

In the Matter of the Arbitration of a Dispute Between	
<b>OREGON STATE HEALTH &amp; SCIENCE</b>	)
<b>UNIVERSITY</b>	)
	)
Employer	)
	)
And	)
	)
<b>OREGON NURSES ASSOCIATION</b>	)
	)
Union	)
	)
	)

**Appearances:**

**Attorney Thomas Doyle**, 18765 SW Boones Ferry Rd., Ste. 200, Tualatin, OR 97062 appeared on behalf of the Oregon Nurses Association.

Oregon State Health & Science University, herein OSHU, the University or Employer, and the Oregon Nurses Association, herein ONA, the Union or the Association, are Parties to a collective bargaining agreement which provides for the arbitration of certain disputes. From a list of arbitrators provided by the Oregon Employment Relations Board, the Parties selected Paul Gordon to serve as Arbitrator in a dispute concerning Association Members as to PAYMENT provisions of Modified Operations at the University. Hearing in the matter was held virtually via ZOOM in various locations on February 16, 2022, without a Court Reporter. The hearing was recorded on ZOOM including a transcript feature which was available to the Parties. The Parties agreed to a briefing schedule with briefs being filed by April 25, 2023 when the record was closed.

The Parties stipulated to a statement of the issues as:

Was the grievance filed in a timely manner?

If so, did OHSU violate Section 7.10.2 of the CBA by curtailing nurses in Interventional Radiology and the Cardiac Cath Lab who had reported for work and not paying them for the remainder of their shifts?

If so what is the remedy?

### **RELEVANT CONTRACT LANGUAGE**

**January 4, 2021 – June 30, 2023**

#### **ARTICLE 4 – MANAGEMENT RIGHTS**

Except as may be specifically modified by the terms of this Agreement, the Employer retains all rights of management in the direction of its workforce, inclusive of those rights enumerated in ORS 243.650 through 243.782. These rights of management shall include, but not be limited to, the right

1. Direct employees.
2. Hire, promote, transfer, assign and retain employees.
3. Suspend, discharge or take other proper disciplinary action against employees.
4. Reassign employees.
5. Relieve employees from duty because of lack of work or other proper reasons.
6. Schedule work.
7. Determine methods, means and personnel by which operations are to be conducted.

#### **ARTICLE 7. HOURS OF WORK**

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**7.10 Modified Operations.** The Employer may, in its discretion, decide to modify its operations during emergencies, and periods of inclement weather conditions. During modified operations the Employer may close selected portions of its operations, redeploy or cancel schedules of staff whose classification is not a critical function as defined under the Employer's Modified Operations. In the event of modified operations being declared by the President or their designee, the following rules shall apply in lieu of the provisions of Section 7.12.3:

**7.10.1** If the employee reports for her/his regularly scheduled shift without having received, at least one (1) hour prior to the start of the employee's shift, either actual or constructive notice that his or her work area is closed, then she/he shall be paid for the full shift of work.

**7.10.2** When modified operations require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of her/his work shift. If the employee requests to stay at the work site, the Employer will make an effort to arrange overnight lodging at the work site.

**7.10.3** When the employee's work area remains open the employee shall suffer no loss of pay if she/he misses less than two (2) hours of work due to the inclement weather, provided the employee has made every reasonable effort to report to work as scheduled. Employees arriving late by two (2) hours or more shall be paid based upon actual hours worked.

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### **7.13 Shift Curtailment and Cancellation**

**7.13.1 Shift Curtailment and Cancellation.** Shift curtailment occurs when an employee does not work a portion of his or her scheduled shift due to lack of work. Nurses will be allowed to finish work for the day including charting and other documentation. In procedure units, a reasonable effort will be made to provide advance notice; however, no such advance notice is required. The Employer will not adjust the regular start time(s) of a shift(s) to avoid double back eligibility as outlined in Section 9.2. However, if an employee is curtailed during the last hour of the shift, the employee remains eligible for double back pay per Section 9.2. Employees shall not be curtailed more than once during any given shift. Employees may utilize accrued leave or leave without pay, at the employee's discretion, for all curtailed hours.

**7.13.2 Shift Cancellation.** A shift cancellation occurs when an employee does not work any portion of the scheduled shift because of lack of work. The Employer may place the Adult Critical Care and Labor & Delivery employees on-call consistent with the provisions of Article 7.6.3. Other employees may choose to be on-call at the Employer's request, or remain at home using accrued leave or leave without pay at the employee's discretion.

**7.13.3 Report Pay and notice requirements.** An employee who reports to work for a scheduled shift without having received notice of shift cancellation or is curtailed will be paid for a minimum of four (4) hours or one-half (1/2) of her/his scheduled shift, whichever is greater. An employee who receives notice of shift cancellation at least two (2) hours prior to the beginning of the scheduled shift is not entitled to any minimum pay for the scheduled shift. An employee who receives notice of shift cancellation prior to reporting to work but less than (2) hours prior to the beginning of the scheduled shift will be paid for a minimum of two (2) hours. The obligation to pay under this paragraph will

not apply when interruptions of work are caused by a condition leading the Employer to declare modified operations, except as provided in Section 7.10. Nothing herein is intended to deny the Employer the right to require the employee to work during the period for which the employee is being paid.

\* \* \* \* \*

## **ARTICLE 22. GRIEVANCE AND ARBITRATION**

**22.1 General Provisions.** The grievance/arbitration procedure provides the means by which disputes or problems between the parties concerning the application, meaning or interpretation of this Agreement are to be resolved. Meetings to discuss a grievance are encouraged at each step of the process in order to resolve problems at the lowest level possible.

**22.2 Time Limits.** An alleged violation of this Agreement must be presented to the employee's manager as set forth in Section 22.3 below within thirty (30) days from the time the employee had knowledge, or in the normal course of events should have had knowledge, of the occurrence which created the problem, except as follows:

\* \* \* \* \*

Time limits specified in this article must be observed unless extended by mutual agreement of the parties in writing.

### **22.3 Grievance Procedure.**

Prior to formal grievance – nurse and manager. Except in cases of documented discipline or grievances that affect at least five (5) nurses on two (2) or more units, which shall be initiated directly at STEP 1, the employee will first attempt to resolve the problem with the employee's manager. When the employee brings the matter to the manager's attention, the employee must identify the matter as a potential grievance. When notified, the manager will schedule a meeting with the employee within ten (10) days of notification. The nurse will be permitted to bring a nonparticipating witness to the meeting if he or she so desires. The manager will respond in writing within fifteen (15) days following the meeting and the written response will include notification of the employee's right to share the response with his or her representative, consult with an Association representative and file a grievance within fifteen (15) days. The response shall not violate any provision of this Agreement.

STEP 1. If the matter is not resolved through the attempted resolution with the manager, the employee, or the Association on behalf of the employee or group of employees, shall, within fifteen (15) days after receiving the manager's response or within fifteen (15) days of the response being due, present the grievance in writing, on the Association's official grievance form, complete with all the information required on the form, to the employee's division director or designee. The written grievance statement shall include:

- a. The date the grievance occurred;
- b. A description of the problem;
- c. The contract provision alleged to be violated; and
- d. The remedy sought.

Grievances that affect five (5) or more nurses on two (2) or more units shall, in addition to the information above, also include:

- e. The unit(s) impacted;
- f. An explanation of how the above number of nurses/units are affected.

The division director or designee shall schedule a meeting with the grievant within fifteen (15) days of receipt of the grievance and then respond in writing within fifteen (15) days of the meeting. If a response is untimely, the grievance will be considered automatically elevated to STEP 2.

STEP 2. If the grievance is not resolved at STEP 1, the employee or the Association on behalf of the employee shall submit the written grievance and the response from the division director at STEP 1 to Human Resources. The grievance must be submitted within fifteen (15) days of the receipt of the response at STEP 1 or of automatic elevation from STEP 1. The Chief Nurse Executive or designee shall schedule a meeting with the grievant within fifteen (15) days of receipt of the grievance and then respond in writing within fifteen (15) days of the meeting. If a response is untimely, the grievance will be considered automatically elevated to STEP 3.

The parties shall meet and discuss the grievance at each step as described above unless such meeting is mutually waived. Other meetings may be held by mutual agreement.

STEP 3. Arbitration. If the grievance is not resolved at STEP 2, the Association shall, within fifteen (15) days of the receipt of the response at STEP 2 or of automatic elevation from STEP 2, notify Human Resources that it wishes to submit the grievance to arbitration. Either the Association or the Employer may advance a grievance to arbitration; an individual employee or group of employees may not pursue arbitration without the Association's authorization.

- a. The parties agree that whenever feasible a pre-arbitration meeting will be held by the parties to attempt to formulate a submission agreement to the arbitrator.
- b. Selection of the arbitrator. The stated preference of the parties is to select an impartial arbitrator by mutual agreement. If the parties are unable to reach mutual agreement, then the arbitrator shall be chosen by the parties from an agreed list of

arbitrators. Said list will consist of seven (7) names compiled by the parties. The parties shall alternately strike one (1) name each from the list (the first strike being determined by the flip of a coin) and the last name remaining shall be the arbitrator.

The parties agree to replace an agreed upon arbitrator from the list within 30 days after it is discovered that the arbitrator is no longer available. The parties may at any time, by mutual agreement, remove and replace one or more arbitrators from the list.

c. Replacement. Either party may ask for the replacement of an arbitrator from the panel. Such a request shall be in writing. In the event of the need to replace a member of the panel of arbitrators, such replacement shall be made by the parties within fifteen (15) days. If the parties cannot agree upon a successor within the time specified, the successor shall be selected from a list submitted by the Employment Relations Board by a process identical to that of selecting an arbitrator from the panel for a specific grievance: The parties shall alternately strike one (1) name each from the above list (the first strike being determined by a flip of a coin) and the last name remaining shall be the impartial arbitrator.

d. Bifurcation. Upon motion by either party to bifurcate the hearing on procedural or substantive arbitrability issues, the arbitrator will issue a decision on the arbitrability issue after the parties brief the issue in writing (i.e., without a hearing). The arbitrator will issue the decision on the arbitrability issue a reasonable time in advance of any potential hearing on the merits

e. The parties agree that the decision or award of the arbitrator shall be final and binding on each of the parties and that they will abide thereby. The arbitrator shall have no authority to add to, subtract from, or change any of the terms of this Agreement. The arbitrator shall render a decision within thirty (30) days of the arbitration hearing.

f. The arbitrator's fee and expenses shall be paid by the non-prevailing party. If, in the opinion of the arbitrator, neither party can be considered the non-prevailing party, then such expenses shall be apportioned as in the arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

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### **BACKGROUND AND FACTS**

Oregon Health & Science University, OHSU, operates hospitals and multiple health clinics. Several labor unions represent the majority of the employees. The Oregon Nurses Association, ONA, represents about 3,000 of the employees. Among those employees are nurses in the Interventional Radiology, IR, and Cardiac Cath Lab, Cath Lab, units. IR and Cath Lab are procedural units in that they perform procedures on patients and do not house patients 24-hours a day. Nurses in both units are in critical function positions with a regular FTE.

The IR unit provides care to patients undergoing non-invasive procedures for any medical issues from the head to the toe that do not involve the heart. There are five IR procedure rooms at OHSU's main campus and an additional IR procedure room on the Waterfront called CHH2. The Cardiac Cath Lab is a procedural unit that provides care to patients undergoing non-invasive heart-related procedures.

Scheduling of shifts within these units is during weekday daytime hours. Patients are scheduled for these procedures throughout the day beginning with the morning and then sequentially throughout the day. There is some variance in the number of procedures that are scheduled and, consequently, the shifts and hours that are available for the nurses to work. IR and the Cath Lab may close rooms for a number of reasons including physician availability, anesthesia staffing, staff availability, patient volume, impact of staffing of protected leaves, equipment downtime, vacations, report resources, etc.

The Parties' previous collective bargaining agreement had some differences with the later one concerning inclement weather conditions. The later contract was negotiated, at least in part, during the COVID-10 pandemic. The changes in various provisions relating to inclement weather and modified operations were made during negotiations with very little discussion. They derived in part from provisions in another union's collective bargaining agreement. The language of the Inclement Conditions in Sec. 7.10 was changed to have the contract language address closures due not just to inclement weather but to other emergency situations and the COVID-19 pandemic as well. In March 2020, while contract bargaining was underway, Oregon's Governor declared a state of emergency concerning the COVID-19 pandemic. At the same time, she declared a temporary moratorium on elective procedures in hospitals.

The previous agreement read in pertinent part:

**7.10 Inclement Conditions.** The Employer may, in its discretion, decide to close selected portions of its operations due to inclement weather. In the event of inclement weather, the following rules shall apply in lieu of the provisions of Section Joint 7.12.3:

**7.10.1** If the employee reports for her/his regularly scheduled shift without having received, at least one (1) hour prior to the start of the employee's shift, either actual or constructive notice that his or her work area is closed, then she/he shall be paid for the full shift of work.

**7.10.2** When weather conditions require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of her/his work shift. If the employee requests to stay at the work site, the Employer will make an effort to arrange overnight lodging at the work site

The previous agreement also addressed shift curtailment:

**7.12.1 Shift curtailment.** Shift curtailment occurs when an employee does not work a portion of his or her scheduled shift due to lack of work. Shift curtailments may not be implemented for the beginning of the shift, unless by mutual agreement. In non-procedure units, an employee's shift may be curtailed with a minimum of one (1) hour's notice. In procedure units, a reasonable effort will be made to provide advance notice; however, no such advance notice is required. The Employer will not adjust the regular start time(s) of a shift(s) to avoid double back eligibility as outlined in Section 9.2. However, if an employee is curtailed during the last hour of the shift, the employee remains eligible for double back pay per Section 9.2. Employees shall not be curtailed more than once during any given shift. Employees may utilize accrued leave or leave without pay, at the employee's discretion, for all curtailed hours.

**7.12.2 Shift cancellation.** A shift cancellation occurs when an employee does not work any portion of the scheduled shift because of lack of work. The Employer may place the Adult Critical Care and Labor & Delivery employees on-call consistent with the provisions of Article 7.6.3. Other employees may choose to be on-call at the Employer's request, or remain at home using accrued leave or leave without pay at the employee's discretion.

**7.12.3 Report pay and notice requirements.** An employee who reports to work for a scheduled shift without having received notice of shift cancellation or is curtailed will be paid for a minimum of four (4) hours or one-half (½) of her/his scheduled shift, whichever is greater. An employee who receives notice of shift cancellation at least two (2) hours prior to the beginning of the scheduled shift is not entitled to any minimum pay for the scheduled shift. An employee who receives notice of shift cancellation prior to reporting to work but less than two (2) hours prior to the beginning of the scheduled shift will be paid for a minimum of two (2) hours. The obligation to pay under this paragraph will not apply when interruptions of work are caused by an Act of God, except as provided in Section 7.10. Nothing herein is intended to deny the Employer the right to require the employee to work during the period for which the employee is being paid.

Shortly after the state of emergency and temporary moratorium was declared, OHSU went into modified operations and OHSU's President announced that OHSU employees would continue to receive their full pay and benefits for a period of time regardless of how or when operations and schedules were affected. This became known as Leave With Pay ("LWP"). OHSU's Leave With Pay benefit was in place from March 13, 2020 through July 5, 2020.

OHSU remained in modified operations from March 2020 until January 3, 2022. During this time both the IR unit and Cath Lab units continued to operate. There were fewer patients and fewer procedures performed in the units than before the pandemic and elective procedures moratorium, and there were significant mandatory curtailments of nurses' hours. Despite this, the nurses continued to receive full pay pursuant to the Leave With Pay benefit. After the moratorium



and Leave With Pay ended on July 5, 2020, there were still smaller patient numbers in the units. Few nurses volunteered to go home early. Mandatory curtailments continued. The mandatory curtailments were greatly reduced beginning in April, 2021 as detailed below.

In January 2021 two Physicians Assistants' resignations became effective. Both PAs worked in IR at CHH2, but this added work for staff at the main campus. Due to the loss of the PAs, the other IR providers were forced to cover their workload. At the same time physician residents were required to be given more time to study for their boards and would have less time to assist with patients in the units. This resulted in a need to further reduce the number of patients who could be seen in the units. Because of the departure of the PAs, CHH2 was closed most days in January 2021. Some nurses were redeployed to ICU. One of five rooms was closed for scheduling.

The unit nurses were kept advised of these developments by detailed communications from management in November and December, 2020. Among those was a detailed plan for mandatory curtailments if voluntary curtailment, redeployments, voluntary work for EVS, or vacations did not reduce nurse numbers and hours to what was needed to handle the fewer patient procedures. CHH2 was also closed in February and March until new PAs were hired, when it opened again. In April the IR and Cardiac Cath Lab essentially returned to normal.

As noted above, these reductions in patient procedures and subsequent mandatory curtailments of nurses' shifts came at a time when modified operations were in effect. Curtailments had occurred from time to time before the pandemic and modified operations. Most, if not all, of these curtailments were of a voluntary nature whereby nurses could volunteer to leave early when curtailments were needed – particularly in IR. While mandatory curtailment was rare before modified operations, once modified operations was in place, more nurses were subject to mandatory curtailment more frequently. The increase in mandatory curtailment coincided with being in modified operations through the last half of 2020 and the first half of 2021. After July 5, 2020 and the ending of Leave With Pay, nurses had economic loss in wages due to mandatory curtailments and reduced hours. At least one had incidents of only 24 hours for a paycheck.

On May 5, 2021, the Union filed a grievance alleging that the ongoing mandatory curtailment of IR and Cath Lab nurses was a violation of Article 7.10.2. The grievance alleged:

This affects multiple nurses in at least two departments: Interventional Radiology and Cardiac Cath Lab. Per the CBA (22.3 Grievance Procedure) grievances that affect at least five nurses on two or more units go directly at Step 1. The scope of those impacted may be greater, so this grievance must cover all who are impacted.

At least since 1/1/21, nurses have been curtailed and are expected to go home when cases are done, and don't get paid for the remainder of the shift. Per CBA 7.10.2 (Modified Operations) 7.10.2: "When modified operations require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of her/his work shift."

Because OHSU is under Modified Operations, 7.10.2 applies.

The Employer denied the grievance on two grounds. In essence it first contended that it was untimely, as the grievance alleged a violation since the start of 2021 and the contract states that a grievance must be presented within 30 days of knowledge of the occurrence of the problem. It also denied the grievance on the merits, contending in essence that:

Staffing in the procedure areas is intended to flex based upon patient volume, physician cFTE, pre/post resources, hospital census, staff vacations, equipment downtime, etc., as these are direct care roles....While OHSU has been in modified operations, the limitations to volume have been based upon the usual factors but somewhat more pronounced. For example, in December 2020 the only two Physician Assistants (PA's) in IR left OHSU, and the IR faculty had to reallocate their efforts to cover this gap for several months, thus leading the unit to reduce procedure rooms by closing CHH2. During this time we were also charged with sending nurses to help staff the ICU, due to national ICU traveler shortage and ICU recruitment gaps. We also saw a significant decrease in the number of vacations that staff were requesting for the period. Based upon these factors, the IR staff was curtailed more than had been the case in the past. In past practice, staff generally volunteered for curtailment. .... The specific contract language states that employees will be paid "when modified operations require the closing or curtailing of shifts after the employee reports to work." This language was not intended to be a substantive change; it essentially substituted in modified operations for inclement weather. It does not mean that employees must be paid whenever they are curtailed and modified operations are in effect. The employees in EP-CCL and IR are being curtailed as part of normal operations. As background, these are units that must staff in the most difficult situations as they provide STEMI and Stroke interventional services, and help to provide care for our most complex patients in the hospital. These units hold space in their schedules every day for critically ill inpatients that need the diagnostic or interventional services in order to advance their care and be discharged from the hospital. It is expected of the unit managers that they are staffing the unit efficiently. Therefore the staffing plan must take into consideration physician availability, patient volume, staff availability (protected leaves/vacation), equipment downtime, pre/post nursing resources, anesthesia availability, and other usual factors of procedural operations, regardless of whether modified operations is in place. This is a nationally established expectation, and the hospital benchmarks [of] the units [are] based upon staffing efficiency nationally. Therefore, the curtailments here are not attributable to modified operations having been declared.

The Parties did not resolve the grievance, leading to this arbitration. Further facts are contained in the **Discussion**.

## **POSITIONS OF THE PARTIES**

### **The Association**

In summary, the Association argues that the grievance is timely and that the mandatory curtailments without payment for a full shift under Sec. 7.10.3 are continuing violations. It argues that this violation renews each time the Employer fails to pay for the entire shift. While the limitation period under the contractual grievance procedure very well may limit the scope of any available remedy to the 30 days before the grievance being filed, that time period does not render the grievance procedurally non-arbitrable.<sup>1</sup> It argues that the practice being challenged had been going on since at least January 1, 2021. Evidence at the hearing was that the practice had been going on since the end of the LWP on July 5, 2020. Yet, it is well settled that a repeated failure to pay wages is a continuing violation. Each new failure to pay nurses for their full shifts is a new violation and not procedurally barred. The Association concedes that that doctrine does not extend the timeline on violations that occurred prior to the grievance timelines.

The Association argues that there is considerable arbitral authority applying the “continuing violation” doctrine in grievances involving employee compensation, citing multiple arbitral authorities, in particular

“Many arbitrators have held that ‘continuing violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day –each day there is a new ‘occurrence’; these arbitrators have permitted the filing of such grievances at any time, this not being a violation of the specific time limits stated in the agreement (although any back pay ordinarily runs only from the date of filing).” Hillel Day School, 89 LA 907 (1987).

It contents the grievance is arbitrable as a continuing violation, although the relief requested may be limited to the date of filing.

The Association also argues that the contract language requires full shift pay when there is a mandatory curtailment during Modified Operations. When OHSU was placed under Modified Operation status it was not done on a unit-by-unit basis but is facility wide. When OHSU is under Modified Operations, it has the ability to entirely close certain non-critical units and entirely cancel schedules of non-critical staff that are not critical function. OHSU retains the ability to curtail nurses throughout OHSU, subject to the terms of Article 7.10.

7.10 Modified Operations. The Employer may, in its discretion, decide to modify its operations for safety and security reasons, including natural disasters pandemics, local and regional emergencies, and periods of

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<sup>1</sup> The Association’s brief mis-numbers the Grievance Article number. The Association brief also refers to a 21 day time limit to file a grievance, but the actual Article 22.2 of the 2021-2023 contract provides for a 30 day period.

inclement weather conditions. During modified operations the Employer may close selected portions of its operations, redeploy or cancel schedules of staff whose classification is not a critical function as defined under the Employer's Modified Operations. In the event of modified operations being declared by the President or their designee, the following rules shall apply in lieu of the provisions of Section 7.12.3:

7.10.2 When modified operations require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of her/his work shift. If the employee requests to stay at the work site, the Employer will make an effort to arrange overnight lodging at the work site.

Thus, where modified operations require closing or curtailing a nurse after the start of a shift (not just clinic nurses), those nurses are paid for the remainder of their shift.

The Association argues that the modified operations required curtailing of nurses. Prior to being under modified operations, these units did not use mandatory curtailment – they only used voluntary curtailment. Once OHSU declared modified operations, it began mandatory curtailments and subjected these nurses to mandatory loss of substantial amounts of pay. Following cessation of modified operations OHSU once again ceased use of mandatory curtailment. The contract does not require direct proof that each shift that was curtailed was a result of low patient volume. It requires connection between modified operations and the curtailment. The direct correspondence between declaration of modified operations and mandatory curtailment is compelling proof of that causation. The lower census caused by the pandemic resulted in mandatory curtailment. The grievance response also identified that the ongoing mandatory curtailment during modified operations was the result of the modification of its operations:

While OHSU has been in modified operations, the limitations to volume have been based upon the usual factors but somewhat more pronounced. For example, in December 2020 the only two Physician Assistants (PA's) in IR left OHSU, and the IR faculty had to reallocate their efforts to cover this gap for several months, thus leading the unit to reduce procedure rooms by closing CHH2. During this time we were also charged with sending nurses to help staff the ICU, due to national ICU traveler shortage and ICU recruitment gaps.

The downstream effect of these closures and redeployments, as well as volume limitations, were all part and parcel of modified operations. According to the employer, these modifications caused the curtailments. Sec.7.10.2 entitles nurses to full shift pay where the curtailment is the result of the modified operations.

It is notable that the employer failed to produce any data that would lead to the opposite conclusion, only vague, anecdotal references. The employer did not produce any evidence that would establish that mandatory curtailments did not occur before these PA's left (they did) and did not produce any evidence that they stopped after the provider situation was rectified (they did

not). The Association is entitled to the un rebutted presumption that there is no proof the mandatory curtailments were caused by the PA's departing two months. These PA's had nothing to do with Cath Lab or IR caseloads. The cases were done by residents when the PA's left. The compelling correspondence that mandatory curtailment occurs with modified operations and does not occur without modified operations should be credited and a violation should be found.

The Association further argues that Article 7.10 applies to all bargaining unit nurses. The Employer's assertion, that in 2020 the Parties agreed without comment or discussion to exclude nearly the entire bargaining unit from the modified operation article of the contract, is nonsense. The basis for the employer's Hail-Mary argument that the entire modified operations article does not apply to the entire hospital is because all nurses at the hospital are designated as critical function. Thus, according to the hospital, any nurses who are critical function are not covered by 7.10.2.

But the Employer's manager agreed that 7.10.1 and following all apply to nurses in the Hospital. Her testimony made it clear that the modified operations provisions are used by all units in the hospital in terms of shift cancellation and curtailment – especially around inclement weather. The Employer's chief negotiator agreed he would receive an outraged response if he had explicitly tried to exclude the entire bargaining unit from the modified operations protections. This was not discussed at the table. No one, other than the Employer's counsel in preparation for this arbitration, ever considered such an evisceration of the contract could be conceived. The clear contract language does no such thing. The critical function language is only present in one sentence that grants the employer a right under the contract to close units or cancel shifts. Arguably, under the employer's reading of the sentence, it can only close or cancel shifts for non-critical function staff: "During modified operations the Employer may close selected portions of its operations, redeploy or cancel schedules of staff whose classification is not a critical function as defined under the Employer's Modified Operations." By implication, critical function staff cannot have their units or schedules cancelled.

The unit closer, shift cancellation and redeployment language does not speak to the subject of this arbitration – curtailments, which are defined as sending someone home after their shift has begun. See Article 7.13. Therefore, there is no limitation on the language of 7.10.2 to only non-critical function nurses. While the Hospital is under modified operations, if those modified operations require closing or curtailing, the nurse is entitled to full shift payment. There is no limitation that this only protects non-critical function nurses. The entire bargaining unit is critical function. The employer's arguments should be rejected.

The Association requests an order finding that the contract was violated and a make whole award for all effected nurses at OHSU.

## **The Employer**

In summary, OHSU argues that the grievance was not filed in a timely manner. . Article 22.2 provides that "[a]n alleged violation of this Agreement must be presented to the employee's manager as set forth in Section 22.3 below within thirty (30) days from the time the employee had knowledge, or in the normal course of events should have had knowledge, of the occurrence which

created the problem...” The Union’s Step 1 grievance itself states that it “affects multiple nurses in at least two departments” and specifically references the contract language requiring the grievance to be filed directly at Step 1. The Union was required to file the grievance at Step 1 within 30 days of when the mandatory curtailment occurred. It does not matter that a group of nurses presented a letter to White about this issue on April 16, 2021. The grievance asserts the curtailment had been occurring “at least since 1/1/21.” Therefore, in order to be timely, the Union should have filed its grievance no later than January 31, 2021 (or by February 3, 2021, since the contract did not go into effect until January 4, 2021). The grievance was filed May 5, 2021. It is only timely with regard to alleged contract violations that occurred on or after April 5, 2021.

The Employer argues that both White and Schuette credibly testified that the curtailment ended when CHH2 reopened at the beginning of April 2021. The testimony of the Union’s witnesses regarding when the curtailment began and ended was extremely vague and contradicted one another. Union witnesses offered nothing more than mere speculation as to when the curtailment started and ended. Conversely, OHSU’s witnesses were much more specific about when the curtailment occurred. White testified that mandatory curtailment substantially decreased after OHSU was allowed to resume elective procedures in July 2020. Curtailment started again in January through March 2021 due to the departure of the two IR physician assistants, which resulted in the closure of CHH2 for portions of those three months. She further testified that the curtailment stopped in April 2021 when CHH2 reopened again. Scheutte’s testimony was similar. The Union failed to present any evidence of mandatory curtailment that occurred on or after April 5, 2021. Therefore, the grievance must be dismissed because it is untimely.

The Employer also argues that the Union has not met its burden of proof and has failed to prove a contract violation. The grieving party bears the burden of presenting sufficient contractual support to prove its contention and there is a presumption of contract compliance, citing arbitral authorities. The Union must establish that OHSU violated Section 7.10.2, the only contract provision cited by the Union in the grievance as its basis. The Union failed to carry its burden.

The curtailment in the IR and Cardiac Cath Lab was not a result of OHSU being in modified operations. Section 7.10.2 only applies “[w]hen modified operations require the closing or curtailing of operations after the employee reports to work...” The evidence established that the curtailment was due to the resignation of the PAs – not because OHSU was in modified operations. Two IR physician assistants resigned from their employment with OHSU effective at the end of December 2020, which necessitated the closure of CHH2 for much of the first three months of 2021, resulting in curtailment. Although the physician assistants were not assigned to CHH2, they handled all of the in-patient consultation work and also saw out-patients at Marquam Hill. When the physician assistants left, it resulted in the IR doctors at CHH2 having to perform the responsibilities of the physician assistants, which necessitated the closure of CHH2 for much of the first three months of 2021. The closure of CHH2, which resulted in the curtailment, was a direct result of the physician assistants leaving – not because of the pandemic or because OHSU was in modified operations. White sent an email to the IR staff on November 12, 2020, letting them know that the two physician assistants “will be leaving IR at the end of the year” and, also, that there would be less help from physician residents due to a new IR residency program which gave residents more time to study for boards. She sent another email to IR staff on December 1, 2020, notifying them that “CHH2 will be closed in January with the exception of the first and third

Wednesdays” and that “[t]his closure is due to the departure of our APPs and the plan to ensure optimal patient experience...by the IR providers.” White sent another email to the IR staff on December 30, 2020, letting them know that “we will have excess RT and RN staff as the result of our CHH2 closure” and sharing her plan “for addressing days we are overstaffed in IR.” White provided alternatives to nurses who did not want to be curtailed by offering to send them to OHSU’s pre-medicine clinic to help with COVID testing or allowing them to train to redeploy to EVS and be paid at their same hourly rate. White sent another email to the IR staff on December 30, 2020, letting them know that “we will have excess RT and RN staff as the result of our CHH2 closure” and sharing her plan “for addressing days we are overstaffed in IR.” (Ex E-5) In the email, White provided alternatives to nurses who did not want to be curtailed by offering to send them to OHSU’s premedicine clinic to help with COVID testing or allowing them to train to redeploy to EVS and be paid at their same hourly rate. The nurses were offered alternatives to curtailment and were not actually mandatorily curtailed.

Nurses at OHSU have been curtailed at other times due to a lack of providers, such as in 2019 when curtailed nurses were allowed to use their paid time off accruals to cover their curtailed hours but were not paid for their full shifts. In 2020 as a result of wildfires nurses who were mandatorily curtailed and sent home were not paid for their full shift.

IR and the Cardiac Cath Lab may close rooms for a number of reasons including physician availability, anesthesia staffing, staff availability, patient volume, impact of staffing of protected leaves, equipment downtime, vacations, report resources, etc. None of those reasons are due to modified operations. Schuette testified that all of OHSU’s procedural units “have curtailment as a normal course of business.” A Union witness acknowledged that nurses in the Cardiac Cath Lab occasionally were mandatorily curtailed prior to OHSU going into modified operations due to the pandemic. White testified that, prior to the pandemic, there had been curtailment in the IR for many reasons including due to a reduced number of patients, a temporary shortage of providers, and equipment failures. There always had been enough nurses who volunteered to go home rather than having to mandate someone to go home. The Union’s argument seems to simply be that, anytime OHSU is in modified operations, it is required to pay nurses who are mandatorily curtailed for the remainder of their shift even if the reason for the curtailment has nothing to do with OHSU being in modified operations. That is not what the contract language says, and the Union presented no evidence establishing that was the parties’ intent when the contract language was negotiated.

The Employer contends that there has always been language in the contract addressing mandatory curtailment for nurses – Section 7.13 of the parties’ current CBA and Section 7.12 of the prior CBA. That is exactly the language OHSU followed in this situation. The language of Section 7.10 was expanded by the Parties when the current contract was negotiated to address closures due to other types of emergencies. The contract language never was intended to mean that nurses would be paid for their full shift when they were curtailed for reasons having nothing to do with OHSU being in modified operations.

The Employer further argues that Sec. 7.10 only applies to nurses whose classification is not a critical function. The Employer’s Modified Operations policy defines “critical function” as “[a]ny activity required to remain operational during Modified Operations.” Both the IR and Cardiac Cath Lab are critical function units and were required to remain operational at all times

while OHSU was in modified operations. All of the IR and Cardiac Cath Lab nurse positions are critical function positions.

Only the language of the Management Rights clause and Sec. 7.13 applies to the curtailment of those nurses. Article 4 gives OHSU the right to “[r]elieve employees from duty because of lack of work or other proper reasons.” Sec. 7.13.3 provides that a nurse who reports to work for a scheduled shift and is curtailed will be paid for a minimum of four hours or one-half of their scheduled shift, whichever is greater. This was done here. And, nurses were given the option of training for and working in EVS, redeploying to other units, and using their paid leave accruals rather than taking part of their shift unpaid. There was no contract violation.

The Employer also argues that the Union failed to present any evidence of mandatory curtailment or of damages allegedly incurred by the nurses. Alternatives with full pay were provided to nurses who did not want to be curtailed. No nurses actually were mandatorily curtailed. All of them could have avoided curtailment by redeploying to EVS. They chose not to.

The Union failed to present any evidence of dates and times that nurses were sent home from work early or of curtailed hours for which they should have been paid. The Union admitted it had no evidence of that. A party must prove its claim for damages and that monetary relief will be denied where the evidence is too speculative, citing arbitral authorities. The Union introduced an email from Frederickson dated April 28, 2021, regarding time corrections. All of those time entries were from 2020, which pre-dated the Modified Operations language added to the collective bargaining agreement in 2021.

The Employer requests that the grievance be dismissed in its entirety.

## **DISCUSSION**

The Employer has raised the issue of timeliness in the filing of the grievance. The collective bargaining agreement at Sec. 22.3 has a 30 day time limit to file a grievance from the time the employee had knowledge, or in the normal course of events should have had knowledge, of the occurrence which created the problem. The grievance was filed on May 5, 2021. This was initiated at Step 1 in the grievance process at it affected five or more nurses on two or more units. The Parties had informal discussions about the matter in mid-April. The grievance contended that at least since 1-1-21, nurses had been curtailed and are expected to go home when cases are done.

The Employer asserts that in order for the grievance to be timely it should have been filed by February 3<sup>rd</sup> at the latest, as the contract was effective January 4, 2021. It argues that the grievance is only timely as to alleged violations after April 5, 2021. The Union counters that the mandatory curtailments were each a separate act and were thus continuing violations and grievable, although it concedes that that doctrine of continuing violations does not extend the timeline on violations that occurred prior to the grievance timelines.



As the Union notes, arbitrators can apply the continuing violation doctrine in matters of wages and compensation. In this case there are multiple incidents of mandatory curtailments which occurred on various days for various lengths of time during varying time periods. Each here occurred while modified operations were in effect. The patient numbers varied due in large part to the pandemic and its aftermath while modified operations were in effect. There was no solid predictability as to when and what hours or number of procedures would result in curtailments. These are events that constitute a series of new acts.<sup>2</sup> I am persuaded that each act of curtailment while in modified operations was a separate and distinct event and constitute a continuing alleged violation. When the Union filed its grievance on May 5, 2021 it had knowledge or should have had knowledge that each curtailment had occurred. While the grievance alleges violations from at least January 1, 2021 (which indicate times even prior to that date), Article 22, Sec. 22.2 limits the grievance time period to occurrences within 30 days. Thus, the grievance is timely concerning the mandatory curtailments occurring on and after April 5, 2021.

The Employer argues as to timeliness that mandatory curtailments ended at the beginning of April 2021, that the Union failed to present evidence that curtailments occurred on or after April 5, 2021, and that the Union has failed to prove any damages resulting from any such curtailments. The Employer contends that this makes the grievance untimely. The Union contends that mandatory curtailments during modified operations continued to at least some extent during April and past then; that following cessation of modified operations, OHSU once ceased use of mandatory curtailment. As further discussed below, the matter of if a violation actually occurs and the timing of the filing of a grievance are two different things. There can be a timely grievance over a matter that later is determined to not be a violation of a collective bargaining agreement. I am persuaded that the grievance is timely even though there are issues concerning mandatory curtailments during or after April 2021 disputed between the Parties. That goes to the merits, not timeliness.

The grievance being timely as to alleged violations on and after April 5, 2021, the merits of the grievance are now addressed. The burden of proof is on the Union.

The Union's case is basically that the nurses were mandatorily curtailed while the Employer was in modified operations, the curtailments were a result of modified operations, so Section 7.10.2 requires they be paid for the remainder of their shifts. The Employer argues that the curtailments were not due to modified operations, but were because of other factors, particularly the leaving of two Physician's Assistants, and other personnel restraints. The nurses were paid as always under Section 7.13.3. The Employer also argues that there were no mandatory curtailments after the beginning of April 2021 which is the time covered by the grievance, as well as the Union not having proven any actual lost time, wages or detriment since the beginning of April, 2021. The Employer further argues that the Nurses are not even eligible for payment under modified operations because they are all critical care positions and employees.

A pivotal point of analysis here is if any mandatory curtailments after the April 5, 2021 were as a result of modified operations. OHSU was in modified operations since before April,

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<sup>2</sup> See, e.g., Richard I. Bloch, ARBITRATION: TIME LIMITS AND CONTINUING VIOLATIONS, Michigan Law Review, Vol. 98 Issue 8 (1998).

2021 until January 2, 2022, and this was due to the pandemic and the related moratorium on elective procedures. The contract states in part:

**7.10.2** When modified operations require the closing or curtailing of operations after the employee reports to work, the employee shall be paid for the remainder of her/his work shift. If the employee requests to stay at the work site, the Employer will make an effort to arrange overnight lodging at the work site.

The pandemic had a result of greatly reducing patient volume in IR and Cath Lab, and that was a cause of mandatory curtailments during modified operations. Patient volume did fluctuate during the entire time of modified operations. The Employer had to continually monitor and adjust nurses working hours, often by curtailment, to reflect this reduced patient flow as well as consider the many other factors needed to staff nurses for patient procedures. In this case the Employer points with particularity to the loss of the two PAs in January, February and March of 2021. It contends that is why there were curtailments, rather than due to modified operations. However, both circumstances of pandemic related lower volumes in IR and Cath Lab as well as normal staffing factors existed on and after April 5, 2021.

One of the most telling pieces of evidence for this is actually in the Employers grievance response, which stated in part:

While OHSU has been in modified operations, the limitations to volume have been based upon the usual factors but somewhat more pronounced. For example, in December 2020 the only two Physician Assistants (PA's) in IR left OHSU, and the IR faculty had to reallocate their efforts to cover this gap for several months, thus leading the unit to reduce procedure rooms by closing CHH2. During this time we were also charged with sending nurses to help staff the ICU, due to national ICU traveler shortage and ICU recruitment gaps.

I am persuaded that while the limitations on volume which drove mandatory curtailments was somewhat more pronounced due to the departure of the two PAs, there were still limitations during modified operations that were the result of the pandemic and the reason for putting the OHSU into modified operations. Loss of the PAs drove down patient volume even further. The loss of the PAs did not exclusively lower patient volume and available procedures. Even Management's response used the phrase "somewhat." While modified operations may not have been the exclusive reason for mandatory curtailments during and after April, 2021, modified operations was an important factor in the mandatory curtailments. Thus, modified operations did require curtailing of operations under Sec. 7.10.2 during the time period covered by the grievance.

With the grievance being timely only for matters that occurred after April 5, 2021, and the PAs departures having been resolved by April, the factors concerning the PAs departure at the beginning of 2021 actually do not impact any mandatory curtailments starting in April, 2021. Yet the lower patient volume in IR and Cath Lab and curtailments did continue as prior to the PAs' departure.

These curtailments continued after April 5, 2021. There is persuasive evidence in the record for this. The April 16, 2021 communication from the Union to management asserted that, starting in July 6, 2020 to current date, (April 16, 2021) the nursing staff has had the option of leave without pay and/or use vacation hours or comp time to cover curtailment hours. While not detailed, witness Frederickson testified that mandatory curtailments continued through May and June of 2022. Witness Martinez testified that the mandatory curtailments stopped around the time of the filing of the grievance. This indicates there were mandatory curtailments in April and into May, as the grievance was filed May 5<sup>th</sup>. Witness Gerlach testified that in September 2021 there was an increase in the number of patient scheduled cases. This indicates there were fewer before. An August 6, 2021 email from Hospital Management discussed on going COVID-19 pressures on hospital operations, patient load and staffing. Even though mandatory curtailments may have decreased significantly after the grievance was filed, I am persuaded that there were some after the grievance as filed, and that they were required due to modified operations.

The Employer argues that Sec. 7.10.2 does not apply because the modified operations under Sec. 7.10 does not apply to critical function employees such as the nurses here. Therefore, payment under Sec. 7.13.3 was proper. The employer argues the second sentence of Section 7.10 specifically states, "During modified operations the Employer may close selected portions of its operations, redeploy, or cancel schedules of staff *whose classification is not a critical function* as defined under the Employer's Modified Operations" policy. (Emphasis added). Because the modified operations language found in Section 7.10 does not apply to nurses in critical function positions, argues the Employer, then only the language of the Management Rights clause and Section 7.13 applies to the curtailment of those nurses. And, nurses were given options for other work rather than taking part of their shifts unpaid.

In this case it is clear that the nurses' positions in IR and Cath Lab are classified as critical function. But that does not resolve the issue. As the Union notes, the manager's testimony made it clear that the modified operations provisions were used by all units in the hospital in terms of shift cancellation and curtailment. Moreover, the language in Sec. 7.10 is limited to "close" "redeploy" or "cancel schedules" in reference to staff who are not critical function. The IR and Cath Lab remained open and were not closed. The nurses who were mandatorily curtailed were not redeployed. Schedules were not cancelled; they were shortened and curtailed. Shift curtailment and shift cancellation have their own definitions set out in Secs. 7.13.1 and 7.13.2. They are two different things. The nurses here were still curtailed as a result of modified operations. The second sentence of Sec. 7.10 does not exclude them from the provisions for modified operations.

Further support for this is found in Sec. 7.10.2 itself, as that subsection relating to pay specifically references the curtailing of operations after the employee reports to work, as happened here. As note by the Union, the language of Sec. 7.10.2 is not limited to noncritical functions or classifications. Arbitrators must read collective bargaining agreements as a whole. Section 7.10.2 must be read in conjunction with Sec. 7.10. Section 7.10.2 provides for payment for the remainder of the shift when modified operations require curtailment. As discussed above, modified operations did require the curtailments. If Sec. 7.10 is read to eliminate curtailments, that would render the specific reference to curtailment in Sec. 7.10.2 meaningless. Arbitrators cannot render contract language meaningless.

Section 7.10 is a more specific provision than the general hours of work under Article 7 Hours of Work. Subsection 7.10.2 is a more specific provision than the general 7.13.3 payment provision. Arbitrators recognize that in contract interpretation and application, the specific controls the general. Even Sec. 7.10 itself states that in the event of modified operations being declared by the President or their designee, the following rules shall apply in lieu of the provisions of Section 7.[13].3. Thereafter follows 7.10.2. Thus, with modified operations being declared, the nurses here not being excluded from 7.10, and their curtailments being required by modified operations, they are to be paid under the provisions of Sec. 7.10.2. When they were paid under Sec. 7.13.3 they lost wages which they should not have. This is a violation of the contract.

The Union contends that all effected nurses should be made whole. The record in this case is limited to nurses in IR and Cath Lab, and those nurses are the ones who had wage losses. The scope of any remedy is limited to nurses in IR and Cath Lab who had wage losses as a result of mandatory curtailments. To go beyond IR and Cath Lab would be speculative and not based on the record evidence in this case.

Similarly, if nurses in IR and Cath Lab took EVS work or other voluntary redeployments rather than take a loss in pay due to curtailments, they have not suffered any loss of wages. They are not part of any remedy here. To have them paid twice for the same time would be to work a penalty upon the Employer. The contract does not provide for that.

The Employer argues that the Union has not proven any damages were incurred for curtailed nurses as to dates, times and hours curtailed, and contends that this is mere speculation. However, there is evidence in the record that nurses who were curtailed were instructed how to enter that by code on their time records. This means that there is data from which to derive the names and the hours of mandatory curtailments that were not paid for beyond those done by the Employer for Sec. 7.13.3. This would not be speculative as to who or how much is to be paid. It is not unusual for make whole dollar amounts to be sent back to the parties to be ascertained from the payroll records, with an arbitrator retaining jurisdiction on Remedy in such cases.

OHSU violated Section 7.10.2 of the CBA by curtailing nurses in Interventional Radiology and the Cardiac Cath Lab who had reported for work and not paying them for the remainder of their shifts.

Accordingly, based on the evidence and arguments of the Parties, I issue my

### **AWARD**

1. The grievance is sustained.
2. As a Remedy, the Employer will make whole those nurses in Interventional Radiology and Cardiac Cath Lab who reported for work and were curtailed on and after April 5, 2021 until the end of modified operations, and who did not otherwise work in EVS or other redeployments rather than take a loss of pay due to mandatory curtailments.

3. Jurisdiction on Remedy is retained for 60 days after the date of this Award.

Dated this 6<sup>th</sup> day of June, 2023 in Fuquay Varina, North Carolina.

/S/ *Paul Gordon*  
Paul Gordon, Arbitrator