schedule so long as business needs are met. The State’s assertion that it does not require a business need is defeated by the language of the Agreement and the flexible scheduling demand to bargain agreement. The Agreement does not support the State’s assertion that it has an unfettered right to schedule employees as it sees fit. No unfettered right to alter an employee’s schedule can be found in the Agreement or any side agreement. Article 7 says a schedule is set for business reasons, not the whim of management. After the demand to bargain, the parties agreed the State would maintain flexible schedules unless it had a business reason to end such a schedule. The ability to change schedules in Article 7.9 is subject to the terms of Article 7.1. Assuming the demand to bargain did not modify the Agreement, those negotiations did clarify the parties’ intent in administering the contract language, at a minimum. The real

issue is what constitutes a business necessity. This term is not defined in the Agreement, and thus is subject to contract interpretation.

Washington courts have established a clear standard for contract analysis. The intent of the parties controls; the intent is ascertained from reading the contract as a whole; and ambiguity is not read into the contract. Under this standard, the State did not have sufficient cause nor contractual support for altering Grievant's schedule.

The State gave no effect to the parties' intent in negotiating the Agreement nor the flexible schedule demand to bargain agreement. The parties agreed flexible schedules would be maintained absent a clear business necessity to change the schedule. The parties' intent was clear. The parties' interpretation is supported by the commitments made to Grievant when he went to a split schedule. He did so in part to start his private practice. Dr. Liteanu agreed the split shift would be permanent; otherwise Grievant would not have invested in the expenses of opening his practice.

The parties' intent may be discovered not only from the actual language, but also from viewing the contract as a whole, the subject matter and objective, and the reasonableness of the interpretations. Dr. Liteanu's assurances to Grievant support the intent that, absent a business reason, there would be no change in a flexible schedule once granted.

No change was necessary for Grievant to cover his wards in a professional and safe manner. His schedule not only met business needs, but was a perfect schedule for meeting patient needs. He worked this schedule for three years and three months. Dr. Liteanu had to admit the schedule worked for three years. It worked and remained in place even after the November 2010 order ending it. There were no patient care issues. Dr. Liteanu could point to only one example of a scheduling issue, which was contradicted by Dr. Morrison's testimony.

The layoff of two doctors was not a sufficient basis to remove Grievant from his flexible schedule. The impact on actual physician hours was less given the directive for doctors budgeted as full-time employees to work all the budgeted hours. Even after the layoff, Grievant or those backfilling for him were only

scheduled to cover the same two wards he had covered before the layoff. The layoff had no effect on workload and did not form the basis for the ordered change. The fear of others wanting a flexible schedule is not a business reason for the change, since the parties agreed schedules would be reviewed case-by-case.

The State has not articulated a business reason for removing Grievant from his flexible schedule. Nursing staff on his wards supported his split shift as advantageous to patient care. Psychiatrists working with him believed his schedule was advantageous as he was available to oncoming and off-going shifts. Dr. Morrison extolled his schedule as meeting the standard of care required of doctors in the community. Other than a claim that scheduling may have been difficult – without any actual situations where that was the case – the State has not attempted to provide a basis for removing his flexible schedule.

The State violated Article 7 and the agreement from the demand to bargain. The State does not have unfettered discretion to alter schedules. If it desires such power, it must gain that power through negotiations. Until then, it must have a business reason for removing prior approval for a flexible schedule.

Grievant should be returned to Wards F-3 and F-5 on his previously approved split schedule.

OPINION

ARBITRABILITY

The burden of proof regarding arbitrability is on the party arguing a grievance is not arbitrable. Arbitrators do not lightly find matters non-arbitrable. In particular, they will not read into a contract barriers to grievances that are not plain in the language. Arbitrators are bound by the clear language of the Agreement. Provisions of the Agreement must be read in context, not in isolation.

A challenge to substantive arbitrability must be approached in much the same manner as a trial judge who is asked to dismiss a complaint for failure to state a cause of action. The question is not whether a particular contract section has been violated, but rather whether a case has been stated such that it is appropriate to determine whether or not the contract has been violated. Thus, a grievance may be arbitrable because its subject matter falls within the contractual definition of a grievance, yet ultimately fail on the merits.

In this case, Article 31.2(A) defines a grievance fairly broadly, as “an allegation by an employee or a group of employees that there has been an act that violates this Agreement which occurred during the term of this Agreement.” The Agreement does not explicitly exclude Articles 7 or 36 from arbitration. While the grievance references the agreement reached in effects bargaining, it also references the language of Article 7 of the Agreement, and thus alleges that the State violated a provision of the Agreement. The State’s arbitrability arguments go to the merits of the grievance, not its substantive arbitrability. I therefore find that the grievance is substantively arbitrable.

TIMELINESS

The burden of proof regarding timeliness is on the party arguing a grievance was not timely filed. Contractual time limits are meant to be kept. The parties tailor time limits to their needs, and rely on them to maintain orderly and effective contractual relationships. Such procedural requirements are jurisdictional. Thus, regardless of the merits of a claim, if a grievance has not been brought to arbitration in a timely fashion, an arbitrator cannot hear the grievance unless the employer agrees to waive the defect.

The concept of a “continuing violation” is a limited one. Perhaps the best example is a claim that employees have been paid less than the contractual wage rate for the classification. Such a claim asserts a continuing violation which occurs anew each time allegedly improper compensation is paid. Absent specific contract language requiring a contrary result, the failure to file a grievance or protest a violation of a clear contract provision of this nature does not bar insistence upon compliance with the contractual requirements in the future; it does preclude a remedy for the period before the filing of the grievance. This concept does not extend to discrete managerial decisions with a clear point when those decisions become fixed.

In this case, Article 31.3(A) requires that, to be timely, grievances must be filed within 15 days of “the occurrence giving rise to the grievance, or the date the grievant knew or could reasonably have known of the occurrence.” While it encourages informal discussions, it specifies that such discussions do not toll the 15-day time limit. It also specifies that the filing date is the date a grievance is received, not the date it

is postmarked. Article 31.2(C) defines “days” as “calendar days,” making an exception only if the fifteenth day falls on a weekend or holiday.

Grievant had written notice on January 11, 2011, that he was to return to a normal shift. As of that date, there was no remaining uncertainty regarding the rescission of his split shift. Although Dr. Liteanu had earlier agreed to consider “a couple of reasonable requests ... based on seniority,” any such consideration ended by January 11, and a final decision was made and announced to rescind Grievant’s split shift. Under the clear language of the Agreement, therefore, the last day on which a timely grievance could be filed was 15 calendar days later, i.e., Wednesday, January 26. This grievance was dated January 27 and received on February 1. The State promptly raised the question of timeliness in its first grievance response at Step 2, and re-asserted it at Step 3. It thus plainly did not agree to waive the procedural defect.

Based on the clear contract language, I conclude that the grievance is untimely. It is therefore unnecessary to address the merits.

AWARD

1. The grievance is substantively arbitrable.
2. The grievance is untimely.
3. It is unnecessary to address the merits of the grievance.



LUELLA E. NELSON - Arbitrator