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STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BEFORE THE FACT-FINDER

In the matter of the Fact Finding between:

WEST SHORE MEDICAL CENTER
Employer

-and-

Case No. L13 G-0772

MICHIGAN NURSES ASSOCIATION
Union

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FACT-FINDER'S REPORT AND RECOMMENDATIONS

I. APPEARANCES

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May 6th 2014

II. INTRODUCTION

The Michigan Nurses Association ("MNA" or "the Union") and West Shore Medical Center, (also referred to as "WSMC," "Hospital" or "Employer") are parties to a collective bargaining agreement ("CBA") effective from December 31, 2012 through June 30, 2015. The issues in dispute arise out of negotiation of the first of two wage and benefit reopeners.

The CBA reopener provision, Article 30, § 2, provides, "[T]he parties agree to reopen th[e] agreement for wages and benefits each year no later than May 1. . ." Negotiations for the 2013 reopener began in earnest on July 7, 2013, seven months after ratification of the current agreement. After seven bargaining sessions, including two with the assistance of State Mediator Miles Cameron, the parties failed to reach agreement.

On November 21, 2013, the Employer notified the Union of its Final Offer.

On December 6, 2013, the Hospital's final offer was presented to MNA membership for approval, and was unanimously rejected.

Upon rejection, MNA notified the Hospital of the results, as well as MNA's desire to meet again, in hopes of reaching an agreement.

On December 9, 2013, the Hospital rejected MNA's request to meet, stating it "d[id] not see any purpose in scheduling any further collective bargaining sessions since it has no further flexibility on the outstanding issues." The Hospital declared that there was an impasse, and implemented most of the proposals in its final offer.

MNA filed a petition for Fact Finding.

MNA also filed an Unfair Labor Practice charge with the Bureau of Employment Relations, and that complaint is still pending.

The parties have participated in collective bargaining but have been unable to reach total agreement on the terms of a revised collective bargaining agreement.

It is to be noted that duration of the contract , assuming there is a resolution, is itself unresolved. In theory, it would be better for there to be a longer term contract, without further reopeners, as it would avoid the state of 'ongoing and perpetual negotiation' in which the parties seem to find themselves.

III. HISTORY AND THE CURRENT CRISIS

Prior to August 2009, WSMC operated as an acute care hospital (ACH) and was suffering the same financial issues that had forced the closure or downsizing of many hospitals located away from major metropolitan areas. WSMC incurred operating losses in three out of the previous four fiscal years, [1] and operating income was $2,271,000 less than operating expenses during the four fiscal years between July 1, 2005 and June 30, 2009. [2]

In August 2009 the Centers for Medicare and Medicaid Services ("CMS") certified WSMC as a Critical Access Hospital,[3] in part because the nearest other hospital is across a lift bridge that spans the Manistee River. This allowed WSMC access to additional cost reimbursement options, but even with this change in status WSMC still operated at a significant

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[1] WSMC operates on a fiscal year that runs from July 1 through June 30.

[2] Investment income and gifts and grants resulted in a $461,000 increase in net assets during that 4 year period.

[3] "A Critical Access Hospital (CAH) is a hospital certified under a set of Medicare Conditions of Participation (CoP), which are structured differently than the acute care hospital CoP. Some of the requirements for CAH certification include having no more than 25 inpatient beds; maintaining an annual average length of stay of no more than 96 hours for acute inpatient care; offering 24-hour, 7-day-a-week emergency care; and being located in a rural area, at least 35 miles drive away from any other hospital or CAH (fewer in some circumstances). The limited size and short stay length allowed to CAHs encourage a focus on providing care for common conditions and outpatient care, while referring other conditions to larger hospitals. Certification allows CAHs to receive cost-based reimbursement from Medicare, instead of standard fixed reimbursement rates. This reimbursement has been shown to enhance the financial performance of small rural hospitals that were losing money prior to CAH conversion and thus reduce hospital closures. CAH status is not ideal for every hospital and each hospital should review its own financial situation, the population it serves, and the care it provides to determine if certification would be advantageous." Critical Assess Hospital definition, Department of Health and Human Services http://www.hrsa.gov/healthit/toolbox/RuralHealthITtoolbox/Introduction/critical.html

loss during the 2009-2010 and 2010-2011 fiscal years.[4] Thus, a Sustainability Plan was implemented in March 2011 and settlements with Blue Cross and Medicare received in August and September 2011 allowed WSMC to post a modest operating gain in the fiscal year that ended on June 30, 2012.[5]

In September 2012, CMS advised WSMC that its Critical Access Hospital status would probably be revoked because CMS had made a "mistake" in granting that status.[6] WSMC actively sought to reverse that tentative decision, but in the Spring of 2013 exhausted all avenues of appeal and was formally advised that its critical access hospital status would be revoked as of December 1, 2013.

This is part of a larger onslaught on rural health care – in the name of cost cutting – by the federal government.[7] In the fact finder's opinion, the future does not look promising.

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[4] There were deficits in operating income of $726,000 in the 2009-2010 fiscal year and $1,382,000 in the 2010-2011 fiscal year.

[5] The 2011-2012 fiscal year ended with positive operating income of $2,981,000 achieved mainly as a result of the settlements with Blue Cross and Medicare for services provided in prior fiscal year.

[6] WSMC was located within too close a geographical distance to the hospital in Ludington. It is about 31.5 miles away. Drive time is closer to 40 minutes. For those who have a heart attack in Manistee, loss of this hospital could be the difference between life and death.

[7] The perspective of the National Rural Health Association is instructive. Alan Morgan, CEO of the National Rural Health Association, said deep cuts to Medicare funding **"would effectively kill rural healthcare."** [Emphasis added.]

"Looking at CMS data, critical-access hospitals do primary care, and that is where we want our health system headed," Morgan said. "If those patients are not being seen in a rural hospital, are they expecting the patient to go to urban facilities? Or are they expecting them not to seek care? There is a larger issue that is not being talked about here."

"Since 1997, critical-access hospitals (PDF) have been paid 101% of what they say it costs them to provide services to residents of remote areas, unlike traditional Medicare hospitals that receive payments based on uniform fees and which typically cover about 93% of costs of Medicare patients, according to calculations by the American Hospital Association.

"But the OIG found that about two-thirds of the small hospitals that get extra funding to reach remote residents aren't actually that remote at all.

"All told, 846 of the small hospitals were less than 35 miles from another hospital, even though the CMS guidelines require at least that distance in order to qualify for the extra critical-access funding. Seventy-one critical-access providers are less than 10 miles from the nearest hospital.

"**It turns out that about three-quarters of the nation's 1,300 critical-access hospitals were certified under an old process that allowed states to exempt the hospitals from CMS' distance rules, the report says. Though Congress abolished that loophole in 2006, the CMS is still prohibited by law from second-guessing the states' decisions in those cases.** [Emphasis added.]

In any event, for the time being, there is no appeal available. While states could previously exempt hospitals from the 35 mile requirement, that option has been greatly undercut by executive action, if not written out entirely. And short of a change in the policies of the federal government, that is just the way it is.[8]

This change would result in substantial revenue losses[9] that were anticipated to generate an operating loss of $3,400,000 in the 2013-2014 fiscal year[10] and $5,600,000 in the 2014-2015 fiscal year. It was estimated that the annual cash burn to operate WSMC was $4,700,000, that by 2015 the revenue would not be sufficient to cover the outstanding bond debt of $18,700,000 and by 2016 cash and investments would be underwater. This dramatic loss in revenue threatened the ability of WSMC to continue to operate.

The Cheboygan Community Hospital precedent:

WSMC was faced with a situation similar to that which had impacted **Cheboygan Community Hospital**. In 2011, Cheboygan Community Hospital was a small acute care hospital that incurred an operating loss of approximately $7,000,000. Negotiations with the unions

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"Most of the hospitals (88%) that would lose their additional Medicare funding if the distance rules were applied uniformly got their certifications through the now-banned, state-approval process.
"The OIG recommended that the CMS jettison the state-granted certifications and create amended criteria that could apply nationally. If even half of the 846 hospitals that were less than 35 miles from another hospital were kicked out of the program, Medicare would spend $373 million less, according to calculations using 2011 spending.
"The Obama administration has proposed decertifying hospitals (PDF, p. 196) that are less than 10 miles from the nearest hospital, which would only cut off the enhanced funding for 71 hospitals, the OIG estimated. Obama's proposed budget projects that would save $40 million in 2014.
"CMS Administrator Marilyn Tavenner wrote that the agency is in favor of asking Congress to give it the power to decertify state-granted critical-access status, but it disagrees with the OIG's recommendation to establish revised criteria because it could be time-consuming and affect hospitals' payment status.
"For example, the report suggests, the CMS could follow the lead of some states and declare that hospitals in high-poverty areas could be exempt from the distance requirements. Or the government could modify the wording to say that critical-access hospitals must be at least 35 miles from another hospital that offers the same services.
"'The existing location and distance criteria already represent a uniform standard to which all CAHs certified since January 2006 have been subjected,' Tavenner wrote. 'We believe a facility's Medicare certification as a CAH versus a hospital should not be tied to rapidly fluctuating criteria.'"

[8]This is a change in the very assumptions that underlay the way the hospital funded its operations. It is like a change in climate: all you can do is change your clothing and take shelter.

[9]And commensurate savings of federal health care dollars.

[10] The 2013-2014 fiscal year would have only six months without CAH status.

representing employees at Cheboygan Community Hospital were not able to secure sufficient labor cost savings to allow the hospital to avoid further losses and it was forced into bankruptcy. Bankruptcy was devastating for everyone involved.[11] The hospital building was ultimately purchased by McLaren Health Care and reopened to provide emergency room and outpatient services. As a result the Cheboygan community lost all of the acute care beds that had been available and along with more than 150 full time jobs.

Fearing and preparing for the worst, the WSMC Board and Administration did not want that result to occur in Manistee, and developed a plan that it believed would allow it continue to operate as an acute care hospital (ACH) providing many of the medical services that were needed by residents of Manistee and visitors who regularly vacation in the surrounding area. Tourism is an important component of the local economy, and loss of this hospital can foreseeably effect that.

The Board recognized that many impending threats were on the horizon, such things as the reimbursement methodology utilized as an acute care hospital; loss of 340B discounted drug pricing; unsettled Medicaid and Medicare cost reports from 2011-2012; sequestration; health care reform; and high labor and benefit expenses. It was recognized that long term survival depended upon decreasing operating costs and increasing market share and revenue.[12] The largest component of operating costs are wages and benefit costs, so this was the most critical area to quickly address.

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[11]Cheboyban Community Hospital went bankrupt, and the doors were abruptly chained closed, leaving workers without jobs, doctors without patients, and patients and the community without a hospital. The effect was said to be devastating for the community. "'It's not just the employees going back to work. There will be a trickle-down effect,' Friday said. 'They have to go to lunch, and the patients will need a place to eat and maybe do some shopping in our downtown district. Having an emergency room within easy driving distance is important in a county where more than one in five residents is 65 or older,' Stuart said. The area is a retiree magnet, with its woods, waters and small-town atmosphere. 'The day it was announced the hospital would close, I got a call from an elderly gentleman. He said, I'm going to have to move; I can't be this far from a hospital,'" Stuart said. "There were probably a lot of people thinking the same thing." *Slimmed-down Cheboygan Hospital To Reopen Monday* (May 13, 2012) CBS.

[12] WSMC is actively recruiting physicians, but that effort is contingent upon those individuals believing that WSMC has a long term future.

IV. THE HOSPITAL'S PLAN AND MORE ON THE CURRENT NEGOTIATIONS

In June 2013, WSMC promulgated its plan to "right-size" its wage and benefit plan by eliminating $2,900,000 in annual labor costs. This included the potential savings in the following areas:

Wage freeze	$ 700,000
Health Care Plan Changes	$ 670,000
Easter/Birthday Holiday elimination	$ 90,000
Reduce and redesign Time-off days	$ 400,000
Reduce Pension by 1.0%	$ 210,000
Staffing Redesign	$ 500,000
Other	$ 330,000

This proposed plan was presented to *all* employee groups in June 2013.

On June 10, 2013, WSMC and the MNA were scheduled to begin negotiations pursuant to the CBA's reopener provision (Article 30, § 2). A meeting was held on June 10, to provide information to all WSMC unions concerning the WSMC 2013-2014 budget and the changes that needed to be implemented by January 1, 2014 as a result the revocation of critical access status. A collective bargaining session was scheduled with MNA for that day, but the MNA declined to attend that meeting or the financial presentation.

In addition to many informal discussions, WSMC and the MNA held formal bargaining and/or mediation sessions on the following dates:

July 7, 2013 (bargaining session)
August 15, 2013 (bargaining session)
August 22, 2013 (bargaining session)
September 12, 2013 (bargaining session)
October 7, 2013 (mediation session)
October 16, 2013 (mediation session)
October 31, 2013 (bargaining session)

During the various bargaining/mediation sessions, the parties discussed several issues and reached tentative agreements on some topics. A change in the health care plan was ratified in October with an effective date of January 1, 2014.[13]

At the completion of the collective bargaining session on October 31, 2013 the MNA was advised that the remainder of the issues needed to be resolved prior to the WSMC Board meeting on November 21, 2013.

On November 20, 2013, WSMC sent a letter to the MNA that stated:

> Dear Ms. LaFountain:
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> WSMC invited MNA to began negotiations pursuant to the wage and benefit reopener on June 10, 2013. On that date WSMC provided a detailed presentation regarding its financial situation and advised that the 2013-2014 budget was based upon significant changes that needed to be implemented by January 1, 2014 at the latest and provided a proposal. In addition to many informal discussions regarding the outstanding issues, the parties held subsequent formal sessions on July 7, 2013, August 15, 2013, August 22, 2013, September 12, 2013, and mediated with the assistance of Mediator Miles Cameron October 7, 2013 and on October 16, 2013, and held a final collective bargaining session on October 31, 2013. During these sessions the parties' positions on the outstanding issues were thoroughly discussed, and WSMC attempted to accommodate the concerns of the members represented by MNA when crafting proposals that will allow WSMC to remain financially viable. On October 31, 2013 WSMC provided you with a proposal that you replied to on November 4, 2103. Subsequently WSMC returned a proposal for consideration on November 7, 2013. To date we have not received a response.
>
> Please, be aware that the Board of Trustees will be reviewing the issue tomorrow and if MNA has a response it must be received by 9:00 a.m.

On the morning of November 21, 2013, the MNA provided a written proposal on the outstanding issues, a copy of which was submitted as Exhibit D. A telephone conference was held later that morning to discuss the terms of the 11-21-2013 proposal.

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[13] This change places all WSMC employees on the same plan. The cost to employees for the coverage remained the same as under the revised plan, but the cost to WSMC was expected to result in an annual savings of $670,000. The revised health care language is set forth on Exhibit A.

After reviewing the proposal and discussing the outstanding matters with the Board, WSMC prepared its final offer of settlement ("Final Offer") and sent it to the MNA with the following correspondence:

> Dear Cindy:
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> The revised proposal that was provided late last night has been reviewed and discussed with the Board. This proposal fails to fully recognize that the financial difficulties facing WSMC do not appear to be temporary so that temporary fixes will not be sufficient. Attached for your consideration is the Final Offer of WSMC regarding the issues in dispute. It would appear that more time may be needed for issues regarding scheduling and attendance, so the provisions for the small group meeting in Paragraph 4 have been expanded with the recognition that some of those issues may need the input of other than nursing personnel and that 12-31-2013 may be a more realistic time period to complete these discussions. Your unit's willingness to reduce the payment for those who work on a holiday was noticed, but is not included since reducing the pay for those who work on a recognized holiday was not considered the best way to resolve the financial issues. You will note that a proposed LOA is added that would address the situation where the finances of WSMC have improved sufficiently that restoring some of the concessions could be considered. WSMC has fully reviewed the remaining outstanding issues and has concluded that it has no more flexibility on these issues. It is understood that senior employees may not be happy with the reduction in the amount of their PTO, but the proposed levels place WSMC competitively with similar types of hospitals and this reduction in a time off benefit allows WSMC to avoid deeper cuts in direct compensation. Please take prompt action to submit this final Offer to the membership for ratification use. If you have any questions regarding any of the matters in the proposal, please contact Maria or the undersigned.

A copy of the November 21, 2013 Final Offer was received into evidence.

Subsequent to the receipt of the November 21, 2013 Final Offer, MNA scheduled December 6, 2013 as the date for the membership to vote on that Final Offer. On December 4, 2013, non-union employees of WSMC were advised that the same modifications to the existing wage and benefit plan that had been proposed to the MNA had been implemented for those non-union employees.[14] The MNA voted on WSMC's Final Offer on December 6, 2013. In an email dated December 6, 2013, Ms. LaFountain advised WSMC that its members had ***rejected***

[14] A copy of the communication to the non-union employees was presented to Ms. LaFountain before the meeting with MNA employees that was to take place on December 6, 2013.

WSMC's Final Offer. Ms. LaFountain stated that "We are prepared to meet and provide some additional counter proposals in hopes of reaching an agreement. Please let us know your availability." Ms. LaFountain did not identify the issues leading to the rejection of WSMC's Final Offer, did not provide any revised offers or propose any dates for further meetings.

WSMC believed it had no more flexibility on any of the outstanding issues, and provided the following letter to Ms. LaFountain on December 9, 2013:

> Dear Ms. LaFountain:
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> WSMC and MNA began negotiations pursuant to the wage and benefit reopener on June 10, 2013. On that date WSMC made a detailed presentation regarding its financial situation and advised that the 2013-2014 budget was based upon significant changes that needed to be implemented by January 1, 2014 at the latest. In addition to many informal discussions regarding the outstanding issues, the parties held subsequent formal sessions on July 10, 2013, August 15, 2013 and September 18, 2013, mediated with the assistance of Mediator Miles Cameron on October 7, 2013 and on October 16, 2013, and held a final collective bargaining session on October 31, 2013. During these sessions the parties' positions on the outstanding issues were thoroughly discussed, and WSMC attempted to accommodate the concerns of the members represented by MNA when crafting proposals that will allow WSMC to remain financially viable. On November 21, 2013 WSMC provided the MNA with a copy of its final offer of settlement. That Final Offer reflected the worsening financial condition of WSMC.
>
> This final offer was voted on by the membership on December 6, 2013. Your e-mail of December 6, 2013 advised that this offer was rejected by the membership, but did not include any indication of the issues that caused its rejection. That e-mail advised that "We are prepared to meet and provide some additional counter proposals in hopes of reaching an agreement." WSMC does not see any purpose in scheduling any further collective bargaining sessions since it has no further flexibility on the outstanding issues. The parties are at impasse, and all issues except Paragraphs 4 and 15 were implemented by WSMC on December 9, 2013. WSMC regrets having to take this unilateral action, but timely implementation of these necessary changes is required for the continued functioning of WSMC.

Impacted employees were also advised of the implementation.[15]

[15] WSMC's Final Offer to the two SEIU units was implemented on December 17, 2013. It contained virtually identical economic proposals.

On December 10, 2013, WSMC received a copy of the MNA's Fact Finding Petition which indicated the following reason that publicizing the facts and recommendations would assist in resolving the issues in dispute:

> The Association believes that the public disclosure of the facts involved would be beneficial to the resolution of these negotiations. The Association believes public scrutiny of the parties' position and rationale will positively impact the bargaining process and encourage a settlement. Public attention must be drawn to the inequities of the Hospital's position and the impact it may have on the quality of nursing care provided to the citizens of the State of Michigan.[16]

Thereupon, Stanley T. Dobry was appointed as the Fact Finder by the Michigan Employment Relations Commission and February 7, 2014 was set as the initial day for Fact Finding. Extensive discussion regarding the outstanding issues occurred on February 7, 2014 well into the night and at a second protracted hearing date on February 21, 2014.

V. MEDIATION AND TENTATIVE AGREEMENTS

As indicated, prior to invoking fact finding,[17] the parties engaged in some formal negotiation sessions. Mediation left a large number of unresolved issues. Despite an ultimate inability to resolve some issues, the mediation and fact finding process closed the gap. Submission of post hearing briefs was somewhat delayed, as the parties continued their

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[16] Contact was made with the Commission on December 10, 2013 and it was learned that that the Petition had not been filed with the Commission as of that date.

[17] "**factfinding** A dispute resolution procedure. Factfinding may be conducted by a panel of three or more members or by one person who is appointed to review the positions of labor and management in a particular dispute, with a view to focusing attention on the major issues in dispute, and resolving differences as to facts. Factfinding boards have been set up under state laws and have been used on the national level. In 1946, for example, factfinding boards or panels were established in disputes involving the automobile, bus transportation, farm equipment, meat packing and oil industries.

"Factfinding procedures may be provided by law or established by the factfinder or the factfinding panel. The parties have the prime responsibility to present data, but the fact-finder or the board reserves the right to develop such additional or supplementary information as it deems proper in order to make its report or recommendations.

"The factfinder or board may merely report its determination of the facts and hope that the facts are so clear as to provide the parties with an answer. More frequently, recommendations are rendered on the basis of the facts presented. If a recommendation is made, particularly where it is unanimous, it exerts pressure on the parties to accept the recommendation. It is precisely for this reason that objections have been raised and the power to make recommendations has been eliminated in some jurisdictions. The emergency boards under the Taft-Hartley Act are forbidden to make recommendations.

"In the public sector, the factfinder or factfinding panel generally is required to provide recommendations for the settlement of a dispute. [Sources omitted.]" Roberts, Harold S. *Roberts' Dictionary of Industrial Relations 3rd Ed.* (Washington D.C., Bureau of National Affairs, 1986), p. 206.

discussions. Even the remaining issues are closer than they were before the process started. The tentative agreements are:

Tentative Agreements Reached through March 21, 2014

1. **Vacancies and Assignments.** Modify Article 6, **Section 8. Promotions/Bidding Rights**

2. **Persons Leaving Classification**. Modify Article 6, Section 10

3 **Daily Low Census (Cut)**. Modify the Article 6, Section 13

4. **Low Census – Call Back (LCCB)/Float Nurse**. Modify Article 6, Section 14

5. **Personal Leaves of Absence**. Modify Article 10, Section 1 by deleting (f)

6. **Jury Duty Leave**. Modify Article 10, Section 6

7. **Bereavement Leave**. Modify Article 10, Section 2

8. **Overtime Call list**. Modify Article 11, Section 2 (f)

9. Article 12, Work Rules, Schedules and Loads. **[Dispute remains regarding when casuals will be placed on the schedule**

10. **Medical Center Charges**.

11. **Employee's Birthday**.

12. **Unscheduled Paid Time Off**. Modify Article 20, Section 2

13. **PTO Payout Request**

14. **Unpaid Personal Days**. Delete Article 20, Section 9.

15. **Charge Nurses**. Modify Article 24

16. **Article 21**

17. **Step Increases**.

18. **Wage and Health Reopener**. Modify Article 30, Section 2

19. **Reopener as a result of improved WSMC finances.** Add the following letter of understanding:

Reopener as a result of improved WSMC finances. During the period from 7-1-2014 through 6-30-2015, if the finances of WSMC have recovered to the extent that the concessions negotiated

in 2013 are no longer necessary for the efficient operation of WSMC, the Union may request to reopen this Agreement to bargain a potential restoration of some or all of the concessions.

20. **PTO**. A partial PTO crediting occurred on December 31, 2013 based upon the period of time from the employee's last anniversary date to December 31, 2013.

These agreements are of substantial import. They settle many complicated policy and language issues. They make arrangements on issues of power, and move the Hospital and the Union into a better position to serve the needs of the public and their respective constituencies.

They also demonstrate the good faith attempt by both parties to work through their differences, and to come to an accord based upon reason and mutual respect, despite their differences going in to the process.

The tentative agreements are incorporated herein by reference as though set forth in full, and are part of the formal Recommendations of the Fact-Finder.

An ancillary beneficial effect of the discussion was that it familiarized the Fact-Finder with the issues and interests.[18] As the Fact-Finder well knows, one can go through a formal hearing and never hear the real issues discussed, or the parties' priorities articulated.

[18]This was not intended to be a "mediation." Nor is it an implicit criticism of the mediator – who is highly experienced, well-trained and respected in the state – and whose guidance had already helped the parties resolve many issues. Mediation by such a mediator can be sublimely effective, can empower the parties and get them past difficult issues. It is often preferred to taking a chance on the assignment of a particular Fact-Finder. In the present context, they may be working on a limited budget. Moreover, Fact-Finders are individual and not 'fungible goods' and every one of them has a different approach to an arcane art. So any fear that parties will prefer fact finding in lieu of mediation (and mediators are overworked and understaffed, so they don't lack for work) seems misplaced. Rather, it is understood that the Fact-Finder is another participant in the process – one who may make independent findings and a recommendation at a different level – and that this makes him a potentially useful tool for the voluntary resolution of the parties' conflicts. In effect, the Fact-Finder is 'a fulcrum for the levers' that are the representatives of the parties. Levers without fulcrums are always of limited effectiveness. Moreover, the court-house-step settlement of disputes on the eve of litigation is well-documented. Med-arb is doubly important in fact finding, as the Michigan fact finding statute does *not* create a tripartite panel, as it does in Act 312 interest arbitration (for police and fire), which is an important nuance in the process. What has been evolving is not "mediation to finality," to use Willard Wirtz's phrase, but what the Kagels call "med-arb to finality." Anderson, Arvid. *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions*. Proceedings of the National Academy of Arbitrators. http://www.naarb.org/proceedings/pdfs/1974-59.pdf

That these agreements were voluntarily reached does not change the fact that they will save a lot of money and materially contribute toward the continued viability of the hospital. They go a long way toward addressing the problems facing us all.

VI. FACT-FINDER'S AUTHORITY AND STATUTORY CRITERIA

The Application for fact finding noted that there were other issues still unsettled but set forth in the Application the central issues then stalemating the negotiations.

The duty to bargain in good faith under PERA requires the parties to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question rising under the agreement, … but this obligation does not compel either party to agree to a proposal or require the making of a concession." MCL 423.215. The parties satisfy this duty to bargain in good faith in a number of ways, including formal meetings of the bargaining committees, conversations between the representatives of the parties outside of formal collective bargaining sessions, and the exchange of letters outlining the positions of the parties on issues in dispute. If the parties are unable to reach a voluntary agreement, they are required to utilize the services of a mediator to attempt to resolve their dispute.

As passed by the legislature in 1954, the statute is found at Michigan Compiled Laws 423.25 which says in part (§25) "Whenever in the course of mediation under Section 7 of Act 336 of the Public Acts of 1947 being Section 423.207 of the Compiled Laws of 1948, it shall become apparent to the Board that matters in disagreement between the parties might be more readily settled if the facts involved in disagreement were determined and publicly if known, the Board may make written findings with respect to the matters of disagreement." [19]

[19]This statute was patterned after a law earlier passed by the legislature for the resolution of private public utility disputes not affecting interstate commerce through three member special commissions. The rationale of both statutes was a belief in transparency. It was thought that public disclosure of the positions of the parties and the recommendations of a third party would enable the disagreement to be more readily settled. It was believed that public knowledge of a

It has long been held that "mediation and factfinding are extensions of table bargaining intended to assist the parties in their efforts to reach a negotiated settlement." *County of Wayne*, 1984 MERC Lab Op 1142, 1144. A Fact Finding proceeding is not a litigation procedure to determine whose pre-impasse positions were better supported, but is a process to fully explore all of the issues in dispute so that the Fact Finder can help the parties find a solution to their differences that will result in a new collective bargaining agreement. More to the point, this is itself guidance of the weight to be accorded to the evidence. The fact finder ought to consider evidence and arguments in the same way– and with the same 'weigh' that the parties would give them in arriving at a voluntary collective bargaining agreement.

In Michigan, the Fact-Finder acts alone without having Panel Delegates appointed by the parties. [20]

Fact-Finding is *not* arbitration. It is only advisory and nonbinding.

Nor is it mediation where the mediator attempts to convince the parties in their enlightened self-interest to modify their positions and to effect compromises.

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third party's recommendations for settlement would have persuasive effect on the parties themselves and add moral suasion to the Recommendations particularly if the recommendations were given wide publicity.

[20]Delegates can provide their unique understanding and perspective on the evidence that is adduced. During executive sessions they are encouraged to prioritize amongst various demands. Thus, the panel is more likely to come up to a solution that is closer to the needs of the parties, does not violate their expectations, and avoids unacceptable solutions.

Parenthetically, Judge Kenesaw [(Mountain)] Landis, about to leave the federal bench to become 'czar' of baseball in the backwash of the [Chicago] Black Sox scandal, inflicted the worst interest arbitration ever. He ignored the historical relationships in the construction industry and remade the wage system in Chicago. This resulted in chaos, violence, bombings and killing of policemen for the better part of a decade. The lack of a tripartite panel, and his lack of understanding of the parties' needs, were roots of this misjudgment. "The advantage stemming from information sharing works two ways: the neutral learns what the parties really want (and don't want) and they know what he intends to do. Obviously, it is of importance that the arbitrator discover how much in cents per hour each side will 'take' In fact, nothing else is as significant. It is entirely possible, however, to endure a dozen days of formal hearing without acquiring this knowledge." See Bernstein, Irving, *The Arbitration of Wages*, (Berkeley and Los Angeles: University of California Press, 1954), pps. 41-43.

Fact-Finding partakes of the nature of a quasi-judicial proceeding in that the parties make formal presentations, although no transcript of proceedings is taken. In addition to affording the parties full opportunity to make their formal presentations, through the cooperation of respective counsel and their clients, the Fact-Finder did spend a short time with each of the groups at which time he was advised as to the disputants priorities. However, no attempt was made by the Fact-Finder to elicit their ultimate positions on the issues, beyond that which developed in the paperwork. Both the formal and informal sessions were of assistance to the Fact-Finder in ascertaining the areas of disagreement and the bases or rationalizations of the parties for their positions.

In its most basic sense, an arbitrator's function in interest disputes is to legislate for the parties.

Of course, a Fact-Finder only recommends. The process is an extension of he collective bargaining process, and is a search for the fairest and most equitable answer to the problem that the parties cannot themselves resolve. Effectively, it is up to the Fact-Finder to determine the reasonableness of the demands, and to recommend a new agreement (which plausibly should have been the one the parties would have come to at the bargaining table).[21]

In resolving such disputes the Fact-Finder will give consideration to a multiplicity of standards, to "mix the porridge." Internal and external comparable should be given some real weight, and serve to divine "a workable solution satisfactory to both sides."[22] Benefits issues are particularly difficult, and involve consideration of internal comparable, risk pooling, effect

[21]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1358-1361.

[22]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1402

on take home pay, costs of administration, access to information, etc.[23] Wage patterns,[24] historical differentials, labor markets, the cost of living, the amount of a living wage, ability to pay are all metal for this forge, depending upon the particular context and their aptness to the dispute. These are items which may need to be elucidated by labor economists, testifying as expert witnesses.[25]

It is also to be noted that fact finding in Michigan exists in the context of Act 312, which provides for interest arbitration for police and fire personnel. There is a long standing cross fertilization between Fact Finding and Act 312.

In the latter, the panel is required to follow the statutory criteria set forth in Section 9 (MCLA 423.239) of Act 312. Article 9 reads:

> Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable
>
> (a) The lawful authority of the employer.
>
> (b) Stipulations of the parties.
>
> (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
>
> (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally.

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[23]Ruben, Alan Miles, Ed. in Chief, *Elkouri & Elkouri, How Arbitration Works (6th Ed.),* (BNA, 2003), pp. 1413, 1418-1419.

[24]*But see,* Signal Five, Official Bulletin of the Ohio State Troopers Association, *The Elephant In the Tent, The Case Against Pattern [Bargaining].* *[http://webcache.googleusercontent.com/search?q=cache:nG_PRfvdlJQJ:www.ohiotroopers.org/files/Signal%2520Five. The Elephant in the Tent.*

[25]In the case of creation of a health care plan, benefits experts can deal with such issues as creating a formulary for prescription drugs, ways to maximize benefits relative to costs, etc. This has been done for years in the public sector. *See for example* BOARD OF TRUSTEES OF THE UNIVERSITY OF TOLEDO and UNIVERSITY OF TOLEDO CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, and COMMUNICATION WORKERS OF AMERICA Local 4530 and UNIVERSITY OF TOLEDO POLICE PATROLMEN'S ASSOCIATION, Local No. 70 , SERB Case Nos 01-MED-10-0983, 01-MED-08-0704, and 01-MED-12-1107. [http://www.utppa.utoledo.edu/octUpdate/Toledo_Report%20of%20Fact-Finder%20(11-07-2005)_dnj.pdf] *See also*, *City of Rossford and Ohio Patrolmen's Benevolent Association*, SERB Case No. 02-MED-1131 and 02-MED-1132 and [http://www.serb.state.oh.us/sections/research/WEB%20FACT-FINDING/2002-MED-10-1131.pdf].

(I) in public employment in comparable communities
(ii) in private employment in comparable communities.

(e) The average consumer prices for good and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employees including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) **Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in private employment.** [Emphasis added.]

Notably, this section was amended by the legislature in 2011 to add an ostensibly new requirement that the issue of financial ability of the municipal entity is the most critical factor to be considered. In addition, subsection (e) was added to indicate that the wages, hours and conditions of employment of *other employees of the same employer* was also a critical factor, since uniform treatment within an employer is an important consideration.

In fact, ability to pay has always been considered by fact finders and interest arbitrators, although whether it alone would overcome all of the other factors has been a bone of contention. Internal comparability has always been an important benchmark.

There is no question that an Act 312 arbitration panel is expected to consider **all** of the Section 9 factors in making an award, at least as they are pertinent to the record made. It also should be recognized that the particular circumstances may dictate that certain criteria may be emphasized more than other criteria. But as the Michigan Supreme Court has noted in *Detroit v. DPOA*, 408 Mich 410 (1980) at 484, that since the:

> "factors are not intrinsically weighted, they cannot of themselves provide the arbitrators with an answer. It is the panel which must make the difficult decision of determining which particular factors are more important in resolving a contested issue under the singular facts of a case, although, of course, all 'applicable' factors must be considered."

Essentially, the Act 312 criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as with other similarly situated public and private employees. In other words, the economic realities – for both sides and the public – of the situation must be considered.

In addition to the enumerated criteria the Legislature, in setting forth Section 9(h), incorporated criteria sometimes used by Fact-Finders in making recommendations as to collective bargaining agreements which are not specifically enumerated in Section 9.

Whether it is required, the Fact-Finder considered all of these factors, consistent with the Supreme Court's opinion in *Detroit v. DPOA*. Yet there were certain key criteria, namely, 9(c) "the financial ability of the unit of government to meet those costs," 9(e) overall compensation, and 9(h) the other factors criteria which would include the bargaining history and the general economic climate in Northwest Northern Michigan.[26]

Essentially, the Public Employment Relations criteria address the cost of living, the financial ability of the employer to fund the awards, and internal comparables as well as with other similarly situated public and private employees. In other words, the economic realities of the situation must be considered.

The mosaic may also include, *inter alia*, historical and future comparisons and relationships to other internal bargaining units; external communities and bargaining units, prevailing wages paid in similar communities; wage settlement patterns in the public and private sectors; ability to pay; local, regional, state and national economic events and prediction; labor market rates; costs of maintaining other benefits (especially health care and retirement costs); cost of living increases; adequacy of staffing, needs and expectations of the public; tax effort; hiring patterns; settlement patterns; and other factors applicable to the wage proposals.

[26]I am not overlooking the Upper Peninsula (see "Northern Michigan" in Wikipedia) but am simply trying to tlak about labor markets in this analysis.

The interest arbitration panel must try to establish a fair rate in the context of the historical relationship of the parties, and taking into account the labor economics concept of "orbits of coercive comparison,"[27] also called "wage contours."[28] Internal comparability is a significant factor: management needs to preserve its reputation and relationship with the other bargaining units with whom it negotiates.

The Fact-Finder has taken notice of the fact that this is *not* the first time that wage rates were established for the Michigan Nurses Association. Likewise, the nurses are indispensable, but are not the only organized group of employees working for this employer. Indeed, even the wages of supervisors and other staff at this facility ought to be given some weight. In that sense, comparison to other employees and bargaining units of the same employer has always been a material factor, and has been termed "the first orbit of comparison."

In a concessionary negotiation, rough equality of sacrifice is a highly relevant consideration. Hypothetically, it ill behooves a management that is feathering its own nest to ask for reductions from which they themselves choose to be exempt.

Additionally, it is understood that taking money back from a union, even in hard economic times, is a difficult sell for Management who must backtrack against a history of bargaining and agreements. There are also likely to be diverse political repercussions, one way or another. Wage comparisons between bargaining units, and among related groups, is inevitable. While higher wages is a goal, maintenance of employment and avoidance of layoffs

[27]Arthur M. Ross, *Trade Union Wage Policy* (Berkeley and Lost Angeles: University of California Press, 1948), Chapter III, pp. 53-70).

[28] Institutional economists remarked that unions impose wage standards. Dunlop (1957) called the standards "wage contours" and Ross (1948) called them "orbits of coercive comparisons" Bewley, Truman F., *Why Wages Don't Fall During a Recession*, page 109 (Harvard University Press, 2002) ISBN 06740o09437, 9780674009431 (pp. 527). As a practical matter there is a "labor market" analysis, and there is the "coffee shop" comparison.

is another (sometimes competing) goal for a labor organization.[29] An economic theory of a trade union requires that "the organization be assumed to maximize (or minimize) something."[30] Here maintenance of maximum employment for its members is an important goal for the Union. Maximizing benefits and benefit choices may be inconsistent with the Union's wage proposal.

Among the criteria utilized by Fact-Finders are the bargaining history of the parties, both past and current, as well as the "art of the possible," based upon the parties' competing needs and interests, in light of the give and take of negotiations.

As Arbitrator George T. Roumell, Jr. stated, this process is about the "art of the possible," trying to replicate the settlement the parties themselves would have reached had their negotiations been successful."[31]

Neither Management nor Labor should to come to arbitration with a list of demands, expecting to walk away with their list fully granted. Like collective bargaining, Fact-Finding is not a mechanism to get what you want, but rather a process empowering both sides to live with what they get.[32] It is first and foremost an extension of collective bargaining, which is intended to be 'industrial democracy' in the workplace.

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[29]Reed, Albert, *The Economics of Trade Unions 3rd Ed.* (University of Chicago Press, 1989) (ISBN 0226707105, 9780226707105, 44-56, 204 pages.

[30]John T. Dunlop, Wage Determination under Trade Unions (New York: Macmillan Co., 1944), p. 4.

[31] See *County of Lake and Command Officers Association of Michigan*, MERC Case No. LO2 H-9004 (2004), where he wrote at page 4: "As Dean Theodore J. St. Antoine of the University of Michigan Law School wrote: 'the soundest approach for an outsider in resolving union-employer disputes is to try to replicate the settlement the parties themselves would have reached had their negotiations been successful." *County of Saginaw and Fraternal Order of Police*, MERC Case No. I90 B-0797 (1992).

[32]Some pundits have offered the general observation that 'management gets the language, and the Union gets the money.' However, as some scholars observed: "For negotiations that are at impasse most public sector collective bargaining laws require interest arbitration. Typically, the only issue remaining at impasse in public sector negotiations is the economic package, and the most common economic issue is that of wages. Because the strike is proscribed in most jurisdictions, and the labor market is imperfect, a theory of second bets has emerged in settlement of these matters. Rather than relying on market forces, the parties must rely on interest arbitrators and their applications of the institutional wage standards to the record of evidence to determine what the appropriate wage shall be." David A. Dilts; Mashaalah Rahnama-Moghadam; Tadessa Mangestus. *Institutional Wage Standards in Public Sector Interest Arbitration.* Journal of Collective Negotiations (formerly Journal of Collective Negotiations in the Public Sector) Volume 30, Number 4 / 2005, Page 339 - 348.

VIII. THE HEARING

Proceedings were informal. This was an orderly process of presentation, counter presentation, questioning, research, breaks, negotiation and repositioning. It was rather like a formalized mediation in a group setting. There is no specific format for conducting a fact finding, and there was no requirement that we conform to the rules of evidence. Rather, this was Alternate Dispute Resolution in its purest sense.

Further, the Fact-Finder was inundated by scores of exhibits that make clear the severe financial constraints facing the hospital, its employees, the taxpayers and the patients. These all have an impact on the request for changes in wages and the contract. Taken together, the record established that we need to do the best we can with substantially diminished resources – the crisis makes the need for proper resource management ever more acute.

As a personal note, I appreciate each party's efforts in preparing and presenting their case. Obviously, this was an expensive, labor intensive and time consuming effort. I wrote this opinion in the hope that they will avoid the effort, losses, consequences and risk of further dispute, and of continuing to operate without a negotiated agreement.

The Fact-Finder is also appreciative of the cooperation and attitudes of the parties in the fact-finding process. If that attitude of cooperation demonstrated at the Fact-Finding hearings carries over into the future, then the prospects for more normal resolution of labor relations and employment disputes in the future are good.

IX. ABILITY TO PAY AND NEED FOR REDUCTIONS IN PAY AND BENEFITS

Financial Ability of WSMC

The challenges facing rural acute care hospitals are spelled out in the article entitled “Fighting for Rural Hospitals” prepared for the National Rural Health Association. These same factors are applicable to WSMC as identified in the Threat portion of the West Shore Medical Center Critical Access & Budget Update (June 2013). The market for rural

hospitals has been changing dramatically over the last twenty years. Metropolitan hospitals began to acquire or affiliate with smaller rural hospitals as those hospitals encountered financial difficulties. After a wave of rural hospital closures in the 1990's, Congress began the Critical Access Hospital Program which provided financial support to hospitals with 25 or fewer beds that are at least 35 miles away from another facility. As indicated in the attached December 2011 article "When 'Critical Access' Hospitals Are Not So Critical," "Forty-one percent of the hospitals in the program are already losing money, according to the National Rural Health Association, and the loss of funding could mean that they will close."[33]

In an October 7, 2012 news article, it was noted that "Obamacare will shut rural hospitals, forcing patients to drive hours to finds a hospital even for emergency care." This prediction came from Michigan Congressman Dan Benishek[34] who stated that "I have been talking to administrators across my district and they are all really worried about being able to keep their hospitals open." He also commented on a rural Michigan hospital that went bankrupt because of Medicare, referring to the closure of Cheboygan Community Hospital earlier that year.

The historical data presented in the West Shore Medical Center Critical Access & Budget Update (June 2013) establishes that WSMC had been in financial difficulties for many years. That report predicted expected financial losses of $6,150,000 based upon loss of Critical Access Status, loss of 340B discount drug pricing, sequestration and health care reform. WSMC has employed the services of Plante Moran and reimbursement specialists from Munson Hospital to ensure that revenues from the services performed are maximized.

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[33]The National Rural Health Association also predicted that the Congressional budget sequestration required by the Budget Control Act of 2011 sequestration process will "push these health care facilities to the brink of closing their doors." The National Rural Health Association also predicted that the sequestration required by the Budget Control Act of 2011 sequestration process will "push these health care facilities to the brink of closing their doors."

[34]

Congressman Benishek is a general surgeon who practiced for 30 years at Dickinson County Healthcare System in Iron Mountain which is a public hospital organized under the same statutory framework as WSMC. He also served on the Board of that entity.

WSMC also engaged Plante Moran to make financial projections regarding the next five years, which revealed that if no action was taken the excess of expenses over revenue would be as follows:

2014	2015	2016	2017	2018
$2,952,000	$5,513,000	$5,537,000	$5,759,000	$5,858,000

This $18,158,100 in cumulative operating losses would have to be offset by expending cash assets. As of December 2013, WSMC had $27,900,000 in cash and investments and $18,500,000 in outstanding debt, which translates to $9,400,000 in cash on hand. Assuming that all of proposed changes in the salary and benefit structure were implemented, operating losses during the period from 2014 through 2017 were expected to be $10,000,000. This would mean that WSMC would have exhausted all cash reserves by 2017 and still have $600,000 that it was obligated to pay.

The reality of the financial difficulty facing WSMC was confirmed by the actions of bankers servicing its debt when none of them were willing to extend the current loans that were taken out for building renovation purposes without an outside guarantor. As a result the WSMC Board determined that the best course is to utilize current cash and investments to retire debt as the terms of those notes expire during 2014. This will reduce the available cash reserves by approximately $18,500,000 and will shorten the time that WSMC has available to make the necessary corrections in operating costs to avoid running out of funds to operate.[35]

It is undisputed that WSMC faces significant financial challenges if it is to remain a viable rural acute care hospital. WSMC remains confident that it can take the actions necessary to remain in operation provided that the proposals it made are promptly implemented.

[35] WSMC is in the process of consolidating the critical care unit with the medical surgical unit, is evaluating the continuation of OB services and is engaged in the active recruitment of additional physicians.

Immediate action is however necessary to reduce employment related costs and WSMC's proposals must be evaluated in light of its demonstrated financial difficulties.

Economic Issues in Dispute

The major economic provisions of a collective bargaining agreement involve the wages that will be paid, the terms and conditions of the health care coverage to be provided to employees, the retirement plan that will be provided, the amount of paid time off that will be provided and if overtime will be paid for time spent in work that is not required to be paid at overtime rates under FLSA. A public employer ought to pay a living wage, and as a matter of good management, needs to maintain wages and benefits at a level consistent with the labor market value of the work performed and the workers' education, experience and skills. Quality control and customer satisfaction are important values that ought not to be overlooked and in a competitive environment need to be maintained or increased. Health care consumers have options, and, particularly in a non-emergency situation can choose to go elsewhere.

Employee morale is an important component in that equation.

While it is easy to quantify dollars, the continued value of an institution's reputation is very real. and should not be overlooked.

However, pricing for the hospital's services is not entirely within the hospital's control.

In this climate, it is incumbent on both sides need to monitor overall costs, and to do what they need to do to maintain jobs and the level of services. A public employer is required to monitor and balance where it allocates its money, since allocating excessive amounts of funds to maintenance of an overly generous health care or retirement plan reduces the amount of funds available to pay wages and to hire employees to provide necessary services.[36] The total

[36] Public employee unions do not have these same obligations, since their primary obligation is to secure the best wage and benefit package that it can for the employees it represents. The bargaining committees of unions are most often

cost to provide the wage and benefit package must be carefully monitored, and wage and benefit levels must be rearranged when they are no longer affordable.

WSMC is facing extraordinary financial difficulties and must realign its wage and benefit package to allow for its continued existence. The changes in the wage and benefit program were designed to achieve necessary savings with as minimal as possible an impact upon the normal take home pay of its employees. Hourly wages were not reduced, but matters that generated unnecessary overtime pay were targeted. The amount employees would be required to pay for health care premium support each month was not increased from prior contractual levels, but funds for retirement were reduced.

1. Health Care Costs.

Controlling health care costs is critical – for the employer, the union, and the employees. It is the boat anchor around everyone's neck. Increases in health care costs means that less money is available for other worthwhile purposes, such as wage increases.[37]

The parties have reached agreement on changes to the health care plan, so that issue is not in dispute in this proceeding. Health care premium costs are a significant part of overall employee related expenses, and a brief explanation of the changes that were implemented is necessary to properly evaluate the remaining outstanding issues.

Prior to modifications to the health care insurance program, employees had the option to participate in a Priority Health HMO plan or a Priority Health POS (80/20) plan with employees paying 20% of the cost of the insurance. The cost of these plans was:

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comprised of senior employees who will not feel the economic impact of layoffs caused by excessive contractual settlements.

[37]Unlike much of the rest of the civilized world, we have an employer-based system of national health insurance. The costs are effectively a 'tax' or penalty on employment, and if an employer is socially responsible and does the right thing, they incur substantial costs. Conversely, some employers that lack a conscience do their best to strip as many employees as possible of their health insurance. Making lots of the employees part time, and denying them this benefit, is sometimes colloquially referred to as "Walmarting" them. It passes their costs onto the rest of us.

HMO	Cost	Employee portion	WSMC Portion
Single	$ 513.52	$ 102.79	$ 410.43 ($ 4,925.16)
Double	$1,162.84	$ 232.56	$ 930.28 ($11,163.36)
Family	$1,718.00	$ 343.60	$1,374.40 ($16,492.80)

PPO	Cost	Employee portion	WSMC Portion
Single	$ 689.22	$ 137.84	$ 551.38 ($ 6,616.56)
Double	$1,516.57	$ 303.31	$1,213.26 ($14,559.12)
Family	$2,000.26	$ 400.05	$1,600.21 ($19,202.52)

As can be seem from these figures, WSMC was required to pay significantly more for employees who selected the PPO program. In addition, WSMC was not getting the maximum pricing benefit by having two plans.

After reviewing available options, it was determined that the health care plan to be offered to all WSMC employees would be the Priority Health by Choice, POS 80%/60%, $500/$1,000 plan. The monthly cost for this plan for full time employees during the period from January 1 2014 through December 31, 2014 is as follows:

PPO	Cost	Employee portion	WSMC Portion
Single	$ 561.51	$ 137.90	$ 423.61 ($ 5,083.32)
Double	$1,235.55	$ 303.39	$ 932.16 ($11,185.92)
Family	$1,629.61	$ 399.92	$1,229.69 ($14,756.28)

Full time employees are required to make 26 bi-weekly payments of $184.58 (Family), $140.03 (Double) and $63.67 (single).[38] This employee payments allowed the majority of employees who were on the existing POS plan to pay the same dollar amount for their share of the premium coverage in 2014 that they had paid in 2013. Those employees on the HMO plan paid slightly more for the better plan. This plan did not save the amount that had been desired by WSMC, but after discussion with employees and unions the POS plan was considered more acceptable than the HMO plan. It also allowed WSMC to comply with MCL 15.563 which sets the maximum

[38] These payments are based upon a bi-weekly payment. Corrected for monthly payments, the cost for single is $137.90, the cost for double is $303.39 and the cost for family is $399.92.

that WSMC can pay towards medical insurance for 2014 at $15,975.23 (Family), $12,250.00 (Double) and $5,857.58 (Single).[39]

2. Current Wages.

It has been tentatively agreed that there will be no change in the current wage structure during the period from 7-1-2013 through 6-30-2014. *This wage freeze has been uniformly implemented for all non-union employees of WSMC including and administrative staff and has also been tentatively agreed to by SEIU on behalf of the two collective bargaining units that it represents.* This commitment not to reduce wage rates was based upon the assumption that all other changes in the benefit structure would be accomplished by December 31, 2013 and the unions were specifically advised that a failure to achieve necessary savings could cause this issue to be reexamined.[40]

3. **FMLA Leave — Article 10, § 9**

Current contract: Employees who take FMLA may retain 104 hours in their PTO bank.

WSMC: Modify Article 10, § 9 to require usage of PTO days to cover all time off, but employees may elect to retain up to **forty (40)** hours in their bank.

MNA: Modify Article 10, § 9 to require usage of PTO days to cover all time off, but employees may elect to retain up to **sixty (60)** hours in their bank.

Under WSMC policy, employees are entitled to receive an employer contribution towards their health care insurance as long as they are actively employed.[41] Employees who are *not* on some form of paid leave are not entitled to an employer contribution towards health insurance premium costs; but WSMC is required by FMLA to continue to make payments

[39] The 2013 amounts were $15,525.00 (Family), $11,385.00 (Double) and $5,692.50 (Single).

[40] Pursuant to PA 54, step increases have been withheld since 7-1-2013, but there is a tentative agreement to implement step increases as soon as an agreement is reached.

[41] The amount of that payment depends upon whether they are working full or part time.

towards benefits such as health care insurance premiums during the period that an employee is on FMLA leave. Under FMLA regulations an employer can require that paid leave time is utilized at the same time that an employee is on FMLA leave in order to negate some of the costs that may be attributable to the FMLA leave. Under the existing CBA, employees are allowed to retain up to 104 hours of PTO time in their banks and utilize unpaid FMLA leave.

WSMC believes that it is inappropriate to allow employees to take unpaid FMLA leave while still retaining paid PTO time in their banks. Employees cannot be denied FMLA leave, so allowing them to take unpaid time off while preserving paid time off to be taken at a later time negatively impacts overall scheduling and creates additional costs for overtime to fill vacant shifts. In addition, it also has the potential to create additional costs for health insurance.

The proposed 40 hours standard has been adopted for all non-union employees of WSMC who receive paid time off and has also been proposed to the SEIU to be applicable to employees in two collective bargaining units that it represents. WSMC is no longer in a position that it can allow employees to take significant periods of time off of work in addition to authorized PTO time, and appropriately is requiring employees to utilize most of their PTO time if they are absent due to FMLA issues.[42] The 40 hour limit reflects a compromise between the desires of employees to maintain some ability to schedule and take vacations after periods when they have been absent for FMLA reasons, and WSMC's desire to require that PTO time be used for all FMLA related absences so that overall time off will remain at manageable levels.

The Hospital spent a great deal of time on employee absenteeism. FMLA was singled out as a contributing factor. The Hospital clearly indicated its intention to make life difficult for employees requesting FMLA leave, noting in its "UPTO" presentation that it would "[Manage intermittent FMLA better by requiring more second opinions, independent

[42] FMLA is very expansive and can include such vacation like activities as accompanying a parent to a trip to Florida if such activity will assist her parent.

medical exams and other legal remedies." The Hospital has always had these tools available. Rather than attempting to use them and re-assessing the problem, the Hospital seeks an additional disincentive, penalizing all employees instead of the "wrongdoers."

The Hospital sought the same changes in contract negotiations seven months prior to the reopener. In fact, those negotiations resulted in agreement to a reduction in the amount of PTO that may be retained by employees taking FMLA. Now the Hospital is back for more. It is difficult to see the Hospital's proposal as anything other than a second-bite at the apple. The MNA's proposal is reasonable and provides additional cost-savings to the Hospital.

Recommendation:

Both sides have recognized the severity of the financial problems besetting the hospital. While the employer is seeking symmetry in all of its operations, the Union is making bold concessions. There is going to be a large cost savings to the hospital. Additionally, nurses as a group have particular problems with stress and physical ailments; these are an inherent part of being a nurse. Treating them differently than other employee groups is a proper recognition of that fact. Therefore, the **Union's position** on this issue is the factd finder's reommendation.

4. **Tuition reimbursement**. BSN Requirement (Tuition reimbursement policy set forth therein) — Article 16, § 15, Second Paragraph.

> **Current contract:** Registered nurses hired before January 1, 2010 are not required to earn their BSN, however, they are encouraged to do so. The Medical Center will provide funding pursuant to the Tuition Reimbursement policy. The Medical Center guarantees the base amount in place when the registered nurse enrolls in the program which may be adjusted up during the program time, but it cannot be adjusted below the base amount.
>
> **WSMC**: Modify the second paragraph of Article 16, § 15 to read:
>
> Registered Nurses hired before January 1, 2010 are not required to earn their BSN, however, they are encouraged to do so. **Registered Nurses are eligible for tuition assistance in accordance with the Medical Center's Tuition Reimbursement Policy, as the same may be changed by the Medical Center from time to time.**
>
> **MNA**: Modify the second paragraph of Article 16, § 15 to read:
>
> Registered Nurses hired before January 1, 2010 are not required to earn their BSN, however, they are encouraged to do so. **All RNs enrolled in a BSN program prior to ratification of the 2013 Wage and Benefits reopener shall be grandfathered at the policy rates in effect prior to ratification for the remainder of their BSN program or until expiration of this contract whichever comes first. All RNs who enroll in a BSN program on or after ratification are subject to the Medical Center's Tuition Reimbursement Policy which may be changed by the Medical Center from time to time.**

Payment of tuition related expenses is a fringe benefit that is intended to encourage employees to upgrade their educational skills. The policy previously in effect for WSMC employees allowed reimbursement of up to $2500 per year for qualifying tuition expenses. This policy was amended in 2011 to increase that maximum to $5,000 for employees seeking to acquire a BSN degree. In December 2012, Article 16, § 15 was revised to require all registered nurses hired on or after January 1, 2010 to earn their BSN degree within 10 years of initial employment.[43] In addition, that provision prevents the Tuition reimbursement policy base

[43] The 2010-2013 CBA required RNs to acquire their BSN in five years.

amount from being adjusted below the amount in effect when the employee enrolls in the BSN program.

The Tuition Reimbursement policy applies to all WSMC employees, and the amounts to be paid are reviewed by the Board each fiscal year. The amounts were not adjusted downward in the 2013-2014 fiscal year, but may need to be adjusted or eliminated in the upcoming 2014-2015 fiscal year. In order to address this possibility, WSMC has proposed as follows:

WSMC believes that it might not be able to continue the same level of tuition support as was provided before, but has coupled the potential reduction or loss of this tuition support by an elimination of the requirement that registered nurses hired before January 1, 2010 must obtain a BSN and allowing registered nurses hired after January 1, 2010 a longer period of time to achieve their degree. MNA employees will be treated the same as other WSMC employees if any changes to the existing Tuition Reimbursement policy is made, but they should not be grandfathered at the levels of payment in the existing policy.

The language of the tuition reimbursement provision is an example of the give and take inherent in collective bargaining: the union agreed to the BSN requirement for nurses hired after 2010, while the Hospital promised to partially defray the costs associated with it. Now, the Hospital seeks to maintain the BSN requirement, yet offer no guaranteed level of financial assistance, even for nurses who enrolled in reliance on the Hospital's promise. The proposal is inherently unfair. Nurses hired after January 1, 2010 are still required to attain their BSN within 10-years, while potentially receiving reduced or even no financial assistance from the Hospital.

Even more troubling, under the Hospital's proposal, nurses who previously enrolled may be forced to choose between continuing to take courses at their own expense, or risk termination for failing to comply with the Hospital's 10-year BSN deadline.

Honoring the commitment to the nurses who are already enrolled involves less than 10 people. For a minimal cost-savings, the Hospital seeks to impose a substantial burden on the nurses who relied on the Hospital's promise. MNA's proposal is reasonable.

There is a basic conflict between the educational requirements that have been imposed, and the employer's desire to cut costs. Present employees have undertaken educational programs in reliance upon subsidies that were in place, and *which were expected to remain in place*. The fact finder believes that this is a situation where the employer ought not to be 'allowed to change the rules in the middle of the game.' There is an element of equitable estoppel here. That is to say, the nurses have undertaken additional training and a program, justifiably relying upon the tuition payment reimbursement plan that was in place. Moreover, if the educational attainments that have been bought and paid for are to be finished, this program should be kept in place. Thereby, both parties will ge the benefit of their bargain and their previous investment of time and money.

Leaving it for a reopener simply creates needless anxiety and poisons the good feelings that should be associated with the program. If a longer term contract is to be addressed, resolved this issue is an important foundation for the effort.

Recommendation:

In short, the Union's proposal addresses the cost concerns, and leaves in place the legitimate expectations of those members who have changed their position in reliance of the existing plan. The fact find adopts the **Union proposal** as his recommendation.

5. **Easter Holiday**. **Article 18**

Current contract: Paid Easter Holiday.

Employer position: Eliminate paid Easter Holiday.

Union position: Temporarily remove Easter Holiday for 2014 and 2015.

For now WSMC provides MNA employees with ten holidays. Under the holiday pay provisions, employees are paid 8 hours of pay for each holiday and receive time and one half their regular rate of pay for all hours worked on the holiday. The standard holidays are times when employees are generally not scheduled to work except in patient care positions so most employees receive holiday pay to substitute for hours that are lost from their regular schedule of work. As a result, most of the holidays replace work time with holiday time and an employee's regular paycheck is not impacted. Easter is slightly different, since it always falls on a Sunday and many employees are not scheduled to work on that day and the holiday pay is an addition to their regular income.

WSMC has proposed to eliminate the Easter Holiday and the employee's birthday. MNA has agreed to eliminate the birthday holiday but proposes that Easter be temporarily eliminated for 2014 and 2015.

This request by the MNA to consider the change to be temporary would only be appropriate if the financial struggles that WSMC is facing were also of a short term duration. As previously indicated, WSMC is facing a seemingly permanent change in its operating environment and the restructuring of its wage and benefit program is not a temporary fix. The changes proposed by WSMC will be ongoing until such time as its economic situation has stabilized and temporary solutions must be rejected. This does not mean that holiday payments for Easter can never again be considered, but where available funds for future wage and benefit

increases will go should be determined in the bargaining process rather by a mandatory return of an eliminated benefit.

The Union has agreed to remove the Holiday for the remaining two years of the contract, but seeks to reinstate the Easter Holiday prior to the next contract negotiations.

Recommendation:

The fact finder thinks that reinstating the holiday at the end of this contract is presuming too much. It is an attempt to treat this as the "status quo" for the negotiations of the next contract. I recommend that the **employer's position** be adopted.

6. **Pension Plan — Article 19, § 5**

Current contract: Employer contributes 7% each calendar year.

Employer proposal: Reduce contribution to 6% for 2013 calendar year (2014 contribution) and moving forward.

Union position: Reduction to 6% for 2013 and 2014 calendar year (2014 and 2015 contribution), reinstating the 7% rate for 2015 calendar year (2016 contribution).[44] The Union also seeks a payment deadline of February 15 of each year, for the previous calendar year contribution.

WSMC has proposed to reduce the WSMC contribution for the plan year beginning 1-1-2014 by 1% from 7% to 6.00% for MNA employees and has implemented such a reduction for all non-represented employees and physicians.[45]

The effect of the Union's proposal is to acknowledge that the savings to be achieved by this proposal is appropriate for the next two years, but should be considered as an ongoing benefit for years thereafter.

The employer urges that the analysis of this issue is similar to that of the Easter holiday. This request by the MNA to consider the change to be temporary would only be appropriate if the financial struggles that WSMC is facing were also of a short term duration. The changes proposed by WSMC will be ongoing until such time as its economic situation has stabilized and temporary solutions must be rejected. This does not mean that an increase in pension contributions can never again be considered, but where available funds for future wage and benefit increases will go should be determined in the bargaining process rather by a mandatory return of a reduced benefit.

In regards to the request that the pension contribution be made by February 15th of each year, the pension plan documents provide that the contribution will be made once a year at a

[44]Subsequent discussions have clarified that the intention of this proposal was to provide a temporary 1.00% reduction for the next two years but to have the contribution automatically be restored as of 2016.

[45] A similar reduction is proposed for the SEIU units.

reasonable time after the calculation can be determined. WSMC has been calculating this contribution in a process that is essentially manual, and the contribution is normally made in the late spring. The new time and management computer system that is in the process of being installed this year should greatly speed up this process, and WSMC expects that payments will be made sooner in future years. The change in the timing of contributions should not be made in a piecemeal manner through the collective bargaining process, since the pension documents and administrative policy require this to be uniform throughout WSMC.[46]

The Union's counter-proposal also seeks to require payment of the pension contribution by a specified time, February 15. The proposal is necessitated by the Hospital's previous actions, specifically, by delaying payment for nearly 6 months. By failure to contribute in a reasonable time, the employee is deprived of the interest that could have been earned in the interim

Recommendation:

The MNA position represents a reasonable compromise that accommodates the Hospital's financial needs. The **MNA position** is recommended by the Fact Finder.

The long terms prospects of employees is an important consideration. Retirement plans are a reasons why persons seek out public employment and stay on board. The If one wants to fund a pension level, it is better to have it in place longer, as the funding can be take care of more advantageously. In short, the **Union's position** makes sense and is adopted by the fact finder as his recommendation.

[46] WSMC has recently updated is plan documents and it would be costly to revise them to include a specific date for the contribution. The administration has always made contributions as soon as reasonable possible, and any delay impacts their plan assets in the same manner as it impacts MNA employees.

7. **Bonus Pay — Article 22, § 5**

Current contract: Incentive pay for extra time/shifts, mostly in support of staffing needs.

Employer proposal: Remove bonus pay incentive.

Union position: Maintain current contract language.

Employees are paid an extra $112.50 for a 12 hour shift, $75.00 for an 8 hour shift and $37.50 for a 4 hour shift if certain criteria are met such as the number of open positions on a shift or there is 50% absenteeism on that shift. Bonus pay is also paid if there are 10 or more open shifts on a work schedule. WSMC has proposed to delete Article 22, § 5 to concept of bonus pay while the MNA proposes to retain this provision.

The overall desire of WSMC is to eliminate 'unnecessary' premium payments. At the hearing there was extensive discussion on scheduling and the need for employees to sign up for open shifts or have them initially filled by part time or casual employees. As the system now works, the bonus pay provision encourages employees not to initially sign up for shifts to fill out their schedule since they know that if they wait the shift might be paid at bonus and/or overtime pay. WSMC cannot afford to allow employees to manipulate the scheduling process to secure more money for the same work, and the bonus payment program must be ended.

The Hospital originally stated that it had based its proposals with a specific dollar amount in mind. But this proposal was never part of the Hospital's plan to reduce its costs. In fact, it was never even brought to the bargaining table. Rather, it appears to be an afterthought, and just another way to save more money. The first time the Union was made aware of this proposal, was in the Hospital's final offer. Such carelessness makes it difficult to take the Hospital's position seriously. The Hospital's implementation of this proposal is the subject of the pending ULP charge MERC.

Setting aside the Hospital's failure to notify the Union of its proposal, its proposal is in direct conflict with the Hospital's concerns about staffing and patient safety. For a relatively minor financial impact, the Hospital is willing to remove all incentives to nurses picking up extra-shifts.

The Fact Finder notes the Hospital is belatedly seeking changes it never even bargained for, and recommends the Union's position of maintaining the current contract language

This is a new proposal, and is in many respects an ill thought out afterthought. Trying to get employees to work overtime is one of the solutions to the staffing problems that were so richly detailed by both side. Eliminating the incentives is just the wrong solution to the problem. Carrots do work better than sticks.

Recommendation:

The fact finder adopts the **Union's position**.

8. **Overtime — Article 11. § 2. Subsection (c)I**.

Current contract: A Registered Nurse who is called in or requested to work on his/her scheduled time off or is required to stay beyond his/her scheduled hours shall receive time and one-half pay for all such hours worked irrespective of whether the Registered Nurse is on an 8 and 80 or Flex 40 basis.

Employer position: A Registered Nurse who is called in or requested to work on his her scheduled time off ~~or is required to stay beyond his/her scheduled hours~~ shall receive time and one-half pay for all ~~such~~ hours worked ~~irrespective of whether the Registered Nurse is on~~ **in excess of 8** and 80 or Flex 40 basis. A **Registered Nurse who is mandated to stay beyond his/her scheduled hours under Article 11, § 3 Mandatory Overtime shall receive time and one-half for all mandated hours worked.**

Union position: A Registered Nurse who is called in or requested to work on his/her scheduled time off or is required to stay beyond or his/her scheduled hours **per Article 11, § 3 Mandatory** Overtime shall receive time and one-half pay for all such hours worked irrespective of whether the Registered Nurse is on an 8 and 80 or Flex 40 basis.

WSMC currently pays overtime for matters that are not required under FLSA. In order to avoid the payment of unnecessary overtime, WSMC says it needs to cut back on its payments, and revert to the FLSA payment model that pays overtime for hours actually worked in excess of 40 in a workweek or in excess of 8 hours in a day or 80 hours in a two week work period for employees working on that pay plan.

Both parties' proposals agree that employees who are mandated to stay over and work will be paid time and one half regardless of the number of hours they actually work in that pay period. The difference between the proposals is that under the MNA proposal all time worked outside of an employee's regular schedule will be paid at overtime rates, while under the WSMC proposal overtime rates will only be paid if the employee actually works more than the statutory limit of 40 hours or 8 and 80 as appropriate. WSMC needs to reduce the cost of its wage payments, and limiting overtime payments to the bare FLSA standards.[47]

[47] There is no practical impact upon employees who are scheduled for and work 40 hours a week, since all time they spend in additional work will still be paid at overtime rates. Employees who do not wish to work a full schedule or use PTO time will now receive straight time rates for some extra work that they perform. This is exactly the result that was anticipated by the adoption of the FLSA, since the premium rate was only required if an employee actually worked over

The Hospital seeks to cut back on overtime costs, paying only when an RN is required by the Hospital to stay beyond the end of his/her shift. The Union seeks to maintain overtime for RN's who are called in on his/her scheduled time off. It should be noted that the Hospital is not without tools to avoid overtime costs under this provision, namely, maintaining appropriate staffing.

Notwithstanding the employer's position, extra hours are extra work and deserve extra pay. The time and one-half that is required by the Fair Labor Standards Act is really not much of a deterrent for any employer.[48] Essentially, this is no different than portal-to-portal in the mines; employees who work outside their regular shift deserve overtime pay. The employer wants to erode the going rate and practice.

In any event, this is the *status quo*; the employer had the burden of proof. And it did nor prove that a change in the contractual language is warranted.

Recommendation:

The Union's position makes sense, and is a substantial concession. It modifies the existing language. **The Union's position** is adopted by the fact finder as his recommendation.

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the statutory number of hours.

[48]The costs of fringe benefits including health care, particularly, and other roll up costs such as Federal Unemployment Tax, make it cheaper to pay the overtime than hiring new workers

9. **Counting hours worked for Overtime**. **Computing Benefits — Article 11, § 6**

Current contract: For the purpose of computing the benefits defined under this Agreement, paid time off, paid holidays, paid Bereavement, and jury duty, shall be considered as hours worked.

Employer position: Delete current contract language.

Union position: Maintain current contract language.

An integral part of contractual overtime calculation is a determination regarding whether paid but unworked time will be counted. Under Article 11, § 5, Computation of Hours Worked the parties have explicitly adopted the FLSA definition and provided that "Time worked shall be computed on time actually worked."

Article 11, § 6, Computing Benefits however provides that "For the purpose of computing benefits defined under this Agreements, paid time off, paid holidays, paid Bereavement, and jury duty, shall be considered hours worked."[49] WSMC proposes that Article 11, § 6 will be deleted to avoid disagreements since Article 11, § 5 was intended to control the calculation of time worked for overtime purposes. The MNA proposes to maintain Article 11, § 6 and to have it control "hours worked" for overtime purposes.

The parties have discussed this issue but could not reach agreement. The current practice is to apply § 5 to the overtime calculation[50] and to limit § 6 to calculation of benefits such as the earning of PTO or determining whether an employee has worked sufficient hours to be considered a full time or part time employee for health insurance purposes or to qualify for pension contributions. The elements of this provision have been listed in the new PTO accrual language and

[49] Article 5, § 3 Benefit Levels addresses the issue of benefit eligibility and defines a full time employee as working seventy-two (72) or more hours in a 90 day period and a part time employee as working less than seventy-two (72) hours in a 90 day period.

[50] Non-union hourly employees earn overtime based upon the number of hours they actually work rather than the number of hours that they work and are paid.

continuation of the provision is no longer necessary. In addition, its retention will continue to confuse the overtime payment provisions which should be controlled by § 5.

The Hospital has proposed to change the definition of *hours worked* under the guise of creating clarity of computing overtime. But the Hospital's proposal does much more, and impacts provisions completely unrelated to overtime. The proposal far exceeds the purported explanation for removing Article 11, § 6. Moreover, from the Union's perspective, clarity is not lacking when it comes to defining hours worked for the purposes of overtime: this provision governs. The Fact Finder should reject the Employer's attempt at re-writing the contract and recommend that the current language be maintained.

Recommendation:

Despite the strongly argued positions, there is no ambiguity in the practice. The language has a clear, established and mutually approved meaning. The Union admitted as much in its brief. Its application in the future should not prove to be a problem.

To loosely paraphrase the late president of the United Mineworkers, John L. Lewis, one should not mess with a machine that works.

The fact finder understands that the employer needs to save money.

However, this language change is not the answer.

There is no reason to change the current contract language. **The Union's position** is adopted.[51]

[51]As it makes no substantive difference, the employer's position cold be substituted, and is in the realm of "no harm – no foul." The fact finder's concern, however, is that changing language could have an unintended consequence of creating a structural ambiguity. If it is to be done, it should be done in consideration of their whole contract.

10. **PTO Allowance — Article 20, § 1**

PTO Bank Limit

• **Current Contract:** 2 years accumulation

• **Employer Position:** 40 hours above annual earnings limit. If ceiling is reached, additional hours are forfeited.

• **Union Position:** 40 hours above annual earnings limit. Accrual above the maximum is paid out during next annual PTO cash out.

Earning Basis

• **Current contract:** PTO earned on yearly basis.

• **Employer position:** Accrual basis on hours worked.

• **Union position:** Accrual basis on pay period.

The proposed revisions to the PTO program cut employee expectations to the core. They are difficult issues for the MNA membership to accept, since the result would be a change to a long standing practice that allows employees to earn more time off work. Compared to some other area hospitals, WSMC has provided extremely generous levels of vacation and time off for illness for a very long time and continued that practice when it combined the two programs into one PTO program. [52] Rolling two programs together provided the following time off allotments:

• **Current contract:**

Years of Continuous Service	**Time Off**
Less than four (4) years	164 hours
At least four (4) but less than six (6) years	188 hours
At least six (6) but less than eleven (11) years	212 hours
At least eleven (11) but less than sixteen (16) years	252 hours
At least sixteen (16) years	292 hours

[52] At that time, the paid sick leave program had procedures to grant more than the necessary number of days to care for normal absences due to illness in order to build up a bank for long term illnesses.

This equated to 7.3 weeks of time off for those full time employees with at least 16 years of service working 80 hours every two weeks and 8.1 weeks of time off for those full time employees working 72 hours every two weeks.

The employer claims that this amount of time off was difficult to even take each year, resulting in procedures to guarantee time off and to pay for unused PTO time.[53] However, to the extent that this was a sick leave bank – something that can happen without prior planning, and a benefit that becomes more important to an aging work population – it is a valued benefit.

In order for WSMC to continue to operate it is required to reduce the amount of paid time off that will be granted and to institute procedures to limit the ability of employees to take unscheduled time off.[54]

As its beginning point, WSMC utilized market data to determine prevailing practices regarding time off. Its initial proposal was based upon the "market median" for similar sized hospitals. It restructured the PTO earning grid to have four levels with a maximum of 200 hours of PTO after sixteen years of service. The initial level of PTO earning was set at 120 hours in order to allow newer employees approximately three weeks of time off. Most of this time can be used for vacation purposes, since illness that lasts longer than 8 calendar days are compensated for under WSMC's short term disability program.[55] The PTO earning level was increased to 160 hours after six years of employment so employees would have four weeks of

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[53] There 74 employees in the bargaining unit, and 25 have 16 or more years of service.

[54] There are issues regarding the scheduling of time off and procedures to encourage employees not to take unnecessary unscheduled time off. Those related issues will be discussed in later sections.

[55] In any particular year most employees will need to be absent from work due to casual illness for only a limited number of days. WSMC provides a short term disability program under Article 19, § 1 that provides disability benefits at 60% of regular pay up to a maximum of $750 per week beginning on the first day of injury or the eighth day of illness.

time off each year. As a reward for length of service, three more days of PTO were added after eleven years of employment and two more days after twenty years of service.

The nurses were reluctant to make any changes to the current level of time off being earned by a very senior nursing staff regardless of the impact on WSMC finances. In part, this comes from a realization that money saved by the hospital is money not paid to the employees. In that sense, this negotiation is a "zero sum game."

An examination of the current seniority lists reveals that now under the present system 25 nurses would earn 292 hours of PTO a year, 8 nurses would earn 252 hours of PTO a year, 14 nurses would earn 212 hours of PTO a year, 5 nurses would earn 188 hours of PTO a year and the remaining 22 nurses would earn 164 hours of PTO a year. This results in a total of 16,832 hours of PTO that would be earned by 74 nurses, which equates to an average PTO earning of 227.45 hours per nurse and converts to an average of 5.68 weeks of PTO per employee if employees were working 80 hours every two weeks or 6.31 weeks of PTO per employee if employees were working 72 hours every two weeks.[56] In an attempt to satisfy the desires of the most senior nurses, WSMC added an additional PTO earning step at twenty years of service with a PTO earning level of 208 hours.[57]

Agreement was reached on much of the language needed to convert this system from an annual earning basis to a pay period earning and crediting basis, but disputes remain regarding several details. A significant concession was given to the MNA when it was agreed to

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[56] This calculation is for illustration purposes since some of these employees are part time and do not accrue the same amount each year.

[57] There are 22 nurses with 20 or more years of service. Capping the PTO earning tiers at 20 years is also consistent with the pay scale which is capped after 20 years.

base full earning of PTO on working or being paid for 72 hours in a two week pay period rather than utilizing 80 hours as the amount that is necessary to earn full PTO.[58]

The current proposals of the parties on the PTO issue are:

WSMC*:* *Modify Article 20, § 1 to read*:

§ 1.0. PTO Allowance. All full time and part time employees shall be granted Paid Time Off with pay and benefits based upon their length of continuous service with the Medical Center in accordance with the following:

Years of Continuous Service	**Time Off**
Less than six (6) years	**120** hours (.0641/hr worked)
At least six (6) but less than eleven (11) years	**160** hours (.0855/hr worked)
At least eleven (11) but less than sixteen (16) years	**184** hours (.0983/hr worked)
At least sixteen (16) but less than twenty (20) years	**200** hours (.1068/hr worked)
At least twenty (20) years	**208** hours (.1111/hr worked)

PTO is earned and is credited to eligible employees each pay period, based upon their years of continuous service with the Medical Center as of that date. An employee may not maintain more than forty (40) hours more than the number of hours of their **annual earned PTO amount** and PTO in excess of this carry over is forfeited, **except for any approved PTO hours that have been cancelled by the Employer**.

In order to be eligible for full PTO earning, an eligible employee must have worked a total of at least seventy two (72) hours during the immediately preceding two week pay period. Eligible employees who fail to work the required number of hours shall be entitled to a pro-rated PTO based upon the ratio of the number of hours worked up to seventy-two

[58] This left in place the present system that allows a nurse regularly working a 72 hour schedule to earn the same number of PTO hours as a nurse regularly working an 80 hour schedule. This effectively grants the 72 hour nurse more vacation time since the 208 hours of PTO earned by that employee will allow then to take off 5.77 weeks while the 80 hour nurse will only be allowed to take off 5.2 weeks. Trying to smooth out the differences between bargaining unit members' positions is one of the puzzles that Unions must deal with. That is why they call it "collective bargaining."

(72). **For purposes of this section, hours worked shall include PTO, paid bereavement leave, paid holidays, paid jury duty leave and all hours actually worked.**

Union position: *Modify Article 20, § 1 to read*:

§ 1.0. PTO Allowance. All full time and part time employees shall be granted Paid Time Off with pay and benefits based upon their length of continuous service with the Medical Center in accordance with:

Years of Continuous Service	**Time Off**
Less than six (6) years	**124** hours (4.7692 hrs/pay period)
At least six (6) but less than eleven (11) years	**148** hours (5.6923 hrs/pay period)
At least eleven (11) but less than sixteen (16) years	**172** hours (6.6154 hrs/pay period)
At least sixteen (16) but less than twenty (20) years	**212** hours (8.1538 hrs/pay period)
At least twenty (20) years	**252** hours (9.6923 hrs/pay period)

PTO accrues and is credited to eligible employees each pay period, based upon their years of continuous service with the Medical Center as of that date. An employee may not maintain more than forty (40) hours more than the number of hours of their **annual PTO accrual** and PTO in excess of this carry over is forfeited **except for any time PTO hours have been denied and/or cancelled by the Employer. When an employee accrues above the maximum (time off per year plus 40 hours), they shall be paid out the additional hours during the next annual PTO cash out periods for these excess hours._**

In order to be eligible for full PTO earning, an eligible employee must have worked a total of at least seventy two (72) hours during the immediately preceding two week pay period. Eligible employees who fail to work the required number of hours shall be entitled to a pro-rated PTO based upon the ratio of the number of hours worked up to seventy-two (72). For purposes of this section, hours worked are defined **per Article 11, § 6.**

There are several significant differences in the proposals.

The initial issue in dispute involves the maximum number of hours of PTO that may be credited to an employee's account. The parties have agreed that as a general rule an employee

may not have more than 40 hours in excess of their annual earning amount. As an exception, WSMC agrees to allow an employee to exceed this level if previously approved PTO time is subsequently cancelled by WSMC. The WSMC proposed exception ensures that if an employee had received approval for the use of PTO, the later cancelling of that PTO approval by WSMC would not cause that employee to lose that PTO.

The MNA wants to extend this exception to hours that have been *"denied or cancelled by the Employer*." The use of a 'denied" exception is not workable, since merely asking for PTO at a time when it could not be granted would allow essentially unlimited PTO carry over. It would create an 'exception' that could swallow the general rule.

The second issue involves the treatment of banked PTO hours in excess of agreed levels. The purpose of PTO is to provide employees reasonable time off of work to rest and relax or to take care of matters such as illness that cannot be taken care of outside of normal working hours. This time off is with pay to ensure that an employee's normal pay levels are maintained when they are absent from work, and was never intended to be an additional source of income. The hospital predicts that "Once reasonable levels of PTO earning are implemented, . . . employees will have any difficulty scheduling and using available PTO time." A potential loss of PTO will "prompt employees to appropriately utilize and better monitor their PTO banks" without undue hardship.

The third issue involves the counting of "hours" for purposes of PTO earnings. WSMC has included specific language that continues to count all of the paid but unworked time that is included in the language of Article 11, § 6.

The most important difference between the proposals is the amount of PTO to be credited at the agreed upon length of service periods.[59] A primary goal of WSMC is to have a PTO

[59] The MNA revised proposal agreed with the number of years of service needed to reach a new level that had been proposed by WSMC.

earning plan that will support its need to recruit and retain new employees. The WSMC proposal recognized that starting employees should be provided with an appropriate level of PTO as of their start date with an additional amount added after establishing that they intend to be permanent employees by the completion of six years of service. The additional PTO increases based upon longevity of employment are more modest, since significant differences in benefits provided to employees performing the same job should be avoided. The PTO earning levels from the WSMC proposal would have the following impact on current employees:

Less than six years	120	27 employees	3,240 hours
Six to eleven years	160	14 employees	2,240 hours
Eleven to sixteen years	184	8 employees	1,504 hours
Sixteen to twenty years	200	8 employees	1,600 hours
Twenty years	208	17 employees	3,536 hours

This would result in a total of 12,120 hours of PTO being earned by 74 nurses, which equates to an average PTO accrual of 163.78 hours per nurse and converts to an average of 4.09 weeks of PTO per employee if employees are working 80 hours every two weeks or 4.54 weeks of PTO if employees were working 72 hours every two weeks.

The PTO earning levels from the MNA proposal would have the following impact on current employees:

Less than six years	124	27 employees	3,348 hours
Six to eleven years	148	14 employees	2,072 hours
Eleven to sixteen years	172	8 employees	1,376 hours
Sixteen to twenty years	212	8 employees	1,696 hours
Twenty years	252	17 employees	4,284 hours

This would result in a total of 12,776 hours of PTO being earned by 74 nurses, which equates to an average PTO accrual of 172.64 hours per nurse and converts to an average of 4.31 weeks of PTO per employee if employees are working 80 hours every two weeks or 4.79 weeks of PTO if employees were working 72 hours every two weeks.

The levels of PTO earning proposed by WSMC are in effect for all other non-represented employees.[60]

In addition to the drastic reduction in the maximum PTO hours, the change from a guaranteed earning rate to an accrual basis creates uncertainty. The cuts represent both an extreme cut in earnings, and a fundamental change to employee work-life balance. The Hospital will undoubtedly realize substantial cost savings with its PTO proposal. But claims of pure economic need should be viewed with skepticism. The Hospital has been seeking radical changes to the PTO plan for the past decade.

Sell Back of PTO.

The last sentence of Article 20, § 8 provides that "Registered Nurses may cash in any amount of PTO, however a minimum of eighty (80) hours must remain in their PTO bank." WSMC proposes to eliminate that sentence and end the ability of employees to be paid for PTO time except when it is used to replace time that an employee would normally have worked.[61] The MNA proposes to continue the ability to cash out PTO at any time as long as 80 hours of PTO remain in the employee's bank. In the past, WSMC has allowed itself to operate as a form of bank. WSMC eliminated the ability to cash in PTO time for all other employees and does not consider it appropriate to allow this practice to continue for MNA employees.[62]

It will continue to honor the provisions of Article 20, § 6 Sell-back of PTO, which allows for the use of PTO to purchase benefits with pre-tax dollars thorough the § 125 Plan.

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[60] On March 13, 2014 the SEIU advised WSMC that its PTO proposal would be acceptable if they could be assured that they would receive equal treatment with other WSMC employees in future years.

[61] Article 8, § 5 will remain which provides for 100% payout of unused PTO if the employee has one year of service and the appropriate advance notice is provided.

[62] Allowing employees to cash out PTO outside of a § 125 plan may also create tax problems for employees, since under the constructive receipt doctrine the value of the PTO banks could be considered to be taxable income to the employee if they have a right to receive it at any time.

Recommendation:

The fact finder recommends that **neither party's position** on Article 20 prevails in its entirety, The PTO Bank Limit should be at 40 hours, as that will be symmetrical with the other employees at this facility. The Earning Basis should be based on the Union's language. Sell back/cash in should be made uniform with the other employees of this employer. In that context, internal comparability is an important value. The Employer's position on the amount of PTO time earned is adopted as my recommendation.

11. **Work Rules, Schedules, and Loads — Article 12, § 2**

Current contract: Before preparing and posting the final schedule...(a)(2) The manager may then schedule casuals for up to two shifts per four (4) week schedule if ten (10) or more open shifts exist on the schedule.

Employer position: Before preparing and posting the final schedule.. .(a)(2) The manager may then schedule casuals for up to ~~two shifts per four (4) week scheduleif ten (10) or more open shifts exist on the schedule.~~ **40 hours per week and post the final schedule at least one week before the beginning of the schedule period.**

Union Position: Before preparing and posting the final schedule.. .(a)(2) The manager may then schedule casuals for up to two shifts per four (4) week schedule ~~if ten (10) or more open shifts exist on the schedule~~. **and post the final schedule at least one week before the beginning of the schedule period.**

WSMC must staff its shifts in an economical manner, and must have the ability to hire and utilize employees who can work vacant shifts at straight time rates. Casual employees are a normal part of any hospital's work force, and are necessary to ensure that temporary staffing needs are met and to fill schedule holes to allow employees to take PTO at desired times. In order to keep a pool of casual employees, WSMC needs to be able to offer casuals enough hours to be familiar with WSMC procedures and maintain their skills. WSMC's proposal to allow casuals to be inserted on the schedule after full time and part time employees have selected their desired hours is appropriate and should be allowed under the contractual scheduling process.

The Union is strenuous in its objection. "By allowing the Employer to schedule casual employees 40 hours a week, all respect for the Union and regular employees is lost. At bottom, the Employer's proposal is a thinly veiled attempt at eroding the bargaining unit. "

Generally, casual employees might be utilized to cover for employees on PTO. The substantial cut in PTO under either the Hospital or Union proposal should minimize the need for casual staff, not increase it. While the Union has long recognized the need for casual staff to have some guaranteed hours to maintain competency, a reasonable limit must be established.

Recommendation:

There needs to be a balance between the need to use casuals and the rights of bargaining unit members to be scheduled and work. Neither the Union's nor management's proposals strikes the proper balance. The parties need to arrive at compromise language that addresses these critical issues.

12. **Unscheduled Paid Time Off — Article 20, § 2**

- **Current Contract:** Unscheduled PTO occurrences based on calendar year.
- **Employer Position:** Unscheduled PTO occurrences based on rolling calendar year.
- **Union Position:** Maintain current contract language.

Recommendation:

Simply put, there is no reasonable interpretation of wages and benefits – the terms of the reopener – that would encompass this issue. I can't stretch the reopener that far.

Therefore, I recommend that the current contract be left in place.

13. **Scheduled PTO – Article 20, § 3**

The parties have had significant discussion regarding the scheduling of PTO time. The proposals of the parties are:

WSMC: Article 20, § 3 shall read as follows:

§ 3, Scheduled PTO:

Scheduled PTO time can be used in increments of 1.0 hours.

Priority PTO: **WSMC will endeavor to provide employees an opportunity to secure advance approval** of two (2) seven (7) consecutive day periods off or one (1) up to fourteen (14) consecutive day period off, a Registered Nurse desiring to have two (2) seven (7) consecutive day periods or one (1) up to fourteen (14) consecutive day period off between **April 1** of the current year, and **March 30** of the following year, shall, by **January 1** of the current year, submit the request to the manager. The Medical Center **will endeavor to allow** one Registered Nurse per unit, per shift, **to be approved to schedule** PTO at any given time. A "shift" for purposes of PTO shall be defined as: shifts that begin from 7 a.m. to 12:59 p.m. will be considered day shift and the majority of hours worked on or after 1 p.m. will be considered night shift. A form for this specific purpose shall be provided by the Medical Center.

Each Registered Nurse is allowed a maximum of four (4) seven (7) day choices (maximum of 28 days) during the year. Requests greater than seven (7) consecutive day period will count as two priority vacation choices. The weeks shall be listed in preferential order on the form provided by the Medical Center. **Approval of** two (2) seven (7) consecutive day periods or one (1) up to fourteen (14) day period off will not be granted if the period encompasses a holiday listed in Article 18, § 2 of this contract unless a Registered Nurse is not scheduled to work the holiday that falls within that vacation period, or if the Registered Nurse arranges coverage if scheduled to work the holiday. **Only one seven (7) day period will be approved as priority PTO during each of the peak vacation periods commencing with Memorial Day weekend through Labor Day and commencing with November 1 through January 1**. Requests received by the due date shall be processed in seniority order for each unit. A member of the Association will be present for this process. All requests will be responded to no later than **February 1** of each year.

In the event more than one Registered Nurse per unit, per shift requests the same 1st, 2nd, 3rd and 4th choice of weeks, the Manager will advise the Registered Nurse involved no later than **February 1**. To avoid such conflicts, the Registered

Nurse is expected to utilize a master time-off calendar to encourage communication and minimize conflict. It will be the responsibility of the Registered Nurse involved to resolve the issue and re-submit the forms to the scheduling office. Additional consecutive time off requested beyond the second seven (7) day period **will not be approved outside of the normal scheduling process.**

Approval of PTO requests is contingent upon the Registered Nurse having sufficient paid time off accumulated to cover the days off. It is the Registered Nurse's responsibility to monitor his/her PTO balance to ensure sufficient time is banked for the time off. In the event that he/she will not have sufficient paid leave earned, the manager will notify the Registered Nurse prior to the scheduled time off and the Registered Nurse will forfeit their vacation and be required to work. A Registered Nurse who submits a request and receives approval may not cancel the request at a later date. He/she cannot change the request, trade with a co-worker, or work during the approved time off, except for an emergency staffing situation or call-in. In the event the Registered Nurse receives PTO approval and subsequently transfers to a different shift or unit, the approved PTO shall not be revoked. The approval transfers with the Registered Nurse.

Non-priority PTO: PTO requests of any length can be submitted as the need arises through the regular scheduling process. In case of a work emergency, the approved vacation time will be rescheduled by the Employer and the Registered Nurse.

The Medical Center reserves the right to limit the number of Registered Nurses on scheduled PTO at any time so as not to interfere with Medical Center's functions and to cancel previously approved PTO requests.

PTO may be used to supplement time for all hours lost due to low census (i.e. sent home early), low census call back, negotiations, if they are cut and /or if they volunteer off. PTO used for this purpose cannot result in overtime.

MNA: Article 20, § 3 shall read as follows:

§ 3, Scheduled PTO:

Scheduled PTO time can be used in increments of 1.0 hours.

Priority PTO: **To obtain a guarantee** of two (2) seven (7) consecutive day periods off or one (1) up to fourteen (14) consecutive day period off, a Registered Nurse desiring to have two (2) seven (7) consecutive day periods or one (1) up to fourteen (14) consecutive day period off between **March 15** of the current year, and **March 14** of the following year, shall, by **January 15** of the current year, submit the request to the manager. The Medical Center **will guarantee that** one Registered Nurse per unit, per shift, **is guaranteed** PTO at any given time. A

"shift" for purposes of PTO shall be defined as: shifts that begin from 7 a.m. to 12:59 p.m. will be considered day shift and the majority of hours worked on or after 1 p.m. will be considered night shift. A form for this specific purpose shall be provided by the Medical Center.

Each Registered Nurse is allowed a maximum of four (4) seven (7) day choices (maximum of 28 days) during the year. Requests greater than seven (7) consecutive day period will count as two priority vacation choices. The weeks shall be listed in preferential order on the form provided by the Medical Center. **Only two of the weeks are guaranteed, but nothing in the agreement shall preclude a Registered Nurse from taking all of his/her PTO for vacation**. **A guarantee** of two (2) seven (7) consecutive day periods or one (1) up to fourteen (14) day period off will not be granted if the period encompasses a holiday listed in Article 18, § 2 of this contract unless a Registered Nurse is not scheduled to work the holiday that falls within that vacation period, or if the Registered Nurse arranges coverage if scheduled to work the holiday. Requests received by the due date shall be processed in seniority order for each unit. A member of the Association will be present for this process. All requests will be responded to no later than **March 1** of each year.

In the event more than one Registered Nurse per unit, per shift requests the same 1st, 2nd, 3rd and 4th choice of weeks, the Manager will advise the Registered Nurse involved no later than **March 1**. To avoid such conflicts, the Registered Nurse is expected to utilize a master time-off calendar to encourage communication and minimize conflict. It will be the responsibility of the Registered Nurse involved to resolve the issue and re-submit the forms to the scheduling office. Additional consecutive time off requested beyond the second seven (7) day period **is not guaranteed. However, extra time off will be responded to no later than forty-five (45) days before the start of the time off.**

Approval of PTO requests is contingent upon the Registered Nurse having sufficient paid time off accumulated to cover the days off. It is the Registered Nurse's responsibility to monitor his/her PTO balance to ensure sufficient time is banked for the time off. In the event that he/she will not have sufficient paid leave earned, the manager will notify the Registered Nurse prior to the scheduled time off and the Registered Nurse will forfeit their vacation and be required to work. A Registered Nurse who submits a request and receives approval may not cancel the request at a later date. He/she cannot change the request, trade with a co-worker, or work during the approved time off, except for an emergency staffing situation or call-in. In the event the Registered Nurse receives PTO approval and subsequently transfers to a different shift or unit, the approved PTO shall not be revoked. The approval transfers with the Registered Nurse.

Non-priority PTO: PTO requests of any length received after the January 15 deadline each year shall be granted on the basis of first come first served according to unit staffing needs. In any event, a registered Nurse must notify the Medical Center at least sixty (60) days prior to the commencement of the

proposed PTO and the Medical Center shall notify the Registered Nurse, in writing, no later than forty-five (45) days from the commencement of the PTO period of approval of disapproval of the proposed PTO. Requests submitted less than sixty (60) days prior to the commencement of the proposed PTO may be granted as department staffing allows. In case of a work emergency, the approved vacation time will be rescheduled by the Employer and the Registered Nurse.

The Medical Center reserves the right to limit the number of Registered Nurses on scheduled PTO at any time so as not to interfere with Medical Center's functions. However, at least one (1) Registered Nurse per unit per shift may be scheduled off on PTO for vacation at any given time. The Medical Center will attempt to allow for two (2) medical/surgical nurses to be off at the same time where circumstances permit.

A textual difference between the proposals is that WSMC desires to eliminate reference to "guaranteed" PTO. WSMC has the obligation to approve advance PTO requests in a timely manner, and to make subsequent monthly schedules with due consideration of previously approved PTO time. Use of the phrase "approved" more properly describes the scheduling process and should be used rather than guarantee.

A significant difference between the parties is the proposal by WSMC to create two peak vacation periods, with the first the summer period between Memorial Day and Labor Day and the second the holiday and hunting period between November 1 and January 1. Those are the times that most employees want some vacation, and restricting the priority approval process to one week at a time during each period allows all employees an opportunity to have vacations.[63]

A final difference is PTO scheduling after the priority process has been completed. The new scheduling procedure builds in a process for non-priority PTO days to be requested and approved as part of normal monthly schedule. This would allow nurses the flexibility to request time off for needs that arise and would give WSMC flexibility to more appropriately plan staffing needs. That process should be utilized and redundant language eliminated. The WSMC **14.**

Recommendation

On balance, the employer's position will give it the flexibility it needs to adjust operations to a new reality8. The proposal accomplishes that goal and should be implemented.

[63] The present scheduling system is unduly favorable to senior employees and needs to be modified.

Reopener as a Result of Improved WSMC Finances

Employer Position: WSMC must agree that the finances of the Hospital have improved in order to trigger reopener provision.

Union Position: Reopener is triggered by improved finances of WSMC, to the extent that the concessions negotiated in 2013 are no longer necessary for efficient operation of the Hospital.

While the specific outcome of the present reopener negotiation remains uncertain, one thing is clear: the Hospital will walk away with significant cost-savings from its employees. The Hospital's demands have always been based on economic need. The reopener provision see s to hold the Hospital accountable to its claim.

Recommendation:

The Union deserves parity with other bargaining units and the unrepresented employees. If other bargaining units get improved economics, this unit should too. It also needs the ability to reopen, if and when the fortunes of the facility improve. The fact finder recommends the union position.

THE LEGAL PICTURE

The legal framework and controversy.

This whole dispute came out of a contract reopener.

The Union argues that the subjects of the reopener are carefully circumscribed, and that it has no obligation to discuss them. Conversely, it asserts that the employer is seeking to reopen terms and conditions of employment that are settled. It also asserts that management has unilaterally altered the terms and conditions, and committed multiple unfair labor practices.

As an initial observation, fact finding is *not* the forum to address those issues. To be sure, the Union can file a grievance which would be heard in a labor rights arbitration; and it has filed an unfair labor practice charge which would be determined by the Bureau of Employment Relations.

Those forums still exist, and the fact finder is not offering any disposition of them. Someone else can make those decisions. This is noted, however, as it provides context.

Reopener and bargaining:

In a general sense, the Public Employment Relations Act is patterned after the National Labor Relations Act. To a large extent, the Bureau of Employment Relations tracks, or at least uses as a touchstone, decisions arising thereunder.

Under § 9(a) of the NLRA, a bargaining obligation is established. And per §8 (a) (5) there is a duty to bargain. In a generic sense, §8(d) requires employers and unions to meet and confer in good faith respecting wages, hours and other terms and conditions of employment. One of the cardinal obligations is to not make unilateral changes in conditions of employment.

Trying to make sense of the pitfalls and consequences of a unilateral change is an extremely complex topic that we need not decide here. Nevertheless, implementing unilateral changes is a tactic fraught with risks, and no such undertaking is advisable unless legal consequence are understood with certainty.

At its core, an alleged breach of the duty to bargain in good faith is a subjective inquiry, which may revolve around the actors' states of mind. It requires a mind that is open and fair, and a sincere effort to overcome obstacles that stand in the way of an agreement. A mere pretense of bargaining is insufficient, and the mind must be open to a possible solution.

Confounding that inquiry is whether a given subject is mandatory. Ordinarily, that would be a matter of statutory interpretation. However, this dispute at its core runs much deeper. There is the interplay of provision in the contract which may "merge" or "zipper" the contract – that is, provisions which might be held to be an express waiver of the statutory right and duty to confer during a contract's term, including merger clauses, management rights clauses, contract term agreements, duration and reopener provisions. Zipper clauses are an express waiver of he continuing obligation to bargain through the term of the agreement. Because a zipper clause waives rights that are based in law, a waiver will be inferred only by "clear and unmistakable language" demonstrating that intent. A duration clause defines the beginning and end of the agreement.

Reopeners are helpful when the economy is volatile and future trends unpredictable. The implication is that the rest of the contract will be left in place and in effect. This reopener does not clearly say what the parties intended if there was a failure to reach agreement under the reopener

Further, there is the very real but not always clear line between "surface bargaining" and "hard bargaining." Under the act, neither party is required to come to an agreement to a proposal, to make a concession. A determination should not turn upon the substance of the proposals. The question will be whether the respondent, as clearly proved, did not intend to bargain and did not act in good faith. Did the Respondent conduct itself so as to defeat, rather than promote agreement?

An important distinction is where the employer presents the same bargaining proposals, but does so from a sincerely held belief that the good of the enterprise required it. This is called "hard bargaining," but it is not an unfair labor practice.

Even withdrawal of proposals, or regression in proposals, may be justified if it is from a motive to garner an improved contractual position, and not from an intent to frustrate agreement completely.

Boulwarism is a comprehensive bargaining concept that describes a systematic approach to bargaining. Lemuel Boulware of the General Electric corporation —who in many respects was the mentor to Ronald Reagan – proposed that unions were unnecessary, and that they only achieved results that a well meaning employer would have arrived at anyway. After extensive research by the company, its bargaining position was given flesh, and then I would be unchanged. The theory is that it was incumbent upon the union to establish that the position was in error. Boulwarism also envisioned a publicity campaign which appealed directly to the workers, and sought to displace having to go through the union. A campaign to disparage and

discredit the union in the eyes of its constituents was considered to be anathema to the purposes of the National Labor Relations Act and an unfair labor practice.[64]

Finally, there is no clear legal definition of "impasse." If an impasse does not exist, then the employer is not free to make unilateral changes in the terms and conditions of employment. If an impasse does not exist, then the employer's ability to unilaterally implement changes is severely limited. In evaluating an impasse, the board may look at: 1) bargaining history; (2) good faith of the parties in negotiations; (3) length of negotiations;(4) importance of the issues that are in disagreement; and (5) the *contemporaneous* understanding of the parties as to the negotiation's state.

The prior three year agreement was a promise and a hope. Even as it said its term was of three years, it had these reopeners in it.

The Union argues that the expression of one thing is the exclusion of the others. In that sense, it urges that by providing for a reopener on wages, it was implicit that other matters would be left in place. As an abstract proposition, the fact finder agrees. This would seem to be within the province of the legal maxim: *Expressio unio est exclusio alterius*. Items not on the list are impliedly assumed not to be covered by the statute or a contract term. However, sometimes a list in a statute is illustrative, not exclusionary. This is usually indicated by a word such as "includes" or "such as."

The inability of the parties to reach agreement on the outstanding issues is a shared responsibility. While concessionary negotiations are always difficult, several TA's show settlement is now achievable.

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[64]*General Electric Co.*, 150 NLRB 192, 194-95, 57 LRRM 1491 (1964), enforced, 418 F.2d 736, 756-57 (2d Cir. 1969), cert. denied, 397 U.S. 965, 90 S.Ct. 995, 25 L.Ed.2d 257 (1970).

In a general sense, the Public Employment Relations Act is patterned after the National Labor Relations Act. To a large extent, the Bureau of Employment Relations tracks, or at least uses as a touchstone, decisions arising thereunder.

Further, there is the very real demarcation between "surface bargaining" and "hard bargaining." Under the act, neither party is required to come to an agreement to a proposal, to make a concession. A determination should not turn upon the substance of the proposals. The question will be whether the respondent, as clearly proved, did not intend to bargain and did not act in good faith. Did the Respondent conduct itself so as to defeat, rather than promote agreement?

Trying to discern whether there has been a breach of the duty to bargain is controversial and problematical. The Board considers the whole of the conduct, and not isolated instances. [65]

A failure to bargain in good faith was premised upon the employer's (a) failure to furnish information requested by the union, (b) its attempt to bargain with the local unions which would undermine the international's position, (c)I presentation of an insurance proposal as take it or leave it (d) an overall contemptuous approach and attitude, based on all the circumstances the Board also found that there had in fact been an absence of collective bargaining as that term was defined by the act. By locking its position down, the employer renounced collective bargaining.

[65]Although some specific actions, viewed in isolation, would not support a charge of bad-faith bargaining, the gestalt of a party's overall course of conduct may establish a violation. See *Roman Iron Works*, 275 NLRB 449, 119 LRRM 1144 (1985). Antiunion behavior away from the table may be an aggravating factor, but it alone will not establish a violation.

The Union's conduct will also be weighed in the balance. [66]So too will the employer's. Presumably, this will take into account the bargaining following this report.

I have written this section to let the parties know that it was given weight – at least as it pertains to the merits and the final outcome. These are important issue.

To conclude, lawyers will be able to argue about the commas and their clients' intentions 'til the cows come home. There is a lot to argue about, and the final outcome is in doubt.

Nevertheless, legal rights and wrongs aside, the transcendent value is the continuation of this hospital, this union, the bargaining unit and its members' jobs. Knowing that you legally had the right of way in the crosswalk doesn't change the fact that you died after you were run over by a truck. Resolving the bargaining issues is my first priority.

[66]Lareau, N. Peter, Venable, Baetjer & Howard *Drafting the Union Contract: A Handbook for the Management Negotiator* Lexis Nexis first published 1988, with annual supplements ISBN: 9780820514949 Volume1: Part 1 Fundamentals; Chapter GF Legal Parameters of Good Faith Bargaining and Volume II: Part II LAW, LOGIC, AND LANGUAGE Chapter 19 Scope of Agreement. See Hardin Patrick, Editor in Chief; Morris, Charles J. (1st & 2nd editions Editor in Chief. *The Developing Labor Law*. 3rd Ed. (1992) (Washington D.C: BNA) pp. 608-632.

THE BIG PICTURE

In passing, I note that the fact finder was in the problem solving mode. He appealed to the parties to open up to common ground. This was done with the express understanding that they were not waiving their legal rights or obligations. *Collective bargaining* is the bargaining unit's blessing and strength. And its curse in that it represents everybody within the classifications. Individuals have differing interests, and the group has diverse interests.

The Union has reluctantly come to grips with the realties that confront them. It is expected that the Employer will react in kind.

The Union and its members must recognize that this is a choice between maintenance of wages and benefits, and keeping jobs viable.

A loss of 430 jobs and of this facility would be catastrophic for the employer, the union and the community. The local economy would be hobbled, if not crushed.

Whether the Department of Health and Human Services is willing to recognize it or not, this is a critical care facility. It exists because there is a real and critical need. Driving to Ludington is not a good choice for those who are having a heart emergency in Manistee.

The Hospital provided ample evidence of changed circumstances justifying the drastic cuts it seeks a mere six months after the agreement and ratification of a three-year contract.

That there is an imminent and highly serious crisis is clear. While moving in the negotiations, the Union continues to argue that there isn't a crisis, or that it isn't as bad as the

employer claims. However, putting you head in the sand won't save anyone from the oncoming semi-truck.

This is a changing and dynamic situation. At least in and through the fact finding, negotiations were characterized by a problem solving attitude by both sides.

The existence and extent of the crisis was proved to the fact finder's satisfaction. It is not required to be an accountant to recognize it. "You don't need to be a weatherman to know which way the wind blows." – Bob Dylan, "Subterranean Homesick Blues."

The Union urges that "Perhaps most troubling about the Hospital's claim of economic distress are its most recent operating results. According to the Hospital's own report, 2012 and 2013 were the most successful years it has had since 2006 (the earliest fiscal year provided by the Hospital). In 2012, the Hospital increased its net assets by $3.345 million. In 2013, the increase was $1.59 million." It also added that : "Most striking is the Hospital's own analysis showing that if took no action and honored its obligations under the current CBA, it would still have over $7.1 million dollars in net cash/investment assets in 2018. The Hospital has a rainy day fund, and then some."

The short explanation is that the causes of these results have changed. Indeed, the accounting has changed, and the scorecard will too. More importantly, short term results do not undo the long term prospects.

While the hospital operated without critical care status in the past, it does not negate its present expenses, and the need to check a growing operating deficit.

WSMC faces significant financial challenges and must restructure its operations if it is to continue as a rural acute care hospital. The challenges that it and other small hospitals face are real and immediate as reflected by the February 26, 2014 press release that McLaren Northern Michigan will be eliminating 43 positions and reducing the hours for 100 other employees. The President of Munson Healthcare was subsequently quoted as having to deal with similar issues, and that "Changes at the federal government level will cut about $150 million over the next 10 years from our budget, so we are trying to be proactive." No immediate plans were made to cut staff, but "many cost cutting measures are being taken now to make sure that they aren't faced with a more difficult decision down the road." This was followed by the March 13, 2014 announcement that Mercy Hospital Grayling will be laying off 35 employees with the possibility that more employees could be laid off in the future. WSMC's time to take actions to secure its ability to continue to operate is now.

Prescription:

The hospital and the bargaining unit have struck an iceberg. Doing nothing is not an option. In the lifeboat in stormy weather and a vicious sea, there are just two rules in the boat: the boat will go a lot further and faster if everybody rows together in the same direction; and drilling holes in the boat is considered to be rude behavior.

Those who look at the list of issues may scoreboard. But it isn't about that. Suffice to say that the fact finder will not have to live with the consequences – it is the parties's problem, and they need to take ownership and find a solution.

Rather, the parties have closed the gap, and have had serious discussions and compromise on many issues. Even the remaining issues are closer than they were when we started.

Whether this is enough only time will tell. But the long journey must begin with a single step.

This is one of those situations where the union and its members have to weigh the wage rates and working conditions that are fair and in accord with the market, as against the need to maintain full employment. It is a stark choice. If these adjustments are not made, there may be no hospital, no jobs, no workers, no members in the union.

There is a need for unanimity. Not just of this bargaining unit, but for all employees. To escape disaster, we need solidarity, not division. A threat to one is a threat to all. The parties have a shared interest in seeking mutually beneficial solutions.

Equality of sacrifice is a stated goal, but not easy to achieve. The analysis is not just about percentages. Three percent of an elephant is not the same as three percent of a mouse. Those who are on the bottom of the wage scale have the least to give. There is an economic justification for the progressive income tax.

The fact finder's recommendations are not the only permissible outcome. There might be other equitable findings and outcomes. We need to come to terms with reality. However, that does not mean that the employer's or the union's solutions are the only ones to the crisis.

Notwithstanding the paternalistic feelings of the employer, concessionary bargaining does not mean that the Union has nothing to say or do. They have at least a voice and

can help prioritize. They have the unique insight of the people who actually do the labor. It is only through their cooperation that this organization can survive.

There is more than one way to skin a cat.

The settled issues contain extensive reductions to the overall wages and benefits of nurses, and account for substantial cost-savings to the Hospital. Most significant, by foregoing wage increases for 2013 and agreeing to the Medical Insurance changes proposed by the Hospital, the Union has agreed to the two largest cost-saving measures proposed by the Hospital.

The inability of the parties to reach agreement on the outstanding issues is a shared responsibility. While concessionary negotiations are always difficult, several TA's show settlement is now achievable. Indeed, the settled issues between the parties are the result of substantial concessions by the Union and Management.

According to the Hospital's own numbers, these two issues alone represent an immediate $2.8 million dollar savings to the Hospital.

In short, I am recommending baby steps. We may not have solved every problem. But this longest journey begins with a single step.

STANLEY T. DOBRY, Fact finder