

**IN THE MATTER OF
GRIEVANCE ARBITRATION**

Between:

**Board of Regents, State of Iowa,
University of Iowa Hospitals and Clinics,**

PUBLIC EMPLOYER

and

Service Employees International Union,

Local 199 as Grievant

CERTIFIED EMPLOYEE ORGANIZATION

**GRIEVANCE
ARBITRATION AWARD**

PERB No. 10-GA-070

Hearing Date: October 21, 2009

Briefs Filed: October 26, 2009

Award: November 2, 2009

Dennis A. Krueger

Impartial Arbitrator

APPEARANCES

For the Employer: Thomas Evans, General Counsel, Board of Regents
Aimee Clayton, Assistant Counsel, Board of Regents
Dr. Charles Helms, UIHC Witness
Ann Williamson, UIHC Witness
Dr. Daniel Diekema, UIHC Witness
Stephanie Holley, UICH Witness
David Bergeon, UIHC Witness
Brian White, UIHC
Laurance Reed, UIHC

For the Union: Nathan Willems, Counsel for SEIU, Local 199
Katherine Williams, SEIU Witness
Jim Jacobson, Staff Director for SEIU
Bradley VanWaus, SEIU Staff
Vicki Siefers, SEIU Witness
Matt Glasson, SEIU Witness
Becky Leven, SEIU Witness

HEARING

This matter came for hearing at 9:00 a.m. on October 21, 2009, before the undersigned arbitrator who was appointed as impartial arbitrator through the utilization of the Iowa Public Employment Relations Board and mutual agreement of the parties. No objection was made to this neutral presiding over this case with both parties agreeing that this matter was properly before this neutral. The parties were afforded a full and complete opportunity to present written evidence and witnesses, to cross-examine witnesses, to argue their respective positions and to provide rebuttal information. Closing briefs were to be filed by the parties with the arbitrator by electronic mail to the arbitrator by the end of day on Monday, October 26, 2009, at which time the arbitrator would electronically exchange the briefs. The hearing would be deemed officially closed at that time. The on-site hearing concluded at approximately 5:30 p.m. on October 21, 2009. The parties agreed that the final decision of the arbitrator on the merits or substantive issues, if any were found to exist, is to be issued not later than November 2, 2009. Said timelines may be changed by mutual agreement of the parties. The signed award is to be placed in ordinary mail addressed to the parties as designated on the appearance sheet and an electronic copy will be sent to the parties simultaneously.

In rendering these findings and the arbitration award, this arbitrator has given full consideration to all reliable information and evidence relevant to the issues presented. This neutral has reviewed

several times the personal audio tapes and testimony given during the hearing and the complete written record of this hearing including exhibits and arguments presented at the hearing and within the closing briefs of the UIHC and the SEIU.

JURISDICTION

The first task of this neutral is to determine whether or not the claims raised by the SEIU as Grievant are subject to the arbitration provision of the collective bargaining agreement and to establish that arbitral authority exists for the resolution of this dispute between the parties.

The Board of Regents, State of Iowa, University of Iowa Hospitals and Clinics (hereinafter "UIHC", "Board of Regents", "BOR", "State" or "Employer") is a public employer covered by the provisions of Chapter 20 of the Code of Iowa. The Service Employees International Union Local 199, (hereinafter "SEIU", "Union" or "Local") is an employee organization certified under the same statutory provision by the Iowa Public Employment Relations Board in Case Number 5834 and representing the following bargaining unit:

All professional employees engaged in tertiary health care at the University of Iowa Hospitals and Clinics as specifically described by classification as provided in Appendix A of the Collective Bargaining Agreement. (See Joint Exhibit #1.)

The Employer and the Union are parties to a Collective Bargaining Agreement (Master Contract) covering the time period July 1, 2009 to June 30, 2011. (See Joint Exhibit #1.) On September 2, 2009, Mr. Bradley VanWaus as a representative of SEIU Local 199 filed a grievance with UIHC protesting a new work rule or policy implemented by the University of Iowa Hospitals and Clinics. This grievance alleged a violation of Article XIX, Sections 2 and 4 of the Master Contract. (Joint Exhibit #2)

The Master Agreement at Article V at Section 8 contains an arbitration clause which establishes a procedure ending with a final and binding arbitration decision. This factual and contractual background confirms that this neutral does have jurisdiction over this case. Additionally, neither party raised any objection to the arbitration process or the selection of this Undersigned as the arbitrator. Given this logical foundation of contractual facts, the finding is that this matter is appropriately before this neutral for the consideration of procedural and substantive issues raised by the parties. With this determination, we shall move to the claims, facts, and merits, if any, related to this grievance.

The Supreme Court in one of its foundation decisions of labor law has upheld the primacy of the labor contract as the source of the arbitrator's decision-making authority or powers by specifying an arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining agreement" (*United Steelworkers v. Enterprise Wheel Car Corp., 1960*). This analogous thesis was repeated in 1987. "As long as the arbitrator's award draws its essence from the collective bargaining agreement, and is not merely his own brand of industrial justice, the award is legitimate." (*United Paperworkers International Union v. Misco, 484 U.S. 29, 36 (1987)*) Joint Exhibit #1 as the Collective Bargaining Agreement is the primary source for arbitral authority under Chapter 20 of the Code of Iowa. This authority is provided in Article V – Grievance Procedure of the Collective Agreement between the parties. It defines a "grievance" in Section 1 to be the following:

"...an allegation by an employee that the employee has been injured as a result of a dispute or disagreement between the employee and the Employer as to the interpretation or application of specific terms and conditions contained in this agreement."

While establishing the procedure for raising and resolving contractual questions, the same article does provide additional specific direction for this neutral as well which obligates this neutral to stay within the four corners of the contract language contained within the Master Agreement.

Article V, Section 8, Subd. 5. provides direction for this neutral in analyzing the issues presented.

... The arbitrator's decision shall be in writing and shall set forth findings of fact, reasoning, and conclusions on the issues submitted. The arbitrator shall not have power to alter, add or detract from the specific provisions of the Agreement. The decision of the arbitrator shall be final and binding on the parties, subject to the limitations on arbitrators' decisions as provided by Iowa law. (Emphasis added.)

The neutral is aware of that caveat and is keeping that provision in the forefront of the thought process as conclusions are reached. This means that the focus of this deliberation will be on the language contained within the master agreement with its specific wording, meaning, derivation, interpretation, and intent of the negotiating parties. The task before the Undersigned is to interpret, not create, contract language for the parties.

LISTING OF JOINT EXHIBITS

Joint Exhibit #1 – Collective Bargaining Agreement – July 1, 2009 to June 30, 2011

Joint Exhibit #2 – UIHC Universal Influenza Vaccination Policy HR-03.29 (August 5, 2009)

Joint Exhibit #3 – SEIU Grievance Document dated September 2, 2009

**Joint Exhibit #4 -- Settlement Agreement between Board of Regents, State of Iowa,
and SEIU Local 199 dated September 21, 2009**

RELEVANT CONTRACT LANGUAGE

(See Joint Exhibit #1)

ARTICLE III - PUBLIC EMPLOYER RIGHTS

Section 1. Management Rights

The parties recognize that consistent with Section 20.7, of the *Code of Iowa* and the terms of this Agreement, the Employer shall have, in addition to all powers, duties and rights established by constitutional provisions, statute, ordinance, charter or special act, the exclusive power, duty and the right to:

1. Direct the work of its employees.
2. Hire, promote, demote, transfer, assign and retain employees in positions within its authority.
3. Suspend or discharge employees for proper cause.
4. Maintain the efficiency of governmental operations.
5. Relieve employees from duties because of lack of work or for other legitimate reasons.
6. Determine and implement methods, means, assignments and personnel by which the Employer's operations are to be conducted.
7. Take such actions as may be necessary to carry out the mission of the Employer.
8. Initiate, prepare, certify and administer its budget.
9. Exercise all powers and duties granted to the public employer by law.

Section 2. Express Reservation of Management Rights

The foregoing enumeration of rights and duties shall not be deemed to exclude other management rights and management functions not expressly reserved herein, and all management rights and management functions not expressly delegated in this Agreement are reserved to the Employer.

ARTICLE V - GRIEVANCE PROCEDURE

Section 1. Grievance Definition

A "grievance" shall mean an allegation by an employee that the employee has been injured as a result of a dispute or disagreement between the employee and the Employer as to the interpretation or application of specific terms and conditions contained in this agreement.

Section 2. Who May File a Grievance

An employee or a group of employees may file a grievance. The Union may also file a grievance if a complaint involving more than eight (8) employees arises out of the same transaction or occurrence and the facts and claim are common to all members of the group. In order to pursue a group grievance, the Union must provide the names of the affected individuals no later than the third level of the grievance procedure. The Union group grievance may proceed only as to the employees identified in the appeal to arbitration. The Union may file a grievance if the allegation involves a specific right of the Union as provided in this Agreement.

Section 8. Arbitration Procedure

...

Subd. 5. Final and Binding Decision

The arbitrator so selected shall confer with the Employer and Union representatives and hold hearings promptly and shall issue her/his decision not later than thirty (30) days from the date of

the close of the hearings or, if written briefs have not been waived, then from the date the final statements and proofs on the issues are submitted to the arbitrator. The arbitrator's decision shall be in writing and shall set forth findings of fact, reasoning and conclusions on the issues submitted. The arbitrator shall not have power to alter, add or detract from the specific provisions of the Agreement. The decision of the arbitrator shall be submitted to the parties and shall be final and binding on the parties, subject to the limitations on arbitrators' decisions as provided by Iowa law.

Section 9. Exclusive Procedure

The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application or interpretation of this Agreement.

ARTICLE XIX - HEALTH AND SAFETY

Section 1. Compliance with Law

The Employer is committed to the health and safety of its employees, patients and the public. Toward that end, the Employer will provide a safe and healthy work environment for all employees, consistent with applicable state and federal health and safety standards, laws and regulations.

Section 2. New Technologies/Procedures

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. The Employer will periodically advise the Union of any major changes in equipment, medical treatment and /or processes.

Section 3. Physical Examinations

All physical examinations and tests, including annual tuberculosis tests, required by the Employer shall be at the Employer's cost. The Employer shall continue its current practice relating to payment for tests that are necessary due to exposures to communicable diseases in the workplace. Employees shall be provided with copies of the results of any such examinations.

Section 4. Infectious Disease Control

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice.

STATEMENT OF THE ISSUE

At the onset of this hearing neither party had a specific written statement of the issue for consideration by this neutral. Rather than take initial hearing time in the construction of same, the parties proceeded with the hearing exhibits and testimony regarding the merits of the case. At the end of the hearing, neither party presented a respective statement of the issue. In the post-hearing briefing of this case by the parties, each party submitted a very similar, however different,

statement of the issue. These issue statements are provided below and were considered and answered by the Undersigned in reaching his decision.

ISSUES PRESENTED BY THE UNION

Did the Employer Violate the Contract by Announcing and Implementing Mandatory Seasonal Flu Vaccination for All Employees?

Did the Employer Violate the Contract by Announcing Mandatory H1N1 Flu Vaccination for All Employees?

ISSUE PRESENTED BY THE EMPLOYER

Did UIHC violate Article XIX, Sections 2 and 4 of the CBA when it promulgated the Universal Influenza Vaccination Policy (HR-03.29)? If so, what is the appropriate remedy?

While the Union did separate the dispute into two different statement issues, they are effectively the same issue of the alleged violation of Sections 2 and 4 in Article XIX of the CBA. The "seasonal" influenza and H1N1 influenza, both dealing with influenza strains, are in essence covered by the "universal" policy. Even if not officially implemented by the Employer, the H1N1 immunization policy is an anticipatory breach of the identical contract provisions. Thus, in reality, the resolution of one question will lead to the resolution of both questions for the Union.

FACTUAL BACKGROUND OF THE DISPUTE

After an election campaign in 1998, the Tertiary Health Care Bargaining Unit voted to be represented by SEIU Local 199 at UIHC, which is a public hospital falling within the Iowa Board of Regents system. Bargaining subsequently commenced on an initial collective bargaining agreement, and in early 1999, the parties agreed to a first contract. The contract provisions which have been specifically grieved by the Union (Article XIX, Section 2 and Section 4) have only minimally changed since the adoption of the first contract.

On or about August 5, 2009, the University of Iowa Hospital and Clinics created a new policy regarding influenza vaccinations which is Joint Exhibit # 2. This policy was approved and became effective on or around August 9, 2009. The relevant sections of this document are provided below:

HUMAN RESOURCES POLICY HR-03.29

UNIVERSAL INFLUENZA VACCINATION

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, contractors/contractor staff are required to receive the seasonal influenza vaccination annually unless exempted by one of the exceptions 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. This may include a signed physician's note, receipt for payment, immunization record (dated and signed), or copy of the medical record document.

...

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.

Date created: August 5, 2009
Source: UIHC: Infection Control
Date effective: August, 2009

On or about September 1, 2009, the Employer communicated to all University of Iowa Health Care faculty, staff, volunteers, residents, fellows and student employees that they will be required to receive a seasonal influenza vaccination during the University of Iowa Health Care's free immunization campaign running from September 25, 2009 through October 16, 2009; or provide proof of immunization if immunization was received outside of the University of Iowa Health Care immunization program; or provide proper documentation to the University of Iowa Health Care Human Resources of a medical excuse or religious reason to be exempted from the immunization program (See Joint # 2; BOR # 26). This communication covered all bargaining unit members and employees covered by the Service Employees International Union Local 199 in the Tertiary Health Care Bargaining Unit.

In response to this action, SEIU filed a grievance on September 2, 2009, identified as Joint Exhibit # 3. The allegations as stated in the grievance are as follows:

On or about September 1, 2009, the Employer notified bargaining unit staff that it was requiring flu vaccinations without notifying the Union and affording it an opportunity to bargain over this change in practice. There aren't any regulatory agencies that are currently suggesting that healthcare facilities mandate flu vaccinations. Several bargaining unit staff object to this requirement. While the Union believes that receiving a flu vaccination is important, staff must be allowed to make an educated decision over whether or not to receive a flu vaccine.

The Union additionally requested a tripartite remedy to its grievance which consisting of the following items:

1. *Cease and desist from requiring mandatory flu vaccines.*
2. *Afford the Union an opportunity to bargain to impasse over this change.*
3. *Educate staff about the importance of receiving the flu vaccine.*

POSITIONS OF THE PARTIES

POSITION OF THE UIHC

1. The Universal Influenza Vaccination Policy is a Management Right that is not Governed By the Provisions of Article XIX.
 - A. The Primary Purpose of the Universal Influenza Vaccination Policy is Patient Safety.
 - B. Article XIX Governs Employee Health and Safety Issues, and is Thus Inapplicable.
 - C. The Universal Influenza Vaccination Policy is a Reasonable Exercise of Management Rights.
- II. The Employer did not Violate Article XIX When it Promulgated the Universal Influenza Vaccination Policy.
- III. The Union May Not Amend the Collective Bargaining Agreement Through Grievance Arbitration.

The UIHC Universal Influenza Vaccination Policy purpose is two-fold: 1) to protect patients from acquiring a communicable disease from HCW while they receive medical care; and 2) to prevent a disruption of the UIHC's work force.

While the policy does have a secondary impact of affecting staff, the policy is ultimately directed toward patient safety and is not different from other infection control policies that impact staff such as requiring staff to be absent from work due to communicable disease symptoms and illness; and requiring staff to be vaccinated for MMR or requiring staff to be annually tested for TB (See BOR #22 and # 23).

The United States Supreme Court has recognized that hospitals are unique places of employment and "that the primary function of a hospital is patient care." See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 494, (1978), where the Supreme Court cited with approval the Board case of *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976) where the Board concluded that the special characteristics of hospitals justify a rule (concerning solicitation and distribution) different from that which the Board generally applies to other employers, and the Board noted that "the primary function of a hospital is patient care...." See *Sacred Heart Medical Center*, 347 NLRB No. 48, fn. 6 (2006). Chief Justice Burger in his concurring opinion in *NLRB V. Baptist Hospital, Inc.*, 442 U.S. 773, 791-793 (1979) stated, "I would think that no 'evidence' is needed to establish the proposition that the primary mission of every hospital is care and concern for patients and that anything which tends to interfere with that objective cannot be tolerated.... The hospital's only purpose is the care and treatment of patients.... I would not elevate the interests of unions or employees, whose highest duty is to patients, to a higher plane than that of the patients."

The UIHC's establishment of its Universal Influenza Vaccination policy, specifically the requirement that all HCW be vaccinated for seasonal influenza, goes directly to the primary mission and purpose of the UIHC to provide medical care to its patients. The UIHC exists to provide medical care with the intention of curing disease or injury, making patients feel better, alleviating pain, or performing a requested medical service. In providing this medical care, the last consequence that the UIHC wants to have happen is for its patients to become ill as a result of their stay at the hospital. Unfortunately, occasionally this does happen, and in the case of influenza it can happen with disastrous consequences.

The Board of Regents and the UIHC request that the Arbitrator deny the Union's grievance and like the United States Supreme Court recognize that the primary mission of the UIHC is care and concern for patients and its purpose is the care and treatment of patients; and that because of its

unique mission and purpose recognize that the Universal Influenza Vaccination policy is an appropriate exercise of its management rights.

Alternatively, the Board of Regents and the UIHC request that the Arbitrator find that the Employer did not Violate Article XIX when it promulgated the Universal Influenza Vaccination Policy.

POSITION OF THE SEIU

A. UIHC Violated the Terms of Article 19, Section 4.

Section 4 commits the Employer to the “current practice” in place when the language first entered the CBA in 1999. The practice of 1999 had two distinct, but related, aspects: no cost and voluntary.

B. UIHC Violated Article 19, Section 2.

1. The Union’s Interpretation of the Contract Language is More Reasonable than the Employer’s Interpretation.

The Expression of One Thing is the Exclusion of Another is a widely accepted rule of contractual interpretation.

2. The Appropriate Regulatory Agencies Have Not Required or Deemed Necessary Mandatory Influenza Vaccination of Health Care Workers.

There is agreement between the parties that the Iowa Department of Public Health (IDPH) is the regulatory agency with jurisdiction over UIHC and that, though the Center for Disease Control and Prevention (CDC) is not a regulatory agency, its opinions are very persuasive for all institutions in the field of infection control, including IDPH.

3. There Have Not Been Changes in Technology and Information Sufficient to Warrant Mandating Seasonal Influenza Vaccination.

As both Employer and Union witnesses testified, the seasonal influenza vaccine has remained unchanged over many years. Seasonal influenza has existed for a very long time and an annual flu shot has also existed for a very long time.

C. The Past Practice of Ambiguous Contract Terms is Highly Relevant in Giving Meaning to Ambiguous Contract Terms.

“When faced with ambiguous language, most arbitrators rely exclusively on the parties’ manifestation of intent as shown through past practice and custom.”¹

D. The Bargaining History Between the Parties Lends Support to the Union’s Understanding of the Disputed Contract Terms.

The Union produced ample testimony and evidence as to how and why the disputed contract terms came into existence; the Employer produced no testimony or evidence.

Union’s Conclusion

For all of the above and foregoing reasons, the Union requests that the grievance be sustained, and that the Employer be ordered to cease and desist from further violations of the collective bargaining agreement.

¹ *How Arbitration Works*, Elkouri & Elkouri, 6th Ed., BNA, 2003, p. 623.

DISCUSSION OF THIS CASE ON PROCEDURAL ISSUES

In reviewing the entire record, there is no evidence which would lead this neutral to believe any procedural ambiguities or defects exist. It has already been established that jurisdiction exists for this arbitration. The record is totally void of any procedural objections from management regarding timeliness, arbitrator selection, or any other procedural topic. The record is replete with both parties mutually working through their differences to place them on the table of this contractual grievance process. See Joint Exhibit #4. Given the lack of notice to this neutral and specification of any procedural problems, the undersigned finds no fatal flaws on the procedural side of this case. As such, this neutral will proceed to the grieved contract language and weigh the arguments of the parties on their substantive merits.

DISCUSSION OF THIS CASE ON SUBSTANTIVE MERITS

The Employer spent some time in describing the vision of UIHC which includes innovative care, excellent service, and exceptional outcomes making it an internationally recognized academic medical center. The purpose and mission of the UIHC is to serve as the teaching hospital and to provide comprehensive health care services for the State of Iowa and to its patients (See BOR #1 and Testimony of Ann Williamson). To fulfill its mission the UIHC employs a staff of nine thousand nine hundred forty-eight (9,948), of which approximately two thousand eight hundred fifteen (2,815) are represented by the Union (See BOR #2 & 49; Testimony of Ann Williamson and Dave Bergeon).

The UIHC provides treatment for the sickest patients with the most complex medical conditions in the State and is ranked at the 77th percentile of patient acuity case mix when compared with other academic medical centers nationwide (See BOR #2; Testimony Ann Williamson). Patient care areas at the UIHC include trauma treatment, cardiac and stroke treatment, organ transplant, burn treatment, comprehensive cancer treatment, neonatal intensive care and numerous other medical

treatment areas (See BOR #2; Testimony of Dr. Helms and Ann Williamson). During the service year of 2008-2009, the UIHC had thirty thousand one hundred eleven (30,111) acute patient admissions and nine hundred six thousand and thirty-one (906,031) outpatient visits (See BOR # 2; Testimony of Ann Williamson).

As Dr. Diekema clarified, the real cause for concern is the fact that the United States is faced with a pandemic influenza season that is unprecedented in recent history and will involve two "waves", one occurring in the fall and another occurring in the spring (Testimony of Dr. Diekema). The prolonged nature of the current influenza season increases the risk of morbidity and mortality due to hospital-related exposures, making vaccination of all healthcare workers a top priority.

Both the Union and the Employer through exhibits and testimony spent much time describing the current influenza situation which has developed nationally and in the State of Iowa. This information included both the seasonal influenza strains and the newer and currently more troublesome H1N1 strain. Reflective of this information were the following documents for the Union identified by Exhibit Letter:

- A - Fitness of Pandemic H1N1 and Seasonal Influenza A Viruses during Co-infection*
- B - Trends in Pneumonia and Influenza Morbidity and Mortality*
- C - History and Epidemiology of Global Smallpox Eradication (Herd Immunity) from CDC*
- D - Interim Guidance on Infection Control Measures for 2009 H1N1 Influenza in Healthcare Settings, Including Protection of Healthcare Personnel from CDC*
- E - Bio-Emergency Preparedness Plan for UIHC*

Reflective of this information and only partially representative of the sixty-one exhibits for the Board of Regents were the following documents identified by Exhibit Number:

- #35 - Prevention and Control of Seasonal Influenza with Vaccines - Recommendations of the Advisory Committee on Immunization Practices (ACIP), 2009 from CDC*
- #36 - Key Facts About Seasonal Flu Vaccine from CDC*
- #37 - CDC Says "Take 3" Actions To Fight the Flu*

#40 - Seasonal Influenza Vaccination - Important Protection for Healthcare Workers Fact Sheet from U.S. Department of Labor, OSHA

#43 - Head to Head: Should influenza immunization be mandatory for healthcare workers? Yes by Dr Helms and Dr. Polgreen

These and additional exhibits provided detailed and analytical medical information from a variety of sources, individuals, and perspectives (although the main one seemed to be the Center for Disease Control). These documents and supplemental testimony of healthcare staff and experts were highly informative of the influenza health issue and provided enhanced background context for the language issue between the parties and before this neutral.

The genesis of this case was the adoption and implementation by the UIHC regarding a new universal influenza vaccination policy. More specifically, it was the requiring or making mandatory influenza vaccinations for all bargaining unit staff that was the catalyst for this grievance. Additionally in the "Compliance" section of the policy, it called for placing any non-compliant employee on a leave of absence without pay until the requirements are fulfilled.

The Union grieved this action on the basis of two paragraphs contained within the collective bargaining agreement at Article XIX in Section 2 and Section 4.

ARTICLE XIX - HEALTH AND SAFETY

...

Section 2. New Technologies/Procedures

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. The Employer will periodically advise the Union of any major changes in equipment, medical treatment and /or processes.

...

Section 4. Infectious Disease Control

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice.

Attention is now directed to Article III, Public Employer Rights for consideration. The first section in a rather lengthy paragraph provides a detailed listing of nine management rights and powers retained by the Employer. This list includes, but is not limited to, the power or authority to... *"take such actions as may be necessary to carry out the mission of the Employer."*

It is the Second Section of Article III which refers to the "Express Reservation of Management Rights" with the paragraph below:

*The foregoing enumeration of rights and duties shall not be deemed to exclude other management rights and management functions not expressly reserved herein, and all management rights and management functions **not expressly delegated in this Agreement** are reserved to the Employer. (Emphasis added.)*

Any master contract between any employer and any bargaining unit will assuredly modify the rights of both parties. The unilateral actions of management are mitigated by the affirmatively negotiated rights of the bargaining unit covering its members. The individual actions of bargaining unit members become altered and more uniform when brought under the umbrella of the union.

In examining the position of the UIHC, the primary argument in their case is one that management rights allows them to make the determination of mandating influenza vaccinations. In support of this position, the Employer cites some United States Supreme Court cases advancing the thesis that the special characteristics of hospitals justify a different rule from that which the Board (NLRB) applied to other employers. 222 NLRB 1150 (1976) et al. The cases dealt with solicitation and distribution of union literature. *Beth Israel* did talk about the "primary function of a hospital is patient care" and that a hospital may be warranted in imposing more stringent restrictions on employee solicitation and distribution in immediate patient-care areas than are generally permitted other employers, but the balance should be struck against such restrictions in other areas. The NLRB held that petitioner's ban violated Section 8(a)(1) of the

NLRA...and that the disciplining of employees for not observing the prohibition violated Section 8 (a) (3). The NLRB ordered the petitioner to cease and desist from interfering with "concerted union activities" and employees' Section 7 rights and to rescind its rule.

The Undersigned is cognizant that each employer has a unique set of functions and goals. This is true of school districts, cities, counties, and indeed hospitals. Each entity has a special focus with schools on the children, cities and counties on the residents, and certainly hospitals on the patients. This neutral has not lost sight of that fact in this or in other cases. The factual situation present in each case is that the employer and the union have struck "their balance" in their labor relationship as related to the focus, and then reduced it to mutually acceptable language in a master contract. This does not mean that all the terms and conditions of contracts are fair or equitable or liked by all, or that others might develop different language, or that the language will continue forever. For any neutral, and this neutral in particular, the focus is on providing meaning and substance to that contract bargained between the parties and interpreting the balance which they achieved at a given point in time.

While the UIHC has retained management rights, the second paragraph of Article III cites the collective bargaining balance when this Contract states the UIHC retains the management rights and management functions which are not **"expressly delegated in this Agreement..."**.

(Emphasis added.) The UIHC did bargain a contract and that contract did abridge or modify some of those rights, namely in *Article XIX - Health and Safety*. It bargained topics such as New Technologies/Procedures, Physical Examinations, Infectious Disease Control, and Staff Safety and Health Councils and made them subject to the grievance procedure. While management rights certainly provides much latitude to the UIHC in determination of its operation and purposes, this latitude does have some restrictions. Otherwise, the health and safety language and the grievability language would become meaningless and the employer would be able to do whatever it wanted.

The University of Iowa Hospitals and Clinics, as the Employer in this case, has a right to operate in what it believes to be a safe, responsible, and efficient manner regarding its work environment and the safety of its patients, staff, and the general public. Service Employees International Union Local 199, as the Union in this case, has the right to provide its membership with job security through appropriate and reasonable hiring and working conditions including their health and safety. After representing those and other interests at the negotiating table, both parties have a legal obligation to follow and adhere to the collective bargaining agreement once it has been finalized. The problem in this instance is that there exists a question, disagreement, or misinterpretation as to what has been actually bargained (or not bargained) within the master contract. It consequently becomes the task of this neutral to make that determination for the parties through interpretation of the "Collective Bargaining Agreement" identified as Joint Exhibit #1.

BOR #11 is an exhibit which is a survey of other health medical organizations related to mandatory staff flu vaccinations. While this exhibit indicates that approximately half of the thirty respondents from around the nation have some type of certified collective bargaining units within the medical facility, only a very small minority (two to four) have indicated that influenza immunizations have been made mandatory. Many respondents used phrases such as "being considered", "a lot of discussion", "the question is on the table", "looking at mandatory immunization for the future", and "maybe mandate or sign declination." While there exist several problems with this type of data, the three major ones are 1) many of the institutions are not organized for formalized collective bargaining, 2) there are different statutory provisions for collective bargaining in different states, and 3) the contract language and bargaining around it is undoubtedly different. While providing the medical lay of the land as to what is happening currently on the influenza front, this information is more suited for bargaining new language rather than interpretation of language which was bargained over ten years ago.

As both parties are acutely aware, this proceeding is not a fact-finding or an interest arbitration hearing, it is a grievance arbitration. In the analysis and final determination of the contested issues, the focus for this neutral must always remain within the four corners of the collective agreement which the parties have bargained and my conclusions must be based on well recognized tenets of contractual interpretation. In this instance it is not for me to make medical diagnoses or prognostications, analyze the collective hospital or personal beliefs, determine amount of cost for the employees or the hospital, or count the number employees hurt or helped. It is not for me to compare what other neutrals have done in other cases with other language and other bargaining relationships or to fact-find and suggest a middle ground. It is for me to interpret this contract language looking at how the UIHC and SEIU constructed their specific contract language and give significant meaning to what these two parties intended. The task before this neutral is a very significant one, an urgent one, and one which is taken very seriously given its impact.

One of the first undertakings in the analysis of this case for the Undersigned is to drill to the core of the contested issues and separate the wheat from the chaff and the meritorious arguments from those not on point. In essence, it is to determine precisely what this grievance is and is not about.

What this grievance is not about --

This grievance is not about whether UIHC requiring or mandating influenza vaccinations is a mandatory topic of bargaining under Chapter 20 of the Code of Iowa. That question is one that must be answered in a different forum by the Iowa Public Employment Relations Board.

This grievance is not about whether the current influenza crisis or pandemic is important or not important, or that one group is more zealous or less zealous in responding to the crisis. Both UIHC and SEIC recognize the importance and severity of the spreading of influenza around the

nation and our state and the UIHC community. Both UIHC and SEIC are honestly and openly expressing different views of influenza containment and both are wanting to seek a viable and successful solution.

This grievance is not about the specific cost of influenza vaccination for employees. Both the UIHC and SEIU admit those costs are the responsibility of the Employer and the Employer has not waived in accepting that responsibility.

This grievance is not about whether the Union should be afforded an opportunity to bargain over mandatory influenza vaccinations. That specific language is clearly not stated within the master agreement for purview of this neutral and hence not grieved. The task of making such a determination belongs under statute to the Iowa Public Employment Relations Board which has not made a determination on that topic that this neutral is aware of at this time.

This grievance is not about the educating of staff regarding the importance of receiving the flu vaccine. From the documents and testimony presented at the hearing, UIHC has developed an ongoing, quality educational and public relations campaign about influenza and the need for influenza vaccinations and other related containment strategies. (See BOR Exhibits #29, 30, 31, 32, 33, and 34.) Education of staff and others has been done and continues to be done in a continually growing framework of knowledge and materials. UIHC is a teaching facility and education, especially of its own staff, is already a mission and an existing practice. The Union in its requested remedy is also seeking to educate its members around flu immunization.

This grievance is not about exceptions for some staff based upon true religious or medical reasons or rationale. Both parties have recognized these exceptions. The UIHC by providing an section entitled "Exceptions" within the Universal Influenza Vaccination Policy HR-03.29 and

SEIU by not grieving or providing any evidence relating to these two specific areas. BOR #14 and BOR #15 are the exemption forms for medical and religious reasons.

What this grievance is about --

What this grievance is about, and precisely centered upon, is whether the UIHC has the contractual right to require or make mandatory influenza vaccinations for all employees, with the exception of employees having medical or religious reasons for not having the vaccinations. In essence, this would be the group wanting to decline for personal reasons not attached to medical contraindications or religious beliefs. UIHC believes it has the right to mandate and require that all staff receive influenza vaccinations and place them on unpaid leave if not compliant. SEIU believes that employees within its bargaining unit have a right of declination for personal reasons without being placed on unpaid leave.

The analysis and interpretation would be easier if there existed language with the collective agreement which perhaps stated,

"Any vaccinations provided to employees will be at no cost and the decision to receive the vaccination shall be voluntary on the part of the employee."

Or perhaps in the alternative position,

"The Employer has the right to require employees to have mandatory vaccinations. The immunizations and follow up lab work will be at no cost to employees."

Neither statement appears anywhere within the collective agreement.

A contract is clear and understandable when the "plain meaning" of the language is understood by the common person when reading the language. This is referred to at times as the objective approach of arbitrators. As one arbitrator using this approach concluded, *"if the contract is clear, logic and equity will be cast aside, regardless of the result."* See *Safeway Stores, 85 LA 472, 475 (J. Scott Tharp 1985)*. It doesn't matter if a particular contractual term is not prudent or inquiring into bargaining power imbalances and issues of justice, it is just the normal and customary

meaning of the terms to a reasonable person. When the Undersigned reviews the grieved language of Article XIX, Section 2, there exists no apparent ambiguity related to the interpretation of the instant dispute. Section 2 states the following:

Section 2. New Technologies/Procedures

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. The Employer will periodically advise the Union of any major changes in equipment, medical treatment and /or processes.

In viewing the language from both a logical and grammatical perspective, the results align on the same conclusion. The Employer has reserved "the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns.....".

However, this reservation is only applicable under certain conditions. This sentence is constructed as an "if, then" conditional statement. Thus, from a logical perspective, if A occurs, then B can happen. In other terms, if B does not happen, then A cannot occur. In this instance, IF health and safety concerns are required or deemed necessary by regulatory agencies and changes in technology and information, THEN the Employer reserves the right to change and modify programs and practices related to health and safety. In reviewing the record at this time, there is no evidence that any regulatory agencies (such as the Iowa Department of Public Health or the Center for Disease Control) have required or made necessary mandatory immunizations. The record is certainly filled with terms such as "recommended", "should receive", "encourage", "strongly recommended", and "suggested". In fact, the CDC has suggested since 1984 that healthcare workers be vaccinated (for influenza) annually. (BOR #55) The bottom line is that no regulatory agency has required or deemed necessary the immunizations.

Grammatically, the last phrase in the sentence is placed and used to modify the words directly preceding that phrase. Thus, "as required or deemed necessary by regulatory agencies and changes in technology and information" describes the words directly preceding --- "on-going health and safety concerns." The logical and grammatical constructs are not at odds with each other and it is noted that this language was not bargained by neophytes to the collective

bargaining arena. Both parties were competently represented by negotiators with knowledge and expertise of contract language and construction.

The analysis of Section 2 has determined that contractual authority for the Employer to require influenza immunizations does not exist within that Section. It does not exist because no regulatory agency was cited as requiring or deeming necessary the influenza vaccinations.

We shall now turn to Section 4 of Article XIX and review that single sentence of language as it relates to the action of the Employer in mandating influenza immunizations.

Section 4. Infectious Disease Control

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice.

A contract contains ambiguous language if that language is reasonably susceptible to more than one meaning or interpretation. In reading the grieved language, this neutral is not able to discern a clear and single interpretation of the contract language related to the mandatory or voluntary nature of employees receiving influenza vaccinations. This ambiguity develops because one cannot be certain whether the "current practice" contains or allows mandatory immunizations with consequences of being placed on an unpaid leave of absence. As a result, this neutral in utilizing standards of contract construction has to discern the parties' mutual intent from the record provided to him as nearly, and as reasonably, possible. This becomes even more difficult when confronted with circumstances presumably not contemplated by the parties at the time of contract formation which I believe to be the case in this dispute.

In the interpretation of contract language, the prime directive for any neutral is to determine the mutual intent of the parties writing the language. The problem is that frequently parties hold a different understanding of the same contractual language. The Union reads the contract language and finds the intent to be the vaccinations are voluntary on the part of the employees. The Employer reads the language and finds it possesses the right to make vaccinations

mandatory and require compliance with consequences. It is now the responsibility of the Undersigned to analyze the record and find the mutual intent of parties during negotiations utilizing the information and data each party has supplied.

This of course does not mean that an arbitrator must assume that the labor agreement covers every conceivable situation. Often the proper conclusion is that a silent contract has left management free to act unilaterally. In other words, an arbitrator must decide whether the agreement even has a gap and whether the parties already reached a point such that no gap-filling is necessary. If it is necessary, established arbitral principles provide a source of guidance for completing the labor contract.

Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are "(1) standards of contract interpretation, (2) the concept of past practice, and (3) the concept of reasonableness. Such guidelines are frequently used in conjunction with each other." *Common Law of the Workplace - the Views of Arbitrators* (1998 p.65). National Academy of Arbitrators, Theodore J. St. Antoine, Editor; BNA, Washington, D. C.

Bargaining History of the Parties.

A major part of the Union's case goes to the bargaining history of the health and safety language. The Employer provided no exhibits or testimony related to the bargaining history of the grieved language. This neutral finds what happened in the construction of the language is relevant and must be examined.

Of probative value to the bargaining history is the testimony of Matthew Glasson. He was the bargaining representative for SEIU as it bargained its first contract with the Board of Regents in 1998-1999 and participated in every bargaining session and helped in the drafting of contract proposals and final language. He testified regarding the anti-union campaign by the Employer

against SEIU and threats to employees of losing terms and conditions of employment. This made the Union strongly oriented toward maintaining the rights and benefits they currently possessed.

Union Exhibit H consists of some written bargaining proposals and counterproposals that were exchanged between the parties during that first bargain. The final page was the language that went into the first master agreement. Time was spent reading and reviewing the proposals and counterproposals from that bargain to place oneself, as much as possible, in the positions of the parties and identify with some of the issues. To help in this task, the following summary was constructed for a closer and more condensed picture of the health and safety bargain. Although now focusing on Section 4 of the Article XIX, the abbreviated summary was done for the entire Article to obtain a better perspective of positions from both parties toward health and safety. This also allows the neutral to read the contract as a whole document and see how contractual pieces fit together, rather than focus on only one sentence.

ARTICLE XIX - HEALTH AND SAFETY ----- BARGAINING HISTORY COMPILATION -----

Section 1. Compliance with Law

The Employer is committed to the health and safety of its employees, patients, and visitors. Toward that end, the Employer intends to comply with applicable state and federal regulations regarding occupational health and safety as enforced by state and federal agencies. Employer Counter 1/7/99:

The Employer is committed to the health and safety of its employees, patients and the public. Toward that end, the Employer will provide a safe and healthy work environment for all employees, consistent with applicable state and federal health and safety standards, laws and regulations. First Contract:

The Employer is committed to the health and safety of its employees, patients and the public. Toward that end, the Employer will provide a safe and healthy work environment for all employees, consistent with applicable state and federal health and safety standards, laws and regulations. Current Contract

Section 2. New Technologies/Procedures

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. Employer Counter 1/7/99 Union Counter 1/28/99:

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. First Contract:

The Union recognizes that the Employer reserves the right to change and modify programs and practices related to health and safety to address ongoing health and safety concerns as required or deemed necessary by regulatory agencies and changes in technology and information. Current Contract

The Employer will inform the Union immediately upon knowledge of the planned implementation on any new equipment, medical treatment, and/or processes. The Union shall have the right to research and recommend safer substitutes or modifications to the new equipment , medical treatments and/or processes. Union Counter 1/29/99:

The Employer will periodically advise the Union of any major changes in equipment, medical treatment and/or processes. Current Contract

Section 3. Physical Examinations

All physical examinations and tests, including annual tuberculosis tests, required by the Employer and all tests requested by the employee as a result of being exposed to communicable diseases in the workplace shall be at the Employer's cost. Employees shall be provided with copies of the results of any such examinations or tests. Union Initial Proposal 10/12/98:

All physical examinations and tests, including annual tuberculosis tests, required by the Employer shall be at the Employer's cost. Employees shall be provided with copies of the results of any such examinations. First Contract:

All physical examinations and tests, including annual tuberculosis tests, required by the Employer shall be at the Employer's cost. The Employer shall continue its current practice relating to payment for tests that are necessary due to exposures to communicable diseases in the workplace. Employees shall be provided with copies of the results of any such examinations. Current Contract

Section 4. Infectious Disease Control

The Employer shall provide the Hepatitis B vaccine at no cost to the employee to each employee exposed to blood and other potentially infectious body fluids in the course of the employee's job. Union Initial 10/12/98

The Employer shall continue to provide other vaccinations to employees at no cost according to its current practice. The Employer shall provide new vaccines as they become available. Union Initial 10/12/98

The Employer shall continue to provide (other) vaccinations and follow up lab work to employees at no cost according to its current practice. The Employer shall provide new vaccines as they become available. Union Counter 1/28/99

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice. The Employer shall provide new vaccines as they become available. Union Counter 1/28/99 and 1/29/99

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice. First Contract.

The Employer shall continue to provide vaccinations and follow up lab work to employees at no cost according to its current practice. Current Contract

Regarding Article XIX, Sections 2 and 4, that language has remained substantively the same with the only addition being the last sentence of Section 2. In reading the entirety of the proposals and counterproposals, the terms "mandatory" or "voluntary" were never used to discuss vaccinations. Mr. Glasson also testified that he thought the Union "set in stone" the current practice of providing shots at no cost if the employees wanted them, implying a voluntary compliance. No actual bargaining notes were provided in this record due to the fact that they were lost in the recent Iowa City flood. When questioned about "current practice" on cross examination, he indicated that he did not agree that the term means only "at no cost".

Ms. Becky Leven who was an organizer for SEIU in 1998 and participated in negotiations on the first bargaining team indicated the team was concerned about practices that might disappear and was present on the bargaining team to help keep them. She had no specific recollection regarding the bargaining of health and safety language. Related to the current Article XIX, she stated the practice was to provide employees with vaccinations at no cost. Mandatory vaccination was never brought up and there was no discussion about it which she could recall.

In reviewing the development of Article XIX, it is noted the term "required" is used in Section 2 ("*...as required or deemed necessary by regulatory agencies ...*") and in Section 3 ("*All physical examinations and tests, including annual tuberculosis test, required by the Employer...*") The term "required" is not used in Section 4. In normal construction guidelines, to use a particular term in one or two paragraphs and then not use it in a different paragraph in the same article or section implies its absence. The term "continue" is used implying that what was being done

regarding vaccinations would be brought forward into the contract. This is consistent with the recollection of Glasson and Leven in wanting not to lose any existing benefits and that the practice was at no cost to the employee and voluntary. The Employer brought no witnesses to contradict or negate this testimony.

Past Practice

In cases where the contract is completely silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties provides guidance to reaching the correct interpretation for this neutral. *A "past practice" is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is an appropriate course of action. See "Common Law of the Workplace" at p81.*

Board of Regents Exhibit # 23 is a Human Resources Policy (HR-03.23) titled "Mandatory Health Screening and Immunization Requirements - Employees, Volunteers, Students and Temporary Agency." This policy was created, approved and became effective on December 1, 2004, and was reviewed and revised on September 25, 2007 and June 4, 2008. This means that this policy was in place, and reviewed and revised by the Employer, approximately one year before the CBA (Joint Exhibit #1) became effective and probably about the time that contract negotiations were starting. As a matter of record, no information was provided about the HR policy or health and safety topics being discussed during the most recent round of bargaining. In reviewing the actions of the parties through testimony and exhibits, employees have received vaccinations and follow up lab work at no cost. That practice is clear and uncontested. Regarding the voluntary nature of the vaccinations on the part of the employee, one must look closer into the record. Witnesses Glasson and Leven both testified that vaccinations were voluntary and Leven indicated that she was never asked or directed to get a vaccination.

The Employer introduced BOR #23 as evidence of required testing and immunization for tuberculosis (TB) and measles, mumps, and rubella (MMR). Glasson indicated he was not aware

of this policy and that this policy was not negotiated to his knowledge. Leven indicated that no one had ever told her that MMR was required. In later testimony for the Employer, Dr. Helms thought that UIHC "pushed hard" for MMR vaccinations but was not certain if they were required and then later modified his testimony saying it looked as though MMR vaccinations were mandatory.

In reading BOR # 23 completely, this neutral finds within the "Policy" section of the first full paragraph that "**recommended immunizations**/screenings include Hepatitis B, Tetanus/Diphtheria, **Influenza** and Varicella (chickenpox), and **annual flu vaccination** consistent with Infection Control Policy IC-04.000. There is a policy differentiation between "*Section A. New Staff Members*" and "*Section B. Current Staff Members.*" It is noted a TB test is mandatory for both new and current staff. This mandatory TB test is also covered in *Section 3. Physical Examinations of Article XIX* of the current contract so that requirement is congruent and has been bargained by the parties.

Related to the MMR requirement, the record remains hazy and bifurcated between new and current employees and whether or not the Union knew about it. If they did, there is no proof in this record to that effect such as letters or grievances. Board Exhibit # 49 is a compliancy status report of the listed vaccinations within the bargaining unit with TB screening at 90%, Measles at 98%, German Measles at 99%, Mumps at 97%. While the influenza vaccination rates for this year are incomplete, SEIU voluntary vaccination rates have been increasing in each of the last three years from 60.69% to 77.3% to 80.69% in 2008-2009. There is nothing in the record dealing with enforcement or the number of bargaining unit employees placed on unpaid leave or terminated per this policy from either party. One can determine or conclude if no "enforcement" of the new policy was done to require MMR vaccinations, or no employee communicated a problem to the Union, then vaccinations would still be viewed as voluntary on the part of the employees and the Union. In essence, they only become required when there are consequences made known and applied about any non-compliance.

For a practice to be considered binding, the generally accepted tests include 1) being uniformly done, 2) repeated often, and 3) readily ascertainable over a reasonable period of time. Different arbitrators could use other, however similar, factors, tests or descriptors to determine past practice, such as Richard Mitterthal who identified the following factors:

- 1) Clarity and consistency of the pattern of conduct
- 2) Longevity and repetition of activity
- 3) Acceptability of the pattern
- 4) Mutual acknowledgement of the pattern by the parties

See Mitterthal, Richard, Past Practice and the Administration of Collective Bargaining Agreements, 50 Mich. L. Rev. 1017 (1961).

Over a period of years influenza vaccinations have uniformly been at no cost and voluntary on the part of the employee. This has been true and repeated often as thousands of bargaining unit members have been vaccinated and the voluntary nature has been mutually understood over time. The record establishes this practice and the longevity of it between the parties. The record does not establish consistency or mutual understanding or acceptability of the pattern regarding any required or mandatory application of immunizations.

Now once again, this neutral fully grasps and comprehends the position of the Employer that they should possess the management right to create the Universal Influenza Policy and apply it to all employees. This seems even more correct and significant when backed by medical evidence and data and buttressed by logic. In this instance, there is a bar to that action. They have bargained a master contract which includes language regarding the health and safety of the employees, and more so, specific references to vaccinations and procedures. This contract language has history and meaning to the parties and a practice that has developed and continues. Some employees and some management may agree or disagree with the language, some patients, the public or other medical professionals may agree or disagree with the language. However, the contract interpretation as carefully and best discerned must be followed.

**IN THE MATTER OF
GRIEVANCE ARBITRATION**

Between:

**Board of Regents, State of Iowa,
University of Iowa Hospitals and Clinics,**

PUBLIC EMPLOYER

and

Service Employees International Union,

Local 199 as Grievant

CERTIFIED EMPLOYEE ORGANIZATION

**GRIEVANCE
ARBITRATION AWARD**

PERB No. 10-GA-070

Hearing Date: October 21, 2009

Briefs Filed: October 26, 2009

Award: November 2, 2009

Dennis A. Krueger

Impartial Arbitrator

DECISION AND AWARD

For the reasons cited above, the Undersigned concludes that the grievance is sustained.

The University of Iowa Hospitals and Clinics as Employer has violated the Collective Bargaining Agreement at Article XIX - Section 2 and Section 4 with the creation of the *Universal Influenza Vaccination Policy HR-03.29* which makes influenza vaccinations mandatory and institutes an unpaid leave for non-compliance. UIHC is hereby ordered to continue the practice of providing influenza vaccinations at no cost to the employee on a voluntary basis. UIHC is additionally ordered to cease and desist from requiring employees in the bargaining unit to receive influenza (seasonal and/or H1N1) vaccinations or face related consequences of unpaid leave.

In arriving at this decision, I have considered all evidence, arguments and authorities submitted by the parties even if not specifically discussed in my decision. Respectfully submitted,

Dennis A. Krueger, Arbitrator

Date

CERTIFICATE OF SERVICE

I certify that on this _____ day of _____, 20____, I served the foregoing **Grievance Arbitration Award** upon each of the parties to this matter by mailing a copy to them at their respective addresses as shown below:

**Mr. Thomas Evans, General Counsel
Board of Regents, State of Iowa
11260 Aurora Avenue
Urbandale, Iowa 50322-7905**

**Mr. Nathan Willems
Sole, McManus, Pearson, and Willems, PC
118 3rd Avenue S. E. -- Suite 830
Cedar Rapids, Iowa 52401**

Electronic copies have been emailed simultaneously to Mr. Thomas Evans and Mr. Nathan Willems on this date.

Dated this _____ day of _____, 20_____

Dennis A. Krueger, Arbitrator
1108 6th Street
West Des Moines, Iowa 50265

Copy of Award mailed to Iowa Public Employment Relations Board.