

**IN THE MATTER OF GRIEVANCE ARBITRATION**

BETWEEN:	)	
	)	HUGH J. PERRY, ARBITRATOR
STATE OF IOWA, BOARD OF REGENTS,	)	
UNIVERSITY OF IOWA,	)	
	)	AFSCME LOCAL 12, GRIEVANT
PUBLIC EMPLOYER,	)	
	)	
and	)	
AFSCME /IOWA COUNCIL 61, LOCAL 12,	)	AWARD ISSUED November 1, 2009
	)	
EMPLOYEE ORGANIZATION.	)	

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**APPEARANCES:**

For the State of Iowa: Timothy B. Cook, Attorney

For AFSCME Council 61: Todd Taylor, Staff Representative

**BACKGROUND**

AFSCME Local 12 represents a group of workers employed by the University of Iowa Hospital and Clinics (UIHC), some 2000 total. The Union grieves the Employer's promulgation of a policy effective August 8, 2009 which mandates that all staff working within the UIHC, including members of its bargaining unit, receive a seasonal flu shot and, if deemed necessary by the Hospital Advisory Committee, an H1N1 influenza vaccine. A group grievance was filed by the Union on September 11, 2009. The Union contended that this was a work rule and that the Employer had not contacted the Union in advance of its implementation as required by the contract and that it was not reasonable. It requested that the Employer contact the Union to discuss this policy and its procedures and cease and desist all unilateral flu immunization mandates without Union input. The Union also filed a prohibited practice complaint with the Public Employment Relations Board on September 14, 2009 alleging the Employer's refusal to bargain a mandatory subject of bargaining (health and safety matters). The Union filed a request for a temporary restraining order in Johnson County District Court on September 18, 2009 seeking to have the Employer restrained from enforcing its policy until such time as the Union could pursue its grievance through the parties' contractual grievance procedure and its prohibited practice complaint through PERB. On September 21, 2009 the parties entered into an agreement. The Union agreed to

dismiss its request for a TRO and its prohibited practice complaint. The Employer agreed to submit this matter to binding arbitration. In the interim, the parties agreed that all bargaining unit employees subject to the policy would be required to either receive a seasonal influenza vaccine or claim an exemption for medical, religious or “personal reasons” during the immunization campaign period of September 25, 2009 through October 16, 2009. The parties agreed that should the Employer prevail in this arbitration, then all employees who requested an exemption for “personal reasons” would have two weeks from the date of the decision to receive a seasonal flu vaccination or face leave without pay. The parties agreed to an expedited arbitration process. A hearing was held on October 4, 2009. Briefs were filed on October 9<sup>th</sup>. This award was to be issued by November 1, 2009. The parties agree that this matter is properly before the undersigned for a decision.

## **ISSUE**

The issue to be decided is: *Did the Employer violate the parties’ collective bargaining agreement when it promulgated its Universal Influenza Vaccination policy and if so, what is the appropriate remedy?*

## **RELEVANT CONTRACT PROVISIONS**

### Article IV Grievance Procedure

#### Section 2 Grievance Steps

#### D. Step 4

##### 1. Grievance Arbitration

Grievances which have not been settled under the foregoing procedure are eligible for arbitration. The issue as stated in the third step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties mutually agree to modify the scope of the hearing...

...The arbitrator shall only have authority to determine the compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process. The decision of the arbitrator shall be final and binding on both parties to this Agreement provided any such decision does not exceed the arbitrator’s jurisdiction or authority as set forth above.

Article XI  
Miscellaneous

Section 1 Work Rules

The Employer agrees to establish reasonable work rules. The Union reserves the right to grieve the application or reasonableness of any work rule so established. These work rules shall not conflict with any of the provisions of this agreement. Newly established work rules or amendments to existing work rules shall be reduced to writing and furnished to the Union at least fourteen (14) calendar days prior to the effective date of the rule. For purposes of this Article, work rules are defined as and limited to “rules promulgated by the Employer within its discretion which regulate the personal conduct of employees.”

Article XII  
Health and Safety

Section 12 Health and Safety Complaint Procedure.

If practical, the Employer will provide safe, secure, healthful working conditions for all employees, The Employer agrees to comply with the Federal Occupation Safety and Health Act (OSHA) and all other applicable federal, State, or local laws and regulations, and departmental safety rules and regulations...

Appendix M  
Board of Regents

14. The Employer will follow protocol established by the CDC and other accrediting bodies, such as Joint Commission on the Accreditation of Hospitals. Education will be provided as needed. Other issues shall be referred to Health & Safety Committees pursuant to Article XII, Section 11.

**Universal Influenza Vaccination Policy**

**Purpose:** To establish the requirement that all faculty, staff, students, volunteers, vendors, contractors/contractor staff and any other individuals serving within the UIHC must be vaccinated for seasonal influenza every year and for novel influenza when indicated and subject to the availability of the vaccine.

**Policy:****Seasonal Influenza Vaccination**

1. UIHC faculty, staff, students and volunteers, vendors and contractors/contractor staff are required to receive the seasonal influenza vaccination annually unless exempted by one of the exemptions below.
2. UIHC faculty, staff, student employees and volunteers must receive the vaccination at the UIHC (free of charge) or, alternatively, from another provider. Persons who are vaccinated elsewhere must provide sufficient proof of immunization...

**Novel Influenza Vaccination.**

If a novel influenza virus is present in the community, a vaccine is available for this new influenza virus, and the Hospital Advisory Committee, in consultation with Infection Prevention Program, determines that universal vaccination for the novel influenza virus is necessary, then the previous section in this Policy (Seasonal Influenza Vaccination) applies to immunization against the novel influenza.

**Exceptions**

1. A person may be exempted from immunization based on a documented medical condition, allergy to the vaccine or bona fide religious belief.
2. For medical exemptions, a written statement signed by a licensed physician, nurse practitioner, or physician assistant indicating the presence of a recognized medical contraindication, or that the vaccination would be injurious to the person's health and well-being will be required.
3. A person claiming exemption based on a bona fide religious belief must attest in writing that the vaccination conflicts with a genuine and sincere religious belief held by that person. Such belief may not be based on philosophical, scientific, moral, personal or medical opposition to the vaccination.
4. If an exemption is recognized and granted by Human Resources, this will be documented in writing and the person may be required to wear a surgical mask while providing direct care or in patient contact during a community outbreak of influenza.

## **Compliance**

1. It is the responsibility of the individual to ensure compliance with this requirement.
2. If the individual does not comply by a specific date set in advance by the Staff Immunization Workgroup/Human Resources, the person will be placed on leave (without pay, if an employee) or otherwise prohibited from entering the UIHC's grounds until the requirements are fulfilled. Individuals on documented leave of absence during the immunization period must be vaccinated within two weeks of return to work or be subject to leave without pay until compliant.

## **FACTS**

An annual seasonal flu vaccine has been in existence for many years. It is generally recommended by the medical community and has been largely accepted by the general public. It is recommended by the CDC (Centers for Disease Control and Prevention). The CDC has not recommended that the vaccine be made mandatory and doesn't have the authority to mandate the vaccine. In recent years, the seasonal flu vaccine has been offered by the UIHC at no cost to its staff and employees. The vaccine is modified or tweaked from year to match changing flu viruses. A flu shot is the injection of a vaccine made from a killed virus which serves to immunize a person from or lessen the severity and duration of seasonal flu. Estimates of the efficacy of the seasonal flu vaccine by those taking it is approximately 70%. Seasonal flu poses a serious health threat to the elderly, pregnant women, young children and people with chronic health conditions, i.e. asthma, diabetes, heart and lung disease. Such patients are treated by UIHC. Some 30,000 to 40,000 people die in this country each year from seasonal flu. Seasonal flu this season is found at a fairly low rate, thus far only about 1% of all flu cases, although there is significant concern about the rapidly spreading H1N1 flu discussed below.

The staff and employees of UIHC, including employees of this bargaining unit (not all bargaining unit employees are affected, only those having direct patient contact such as LPN's, food service workers, etc.), have up until this year been offered seasonal flu shots on a voluntary basis. The rate of participation has, for the previous two years been at an 84% level. In 2006 it was 65%. A voluntary participation rate 84% is significantly higher than voluntary participation by health care employees elsewhere and nearly double that of the general population of Iowa. In 2008 the Employer implemented a declination record system, recording the employees' reasons for not

taking a flu shot. A Survey conducted by UIHC indicated that out of some 7000 covered employees in 2008, 129 employees declined the vaccine for medical reasons, 24 for religious reasons and 893 for personal reasons. The Employer has engaged in an aggressive educational campaign in an attempt to increase voluntary participation in the flu vaccine program. Other measures can be taken to minimize the spreading of seasonal flu at the workplace such as thorough and repeated hand washing, insuring a clean environment, the wearing of respiratory masks, triaging patients and ensuring the separation of uninfected patients from those with the flu. It is generally conceded that the vaccine is the best protection against getting the flu and spreading it to others. Flu is spread by coughing and sneezing of infected people. There is a 24-48 hour period between the time a person becomes infected and manifests flu symptoms. The general flu season runs from November to April, some 3 to 5 months.

In addition to the seasonal flu, a new virus H1N1 has found its way into the general population. This is a particularly virulent strain of virus and of significant danger to children, pregnant women and people with chronic health conditions. It is presently making its rounds throughout the country. A special vaccine was developed for H1N1 but thus far its availability has been quite limited. At the time of this hearing it was not available to UIHC for the vaccination of its employees. As the virus is relatively recent, there is less known about H1N1 or the efficacy of the vaccine designed to be used against it.

UIHC's Hospital Advisory Committee recommended implementation of the Universal Influenza Vaccination Policy which is the subject of this dispute. The committee, in charge of setting hospital policy, is comprised of senior executives and department heads of the UIHC. Union representatives are not on the committee. The policy was developed by the Infection Control Subcommittee with the goal of insuring patient safety. While 84% participation by staff and employees was considered quite good, it was generally agreed that the goal should be higher, toward 95% participation. The committees felt that without mandating the vaccine while allowing for limited exceptions (medical and religious but not personal), that goal could not be met. There was no Union input into the policy. There has been limited experience with mandating flu vaccines for public health care employees. The state of New York has recently mandated flu vaccines on a state wide basis but such a mandate is being challenged by affected health care workers.

## **POSITIONS OF THE PARTIES**

The **Union** contends that although called a policy by the Employer, the mandatory vaccination policy is truly a work rule as defined by the contract. As such,

the Union had the right to be notified of the policy before its implementation and has the right to challenge its reasonableness both in terms of subject and application. The Union had no opportunity for input into the policy. The rule is unreasonable. Seasonal flu is a small part of the flu currently being experienced in this country. These workers have voluntarily complied to a very high degree with the Employer's seasonal flu vaccine program. The Union is not against vaccinations as an important tool in the containment of infectious diseases but does resist such vaccinations on an involuntary basis. There are lesser intrusive alternatives to a flu shot for an employee who declines to take the shot for personal reasons. The contract anticipates that protocol of the CDC be followed. However, CDC does not recommend or suggest involuntary vaccinations. The H1N1 is a new vaccine. Testing and production have occurred very quickly. There is the possibility of unexpected adverse reactions. To mandate such a vaccine in its first season of use is not reasonable. When it promulgated the mandatory flu vaccine policy, the Employer violated the contract on the grounds of reasonableness, application and conflict with other contract provisions. The remedy is for the Employer to contact the Union to discuss procedures on this or other applicable policies. The Employer should cease and desist all unilateral immunization mandates without applicable Union input.

The **Employer** argues that the Universal Vaccination Policy is a policy and not a work rule. Its purpose is to protect patients' health. UIHC, through its Infection Control Subcommittee, has implemented many policies designed to protect patients from communicable diseases that have the secondary impact of affecting staff which are more than reasonable. Seasonal flu is a serious threat to patients of this hospital. It is the duty of UIHC to safeguard patients' health as best it can including doing everything possible to minimize the risk of seasonal influenza to patients. Such was the intent of the policy.

Even if determined a work rule, the mandatory vaccination policy is reasonable. A work rule is reasonable if it does not place an undue burden on the employees. The seasonal flu vaccine has been long accepted as the best way to prevent seasonal flu to patients by health care workers. While the voluntary vaccination program has resulted in 84% participation, ideally some 95% of affected employees should participate. In spite of the fact the flu shots are provided at no expense to employees, that education efforts have been intense and declination forms implemented, participation in the voluntary vaccination program appears to have reached a plateau. That is the reason that a mandatory program was implemented. Flu shots are the best method to insure patient safety. If it is concluded that the policy is a work rule, then the only requirement under the contract is reasonableness and fourteen day notification, both of which were met. The fourteen day requirement should be considered as having been met as it is

simply a notice requirement. The Union does not have a voice in whether the policy goes forward or not. The notice requirement has been met by virtue of this hearing. It should be noted that the H1N1 is not at this time mandated but will only be so on determination of the Health Advisory Committee in consultation with the Infection control committee. The question of a mandated H1N1 shot is, therefore, moot at this time.

The policy is not a work rule subject to challenge by the Union. Even if determined to be a work rule, the policy is reasonable and consistent with policies of the CDC, OSHA and IHC that everyone should be immunized for the seasonal influenza. It is consistent with the opinions of medical professionals that this is the best way to maximize the safety of patients of UIHC. The secondary effect of this policy is that employees are immunized against seasonal influenza and UIHC is providing a safe working environment. The grievance should be denied in its entirety.

## **DISCUSSION**

The contract defines work rules as *Rules promulgated by the Employer within its discretion which regulate the personal conduct of employees*. The Employer's vaccine policy requires all employees with certain limited exceptions to get an annual seasonal flu shot or be placed on unpaid leave until he/she complies. This policy certainly regulates the personal conduct of these employees. They either get the shot or subject themselves to unpaid leave which could lead to constructive termination considering that a flu season might last 3 to 5 months. While the stated intent of the policy is to insure the safety of the patients at UIHC, it also regulates employee behavior. I conclude that it is a work rule. That the Union was not provided a copy of the policy at least 14 days prior to its effective date appears to be a moot point insofar as the policy has been the subject of intense debate between the parties since this grievance was filed on September 11, 2009. The Union does have the right to challenge the reasonableness and application of the rule.

The record demonstrates that these employees have had an extremely high rate of voluntary compliance (84%) with the Employer's directive that they take an annual seasonal flu shot. The Employer seeks a higher level of compliance, 95%. It is accepted that the number will never be 100% due to medical and religious exceptions for not taking the shot. The Employer has promulgated a mandatory vaccination requirement in a year when seasonal flu constitutes of only 1% of flu incidents. The Employer's rule would provide an exception for an employee who claims an exemption for medical condition or allergy to the vaccine. There is an exemption for a bona fide religious belief, but the policy would disallow an exemption to an employee who declines to take the shot for a philosophical, scientific, moral, personal, or medical

opposition to the vaccination. It would appear that these distinctions are fraught with peril. While a vaccine is considered the most effective prevention against seasonal flu, there are other measures in addition to the shot and alternative to the shot that can be and are employed to lessen flu risks. No reasonable person could, in good faith, dispute that patient protection is and should be of critical concern to this Employer, however, it appears that the policy it has promulgated for this and successive flu seasons may well be excessive when balanced against the rights of these workers to decline the vaccine for sincerely held personal reasons. While the CDC strongly recommends seasonal flu vaccinations, it does not recommend or require that they be made mandatory. Based upon this discussion, I conclude that the rule mandating a seasonal flu shots for all of these employees is not reasonable.

The H1N1 is termed a novel virus, meaning that it is new or unusual. It appears to be a serious health threat to certain segments of our population. The vaccine developed to deal with the virus was rushed into production. Supplies are spotty and in some cases non-existent. Unlike seasonal flu which has been around a fairly long time in more or less the same form, there is much less data available as to the H1N1 virus. The efficacy of the vaccine developed to combat it is largely unknown. Although the Employer has placed the H1N1 vaccine in its mandatory vaccination policy, further consideration and determination by the Hospital Advisory Committee in conjunction with the Infection Prevention Program is required before mandating the H1N1 vaccine for all employees. Insofar as more facts remain to be developed with respect to this mandate and this vaccine, it appears premature to determine the reasonableness of the Employer's policy as to this vaccine at this time. Any analysis of the reasonableness of the Employer's rule as to mandating the H1N1 vaccine should include the relatively brief history of the vaccine, its known efficacy, the degree to which employees following educational efforts voluntarily accept it, the policies and protocol of CDC as to H1N1, the availability of the vaccine and other relevant factors. Based upon the record before me, without further facts, I find that immediately mandating the H1N1 vaccine by the Employer, similar to its effort to mandate the seasonal flu shot, would not be reasonable.

Based upon the above discussion, the following award is entered.

### **AWARD**

The grievance is sustained. The Employer violated the parties' contract (Section 1 Work Rules) when it unilaterally implemented a policy mandating seasonal flu vaccines for these employees. The remedy is for the employer to cease and desist from the implementation of its mandatory seasonal flu vaccination program as outlined

in its Universal Influenza Vaccination Policy. (HR-03.29)

Signed this 1<sup>st</sup> day of November, 2009.

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Hugh J. Perry, Arbitrator