CASE: CHIESA #2

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

UNIVERSITY (Employer)

-and-

CLERICAL-TECHNICAL UNION OF UNIVERSITY (Union)

Gr. #3-A-98

OPINION AND AWARD

Mario Chiesa
Employee Relations

THE CASE

The grievance in this matter was presented on August 28, 1998. In part it reads as follows:

> "On Monday August 24th the UNIVERSITY Campus was beset by an electrical outage. Some buildings and offices closed. Some employees were scheduled to work and, subsequent to reporting, directed to leave work (at the Clinical Center for example). Some of those reporting and conforming to work direction to leave the work site were given the choice of benefit time usage or leave without pay. The foregoing constitutes a violation of Articles 7, 9, 18, 22, 28 and 29.
>
> "Remedy sought: Affected CTU represented employees to be paid for their scheduled hours on Monday August 24th and otherwise be made whole."

The facts leading up to this dispute are pretty well settled. The Union represents employees who are covered by the current April 1, 1997 through March 31, 2000 Collective Bargaining Agreement. At times relevant hereto, approximately 70 of those employees worked at the UNIVERSITY Clinical Center.

On August 24, 1998 at about 9:30 a.m. the Executive Director, J. PEACH, was notified that the University's power generation facility was experiencing difficulties and the UNIVERSITY Clinical Center, as well as other areas, suffered a power outage. As a result, all power generated activities, including water and sewer services, were not available.

Consequently, a decision was made to curtail services at the Clinical Center. PEACH issued a memorandum dated August 24, 1998, which in part reads as follows:

> "At approximately 9:45 a.m. the morning of August 24th, a wide area campus power outage occurred which significantly impacts on Clinical Center operations. The following facts are known: 1) Clinical Center

> and other operations are operating on emergency power alone; Physical Plant is unable to provide a time at which we will return to normal power. 2) Water and sewerage services have been interrupted as they depend on normal power. It will require some time after the restoration of power to return to acceptable water quality.
>
> "By this memorandum I recommend the orderly termination of patient services until we receive the advice from Physical Plant that utility services to the building can be assured. It is especially important the elevator and restroom usage be discontinued until normal power returns. I ask your assistance in advising your staff and patients that this is a result of uncontrolled and unanticipated utility outage. This requires the much-appreciated cooperation of all visitors and staff accessing the building. I will provide immediate updates requiring any change in this utility interruption. I am available for any questions at A-20 Clinical Center directly or at 393-4429."

Shortly thereafter PEACH conferred with Mike CANN, the Director of Employee Relations. It was decided that employees would be paid pursuant to the call-in provisions in Article 9.111 of the Collective Bargaining Agreement. Further, employees were given the opportunity to utilize personal time, vacation or unpaid time for the remainder of their regularly scheduled shift. A memorandum dated August 27, 1998 was issued to that effect. A portion of the memo reads as follows:

> "Due to a series of wide-area power outages that occurred on campus Monday, August 24th, 1998, Clinical Center operations were substantially altered for the day. Normally scheduled patient care and certain administrative services were discontinued at noon. Employees who were not essential to patient care or building operations were released for the remainder of the regularly scheduled workday. Employees released early may choose to use personal, vacation, or unpaid time to apply to the remainder of their regularly scheduled shift for Monday. For those employees who were not released, compensation rules will be applied as appropriate in their individual

> circumstances. If you or your staff have any questions or concerns regarding this decision, please contact me. Thank you for your performance under difficult conditions. It is much appreciated."

Notwithstanding the above, some bargaining unit members employed in the Family Practice Department were paid for time not worked without being required to use accrued vacation or personal leave. Apparently the supervisor took it upon herself to follow that procedure.

The grievance concerned with herein was filed, processed through the grievance procedure, and presented to me for resolution. Additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have carefully analyzed the entire record even though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

> ARTICLE 4 FAIR EMPLOYMENT PRACTICES
>
> "I. The Employer and the Union are committed to a policy of non-discrimination on the basis of race, color, sex, religion, creed, national origin, age, political persuasion, sexual orientation, marital status, and handicap.

"II. The parties are mutually committed to promoting respect, civility, teamwork and empowerment in the work place."

ARTICLE 9 OVERTIME

"III. Call-in Pay

A. An employee reporting for emergency duty at the Employer's request for work which she/he had not been notified of in advance and which is outside of and not continuous with her/his regular work period shall be guaranteed at least three (3) hours' pay at the rate of time and one-half.

B. When no work is available for an employee who reports for scheduled work, she/he will receive three (3) hours' pay at her/his regular straight time rate."

ARTICLE 27 UNION RIGHTS AND RESPONSIBILITIES

I. Pursuant to the powers and authority of the Employer under the Constitution of the State of Michigan, the University hereby agrees that all employees of the University who may be appropriately included in the bargaining unit represented by the Union shall have the right to freely organize, join, and support the Union for the purpose of engaging in collective bargaining or negotiations and other concerted activities for mutual aids and protection. The Employer agrees it will not directly or indirectly discriminate against any employee with respect to hours, wages, or any terms or conditions of employment by reasons of her/his membership in the Union, her/his participation in any activities of the Union or collective professional negotiations with the University, or her/his institution of any grievance, complaint or proceeding under this Agreement or otherwise with respect to any terms or conditions of employment."

ARTICLE 28 RIGHTS OF THE EMPLOYER

"Except as specifically abridged, delegated, granted, or modified by terms of this contract, the Employer shall retain all rights to exercise customary and regular functions, duties, and responsibilities of management, including, but not limited to, the right to hire, establish and change work schedules, set

> hours of work, establish, eliminate or change classifications, assign, transfer, promote, demote, lay off employees, and for just cause to discipline and discharge employees and otherwise maintain an orderly, effective and efficient operation. Further, the Employer retains supervision of all operations, methods, processes, means and personnel by which work will be performed and the right to determine and change the work to be done and the standards to be met by employees. The Employer may require employees to have a physical reexamination when directed by the University Physician. It is further understood that management shall not use its right to unfairly and illegally discriminate against an employee, group of employees, or the Union.
>
> "In addition, the Employer shall have the right to make reasonable rules and regulations and change such rules and regulations as it may from time to time deem necessary and which are not in violation of this Agreement. If after publication and transmittal to the Union of rules and regulations, the Union has not processed a grievance alleging unreasonableness within ten (10) working days, the rules and regulations shall no longer be grievable. Thereafter, grievances related to rules and regulations shall be limited to their enforcement and penalties therefrom."

The Union argues that the issue in this case is whether the Employer impermissibly discriminated in its application of the "call-in-pay" provision to some, but not all of the Union members. It maintains that it is undisputed that UNIVERSITY was inconsistent in applying the provision. Furthermore, it argues that notwithstanding the disparate application, the Employer did nothing to correct or mitigate the results. It maintains that even if the inconsistent application were the result of a communication problem, the Employer nonetheless has acted in a discriminatory fashion and mistake is not a valid defense. Further, it argues that the Employer took little action to correct the inconsistencies. In addition, the Union argues that the Employer's -6-

actions violate Articles 27 and 28 of the contract. It references Arbitrator Ellmann's prior decision in support of its position that all of the members of the bargaining unit who did not receive full pay for the day in question without utilizing vacation or personal time should be reimbursed to that extent. The Union argues that the call-in provision is not in question because, while it permits UNIVERSITY to decide to send employees home at the end of the regular shift, it does not allow the disparate treatment suffered in this case.

The Employer argues that its policy is fully supported by the clear and unequivocal language in Article 9.III.B. of the Collective Bargaining Agreement. It maintains that such language has been interpreted and applied in three prior arbitration decisions in a manner consistent with its actions in the current dispute. The Employer goes on to argue that in relation to the allegations regarding discriminatory treatment, the prior decision written by Arbitrator Ellmann does not support the Union's decision. Further, the Employer argues that there has been no discrimination. It maintains that the difference in treatment afforded a handful of employees within the Family Practice Department was nothing more than an error by one supervisor. Further, it argues that even if there was a discriminatory effect, the Union has still failed to produce any evidence suggesting that discrimination was based on race, color, sex, religion, creed, national origin, age, political persuasion, sexual orientation, marital status, handicap, or membership in the Union, participation

in any activities of the Union or collective professional negotiations with the University, or the institution of any grievance, complaint or proceeding under the Agreement. In other words, it argues that none of the provisions of the Collective Bargaining Agreement prohibiting discrimination has been violated.

From the outset it should be understood that in cases of this nature it is the arbitrator's, and hence my, responsibility to arrive at the mutual intent of the parties and apply that intent to the factual scenario. Parties negotiate provisions in Collective Bargaining Agreements with every expectation that they will receive the benefit of their bargains.

The parties have submitted a substantial amount of evidence, including numerous prior arbitration decisions. I have carefully analyzed the decisions and while I will not reference each of them, the parties should understand that I have carefully studied their offerings.

I agree with the Union's contention that the issue in the case is whether the Employer discriminated in its application of the "call-in-pay" provision in the contract. In other words, I am not going to revisit the question of whether the call-in provision; that is, Article 9, specifically III - Call-in-Pay, B., applies to this dispute. That question has been answered by prior arbitration decisions, specifically one authored by Arbitrator Cole. Further, the Union has not argued that the language in 9.III.B. should not be considered. What the Union has argued is that the Employer

hasn't applied the contract provision in a nondiscriminatory fashion.

In analyzing this dispute, we must keep in mind that clearly the vast majority of employees involved had their compensation for Monday, August 24, 1998 calculated according to the language in Article 9 of the Collective Bargaining Agreement. It was only a few other employees who received additional compensation by being paid for the entire day without utilizing vacation time or personal leave. Furthermore, it is clear that the Employer's directive, if followed, would have supplied each employee with a minimum of three hours' pay or apparently the hours actually worked, with additional compensation for hours not being worked, being available for the utilization of vacation or personal leave time. The Employer did not sanction full pay for employees who left early without resorting to vacation time or personal leave time. So, clearly, the few employees who received such consideration by one supervisor did not receive it as a result of the application the Employer's policy or directive.

Clearly, the few individuals in question were treated differently than the bulk of the bargaining unit employees who were required to use vacation time or personal leave if they wanted compensation for the entire day. However, that doesn't necessarily mean the Employer violated the collective bargaining provision cited by the Union.

First of all, the only procedure sanctioned by the Collective Bargaining Agreement was the one that the Employer applied to the

majority of bargaining unit employees. In other words, the three-hour minimum pay, with the remainder of time not worked being paid by utilization of vacation or personal leave, was an appropriate procedure under the Collective Bargaining Agreement. Conversely, employees receiving pay without working and without utilization of vacation or personal leave time is not sanctioned by the Collective Bargaining Agreement. So while there was indeed dissimilar treatment between a group of employees, the appropriate treatment was to follow the Employer's directive requiring the use of vacation or personal leave time. As a result, it would make sense that if the Union sought to rectify the circumstance, the Employer could have legitimately required that the mistake made in relation to a few employees in the Family Service area be rectified by following the Collective Bargaining Agreement procedure which would require those employees to reimburse the Employer for wages

inappropriately secured. The Employer chose not to do so and clearly the Union has not requested such a course of action.

Additionally, the Employer is correct when it points out that the difference in treatment afforded the two groups of employees came about as a result of a mistake and was not based on race, color, sex, religion, creed, national origin, age, political persuasion, sexual orientation, marital status, handicap, membership in the Union, participation in any activities of the Union or collective professional negotiations with the University, institution of any grievance, complaint or proceeding under the Agreement, or otherwise. In other words, there is no showing that

the Employer discriminated against the employees in question utilizing a basis which is specifically prohibited by the Collective Bargaining Agreement.

The evidence establishes that the supervisor in question made a mistake and didn't follow the correct procedure. As a result, individuals were treated differently. However, as I have indicated, that does not lead to the conclusion that the bulk of employees, who were given the choice of utilizing vacation or personal time to fill out their workday, should now have that time re-credited or somehow reimbursed because a small group of employees in Family Service area, who did not work the entire day, were not required to utilize vacation or personal leave time in order to receive pay for the entire day. The Employer's actions did not violate the contract.

AWARD

The grievance is denied.

MARIO CHIESA

Dated: October 27, 1999