

LABOR & EMPLOYMENT

Arbitration Decisions



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Labor Arbitration Decision, Santa Clara Cnty., 139 BNA LA 329

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Decision of Arbitrator

In re COUNTY OF SANTA CLARA and SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 521

September 13, 2018

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BNA Headnotes
LABOR ARBITRATION**LEAVES OF ABSENCE****[1] Educational leave - Class grievance - Sufficiency ▶ 100.5201 ▶ 100.0720**▶ 100.0710 [\[Show Topic Path\]](#)

Grievance alleging that county violated labor contract when it required public health nurses to use their own leave to attend educational seminars/conferences-taken to fulfill their continuing education units requirement for state licensure-met requirements of contract, despite contention it did not “properly identify the aggrieved,” where it is perfectly acceptable to file class grievance that does not name all affected employees, and grievance provided sufficient information to allow county to investigate and respond.

[2] Educational leave - Ambiguity ▶ 100.5201 ▶ 24.15 [\[Show Topic Path\]](#)

Arbitrator must look to parties' practice to determine whether county violated labor contract by granting public health nurses less than full eight hours of educational leave per day to attend out-of town educational seminars/conferences toward fulfilling their continuing education units requirement for state licensure, where contract requires county to provide time off with compensation for attending sessions “needed” for licensure, but it does not spell out how much time must be granted.

[3] Educational leave - Past practice ▶ 100.5201 ▶ 24.366 [\[Show Topic Path\]](#)

Past practice exists of granting public health nurses full eight hours of educational leave per day to attend out-of town educational seminars/conferences to fulfill their continuing education units requirement for state licensure, even though CEUs granted were less than eight hours per day and upper management claims it was not aware of this practice, where prior conferences similar in all relevant ways demonstrate this consistent, longstanding and mutual practice, director of nurses should have been aware of practice as she reviewed all such requests, and director's testimony contradicted argument that hours of educational leave should be granted only commensurate with CEUs obtained.

[4] Educational leave - Bargaining history ▶ 100.5201 ▶ 24.37 [\[Show Topic Path\]](#)

County failed to prove that language added in 2013 and 2015 bargaining was intended to clarify that educational leave was to be provided in quantities commensurate only with the number of continuing education units earned, where 2013 addition that public health nurses “will only be provided with enough paid time required to fulfill the [CEUs]” does not specify how much time is enough, statements at bargaining table indicate that additional paragraph was added in 2015 to address different issue of nurses requesting educational leave after they had already obtained their required 30 CEUs during a two-year licensure cycle, and practice of granting nurses eight hours of educational leave regardless of CEUs earned did not change following language changes.

[5] Educational leave - Past practice - Notice of termination ▶ 100.5201 ▶ 24.366 [[Show Topic Path](#)]

Past practice of granting public health nurses full eight hours of educational leave per day to attend out-of town educational seminars/conferences, regardless of continuing education units earned per day, expires with termination of current contract, where fact that county has put union on notice that it no longer agrees with interpretation expressed in past practice allows it to terminate the practice under the successor agreement.

[6] Educational leave - Past practice - Restoration of personal leave ▶ 100.5201 ▶ 24.366 ▶ 100.559501 [[Show Topic Path](#)]

Employer that violated labor contract when it granted public health nurses less than full eight hours of educational leave per day to attend two out-of town educational seminars/conferences must make nurses whole by restoring personal leave they used, but nurses are not entitled to remedy for third conference they were discouraged from attending due to improper imposition of a new policy regarding educational leave, where any loss suffered by non-attendees is speculative and does not lend itself to an arbitral remedy.

[*330]

For the employer-Traci Simpson, labor relations representative.

For the union-Kerianne R. Steele (Weinberg, Roger, & Rosenfled), attorney.

PAUL D. ROOSE, Arbitrator.

OPINION AND AWARD IN ARBITRATION PROCEEDINGS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

Public Health Nurse Educational Leave

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators contained in the parties' CBA. The matter was heard on May 31, 2018 in San Jose, California.

The Employer raised a threshold issue of procedural arbitrability, asserting that the grievance was not filed and/or processed by the Union in a manner consistent with the CBA.

Notwithstanding this assertion, the parties agreed to present their evidence and positions on the arbitrability issues and on the merits. The parties granted the arbitrator the authority to render a decision on the arbitrability issue. If the arbitrator determined that the matter was indeed arbitrable, then the parties gave the arbitrator the authority to render a decision on the merits of the grievance as well.

The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties chose to conclude their presentations with written briefs. The briefs were received by the arbitrator on August 10, 2018 and the matter was submitted for decision.

ISSUE

The parties were unable to agree on a statement of the issue in this matter. The **[*331]** Union, in its opening statement, proposed the issue as follows:

Whether the County violated Article 2, Section 2.2, titled "No Discrimination," and/or Appendix C.8, titled "Educational/Licensure Maintenance Provisions," when it denied or partially denied requests for paid leave. If so, what is the appropriate remedy?

The County formulated the issues in its opening statement as follows:

The County of Santa Clara requests that you find this grievance procedurally defective in that it does not properly identify the aggrieved, nor does it document how the County of Santa Clara violated Article 2, "Discrimination," and Appendix C.8, "Educational/Licensure Maintenance Provisions," of the memorandum of agreement between County of Santa Clara and Service Employees International Union Local 521, June 22nd 2015 through June 16th, 2019.

If you shall find this grievance is arbitrable, did the County violate either Article 2, Section C.8 of the Memorandum of Agreement between the County of Santa Clara and Service Employees International Union Local 521, June 22nd, 2015 through June 16th, 2019, by allowing the public health nurses with only enough paid time to require to fulfill the continuing education units needed for maintenance of licensure?

The parties ceded to the arbitrator the authority to formulate an issue statement. The arbitrator's formulation of the issue statement in this matter is as follows:

- 1) Was the grievance filed in accordance with the CBA and is the matter thereby properly before the arbitrator?
- 2) If the grievance is properly before the arbitrator, did the Employer violate the CBA when it required public health nurses in 2017 and 2018 to use their own leave to attend sessions taken to fulfill their continuing education units requirement? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Memorandum of Understanding Between County of Santa Clara and Service Employees International Union Local 521 - June 22, 2015 - June 16, 2019

Article 2 - No Discrimination

Section 2.2 Union Affiliation

Neither the County, nor the Union, shall interfere with, intimidate, restrain, coerce or discriminate against any worker in his/her free choice to participate or join or refuse to participate or join the Union.

Article 19 - Grievance Procedure

Section 19.5 - Informal Grievance Step

It is agreed that workers will act promptly through an informal meeting with their immediate supervisor outside of the bargaining unit on any act, condition or circumstance which is causing worker dissatisfaction and to seek action to remove the cause of dissatisfaction before it serves as the basis for a formal grievance ...

Section 19.6 - Formal Grievance

a) Step One - Within twenty (20) working days of the occurrence or discovery of an alleged grievance, the grievance shall be presented in writing to the appointing authority. A copy of the grievance will be sent to Labor Relations and this copy shall dictate time limits. The grievance form shall contain information which identifies:

1. The aggrieved;
2. The specific nature of the grievance;
3. The time or place of its occurrence;
4. The rule, law, regulation, or policy alleged to have been violated, improperly interpreted, applied, or misapplied;
5. The consideration given or steps taken to secure informal resolution;
6. The corrective action desired ...

Article 27 - Full Agreement

It is understood this Agreement represents a complete and final understanding on all negotiable issues between the County and its Departments and the Union. This agreement supersedes all previous memoranda of understanding or memoranda of agreement between the County and its Departments and the Union except as specifically referred to in this Agreement. All ordinances or rules covering any practice, subject or matter not specifically referred to in this Agreement

shall not be superseded, modified or repealed by implication or otherwise by the provisions thereof. The parties, for the term of this Agreement, voluntarily and unqualifiedly agree to waive the obligation to negotiate with respect to any practice subject or matter not specifically referred to or covered in this Agreement even though such practice, subject or matter may not have been within the knowledge of the parties at the time [*332] this Agreement was negotiated and signed. In the event any new practice, subject or matter arises during the term of this Agreement and an action is proposed by the County, the Union shall be afforded all possible notice and shall have the right to meet and confer upon request. In the absence of agreement on such a proposed action, the County reserves the right to take necessary action by Management direction.

Appendix C - Public Health Nursing Unit

C.8 - Educational/Licensure Maintenance Provisions

a. The County agrees to provide time without loss of compensation and benefits for workers within the Public Health Nursing Unit to participate in educational courses, seminars, in-service training, workshops, and courses taken for certifications and credentials provided it is needed in order to maintain licensure and is clearly identified as needed for maintenance of licensure. Time off will be made available, provided that the required work is covered.

b. For the purpose of providing time without loss of compensation and benefits, workers in the PHN Unit will only be provided with enough paid time required to fulfill the continuing education units needed for maintenance of licensure by the State of California every two years. If the worker is requesting more educational leave than needed to meet the State of California requirement for maintenance of licensure, vacation, personal time or leave without pay must be used.

FACTS

The County Employs Public Health Nurses Who Are Required to Receive Continuing Education in Order to Maintain their Licensure and Employment:

The Public Health Department provides public health nursing services to county residents. Approximately 100 public health nurses (PHNs) work for the County. They are trained and licensed as registered nurses.

Under state law, PHNs, like all registered nurses, are required to obtain 30 continuing education units (CEUs), also known as contact hours, every two years. The State of California Board of Registered Nursing (BRN) receives applications from organizations that wish to provide the classes, courses and seminars that qualify for CEUs. Only BRN-approved educational events may be used by a PHN to renew licensure as a nurse.

The County, in turn, requires its PHNs to maintain current licensure to retain employment. The CBA between the parties spells out various ways in which the County supports the PHNs in their efforts to maintain their licenses.

The Union represents all PHNs employed by the County. The County also employs other registered nurses in its health care facilities. Those nurses are in a separate bargaining unit and are represented by a different union.

The Union sponsors nursing conferences at both the statewide and national levels. The biennial national conferences have been ongoing for many years, and typically include sessions that are pre-approved by the BRN for CEUs. The labor organization typically pays travel expenses for attendees and charges no tuition.

In September 2017, Several PHNs Applied to Attend an Out-of-State Union-Sponsored Nurses Conference and Asked to Be Granted Educational Leave for the Days of the October 2017 Conference:

At the time of the events precipitating this grievance, Douglas Palomo was the PHN manager.¹ On September 14, 2017, he sent an email to Anne Marie Santos and Aida Peña.² Both were PHN acting supervisors (also known as working out of class, or WOOC). "Laura" referred to in the email is Laura Brunetto, the County's Director of Public Health Nursing. The email, in relevant part, reads as follows (emphasis in original):

Just as heads up; I know that there is an SEIU National Yearly Conference is coming up in October. Since I will be away and you will be WOOC for me; I would like to help guide you on [*333] how to deal

with staff submitting requests to go to the conference (or any other conference) ...

To help you out determine who is eligible, I have attached the "Educational Leave and Tuition Reimbursement Fund" cheat sheet that Laura provided to us last year ...

It is *ok* to go ahead and *approve* staff going to this workshop (considering *office needs are covered first*):

1) If the class has *CEU's attached*

2) The amount of *time given is related to the amount of CEU's attached* to the course (eg. 16 CEU's = 16 hours of ed leave) and *travel is also considered* here (drive time/flight time, Uber, taxi rides etc.)

Attached to the email was a "cheat sheet" developed by Ms. Brunetto entitled "Education Funds/Leave available for Public Health Nurses." On the form is a row titled "Education Leave." Under the column "Educational/Licensure Maintenance Provisions" on that row, is the following:

Provided enough paid time required to fulfill the continuing education units needed for maintenance of licensure. If worker is requesting more educational leave than needed, vacation, personal time or leave must be used

On September 26, 2017, PHN Marilyn Mara registered for the 2017 Nurse Alliance Conference sponsored by the union. The conference was scheduled to be held in National Harbor, Maryland on Wednesday October 25 through Friday October 27. Over the next two days, PHNs Aida Peña, Joseph Odias, Monika Chauhan and Holly Truong also registered. All five work Monday through Friday schedules.

The conference brochure, provided by the PHNs to manager Paloma, indicated that eight hours of CEUs would be awarded for the three-day conference, provided that the nurse attended the entire conference. The conference was free to members of the Union, and the Union offered to pay for travel and hotel expenses. Due to travel time considerations, the PHNs attending proposed to use their own leave for the Tuesday travel date and asked for educational leave for conference days Wednesday through Friday.

On September 27, 2017, Mr. Paloma wrote an email to his manager Rhoda Blankenship.³ His email stated as follows:

I am getting PHNs submit their paperwork to go to an SEIU National Conference in National Harbor, MD. I have both leads requesting to go; do I allow both to go or just one?

No response from Ms. Blankenship was in the record. Mr. Paloma then wrote an email to Director Brunetto a few minutes later. It reads as follows:

Question; the conference is three days but only 8 CEUs. They need to attend all three days to get the 8 CEUs; do we give them all 24 hours of Ed Leave or how do we handle this? Please look at Aida's paperwork; the second attachment ... it says 8 hours of CEU given at the end of the three day conference.

Ms. Brunetto in turn sent an email to County Labor Relations representative Cynthia Mihulka. It reads in relevant part:

Several nurses are wanting to attend the SEIU National conference. My question is around using the Education reimbursement in the PHN section of the contract. It is a 3 day conference but only offering 8 CEUs ... For purposes of this request, we would approve as education time, the time that is training. As you can see, part of the agenda is lobbying activities. While I am supportive of them doing that, it wouldn't be done out of this section of the contract. They could use the section in the white pages⁴ to request the remaining time and receive half on county time and use one of their banks for the remaining ...

Ms. Mihulka responded to Ms. Brunetto as follows:

Correct. We should only be approving for the training classes that qualify for CEUs at the conference ... All other time can be taken through use of vacation, personal leave, or comp time. They could apply for the make-up time under Section 12.9 - Educational Leave and Tuition Reimbursement Fund for the remainder of the conference. However, I'm not sure that this conference, outside of the CEUs offered, would qualify under the definition of educational leave ...

[*334] Management Declined to Grant Full Eight-Hour Days of Educational Leave for Conference Attendees, Requiring the Unit Members to Use Their Own Personal Leave to Make Up the Difference:

On September 28, 2017, Director Brunetto approved 11.5 hours of educational leave for Ms. Peña. She sent her an email, as follows in relevant part:

I did get some clarification from Labor Relations. We should only be approving for the training classes that qualify for CEU's at the conference. In looking at the agenda, it looks like there are 11.5 hours of training time (I'll include the lobbying training.) All other time can be taken through the use of vacation, personal leave, or comp time ... I believe the statement regarding needing to stay for the entire education session is fairly standard for receiving CEUs. It looks like a great opportunity for the nursing staff. I hope they take advantage of this conference.

The other four PHNs received the same or similar responses to their requests. Each of the PHNs were in a status of needing more CEUs to fulfill their licensure requirement for that two-year period.

The Union Filed a Grievance, Requesting that Management Grant the Full Twenty-Four Hours Educational Leave for Conference Attendees:

On September 28, 2017, Ms. Mara (a shop steward for the Union) requested an informal pre-grievance meeting on behalf of all affected PHNs. That meeting was held on October 6. The Employer agreed to increase the number of approved educational leave hours to settle the grievance, but no settlement was reached.

On October 16, 2017, the Union filed a formal grievance. The grievance was filed on behalf of "All Affected Public Health Nurses." It cited the denial of the 24-hour educational leave requests for the October 2017 conference. It alleged a violation of Article 2 (No Discrimination) and Appendix C.8 (Educational/Licensure Maintenance Provisions).

As remedy, the grievance asked for "make whole, including but not limited to: Grant the full twenty-four hours of Educational Leave requested without loss of compensation and benefits as provided in Appendix C.8; Cease discriminatory actions and all other relevant remedies." It is that grievance that is now before the arbitrator.

Five PHNs attended the October 2017 conference.⁵ Each brought back a certificate of completion of the CEU requirement. They were each granted 11.5 hours of educational leave and used their own personal leave to make up the difference.

In April 2018, Two PHNs Applied to Attend a Two-Day Union-Sponsored In-State Conference and Were Again Required to Use Their Own Leave for Part of the Conference Days:

PHNs Mara and Peña applied to attend the California state nursing conference on May 21 and 22, 2018. They each applied for 16 hours of educational leave for the Sacramento conference. The conference was approved by the BRN to grant ten contact hours for those attending the conference.

The County approved the two PHNs for ten hours of educational leave. They attended the conference and used their own leave for the remaining six hours.

PHN Odias testified that he did not attend the May 2018 conference. "I was discouraged from what the county's response was to ... my most recent conference ..." he stated. "I would have to use my own personal time off, and I didn't want to do that."

PHN Truong testified that she did not attend the May 2018 conference because "I didn't want to go through the same hassle to go to another conference."

[*335] The Parties Bargained Over the Language on PHN Educational Leave in 2013 and 2015, Agreeing to Modifications:

The parties' CBA from 2011 - 2013 included the following language on PHN educational leave:

The County agrees to provide time without loss of compensation and benefits for workers within the Public Health Nursing Unit to participate in educational courses, seminars, in-service training and workshops identified and required in order to maintain licensure. Time off will be made available, provided that the required work is covered.

In May 2014, the parties signed a new CBA, covering the period September 2013 - June 2015. The above-cited paragraph from the prior agreement was retained, and a paragraph (b) was added, as follows:

For the purpose of providing time off without loss of compensation and benefits, workers in the PHN Unit will only be provided with enough paid time required to fulfill the continuing education units needed for maintenance of licensure by the State of California every two years. If the worker is requesting more educational leave than needed to meet the State of California requirement for maintenance of licensure, vacation, personal time or leave without pay must be used.

In November 2015, the parties signed another new CBA. Again, a change was made in the relevant section. The new language added is highlighted in bold by the arbitrator in the following excerpt:

The County agrees to provide time without loss of compensation and benefits for workers within the Public Health Nursing Unit to participate in educational courses, seminars, in-service training, workshops, and courses taken for certifications and credentials provided it is needed in order to maintain licensure *and is clearly identified as needed for maintenance of licensure*. Time off will be made available, provided that the required work is covered.

Labor relations representative Mihulka was the chief negotiator for the County for the 2013-2015 public health nursing agreement. She stated that she drafted paragraph (b) and proposed it to the Union. She testified as follows:

... we added this language for clarification so that it was more clear of an understanding that time off without loss of compensation and benefits for the purposes of educational leave was specifically for the time it took to get your continuing education units. And if you wanted more time up and above what it took to get your continuing education units, whether it was before or after you met your 30 units per two years for maintenance of licensure, that you had to use vacation, personal leave, or leave without pay.

Under cross-examination, she was asked what she "specifically" said at the bargaining table and answered "the county was making it clear that the time off without loss of pay of compensation or benefits was meant for the time that it took to get those CEUs, and not above that time."

Ms. Mihulka also testified that she was the chief negotiator for the public health appendix in 2015. She stated that she drafted and proposed the change to subsection (a). She recalled explaining the proposal to the Union in the following manner:

They need to get the 30 units every two years, but that ... we weren't getting requests for educational leave that would not be part of a CEU requirement. Like I want to go to a cooking class, but that's not a CEU ...

On cross-examination, Ms. Mihulka added that the parties discussed that the educational leave was not to be provided to nurses who wanted to obtain additional certifications, such as lactation consulting certification.

Director Brunetto also served on the County's public health nursing appendix bargaining team in 2015. She testified as follows:

One of the items I recall being discussed [with the Union] was, there was some interest on the union's part to add some additional language around the certifications and credentials ... because there was an interest if the union would want to expand their knowledge base, I think that one of the examples was the lactation specialist. And those do qualify for continuing education units, so I think they just wanted there to be some clarity that those could be included, and most all of those credentials are certifications you can get continuing education units.

PHN Peña served on the Union's public health nursing bargaining team in 2013. She testified about that bargaining as follows:

... the argument was not about obtaining the 30 CEUs or hours to get educational leave. That was not a question because that's mandated by the Board of Registered Nursing. That discussion [*336] over here, the argument was about requesting more time for professional development.

The County Has a History of Granting Educational Leave to PHNs in Eight-Hour Increments, Before and After the 2013 and 2015 Negotiations:

PHN Peña attended the Sacramento Nursing Alliance conference in May 2010 and May 2017. She attended the national Nurse Alliance conference in October 2013 and October 2015.

Ms. Peña also attended a training class in Alameda, CA in February 2016. She attended for two days, received twelve CEUs and was approved for sixteen hours of educational leave.

PHN Mara attended the Sacramento Nursing Alliance conference in May 2017. She also attended the national conference in October 2015.

In all cases, attendees to the Sacramento conference received ten CEUs and were granted sixteen hours of educational leave. In the cases of the national conference, attendees received seven to ten CEUs and were granted 24 hours of educational leave. No expense reimbursements were requested.

The following exchange took place on direct examination of director Brunetto:

Q: If you see a request for, let's say, one full day, or eight hours of education leave, how many ... continuing education units would you expect to see?

A: It can vary, but typically 6 CE units for a full eight-hour day is pretty normal, if you have education provided throughout that day.

Ms. Brunetto testified that, prior to September 2017, she did not "necessarily" see the time-off request form for educational leave requests. "That went to the manager," she stated. She also testified that it was "very rare" to receive a request for educational leave without an accompanying request for expense reimbursement.

UNION'S POSITION

The Union argues that the grievance is not procedurally defective. The grievance identifies the class, and names class representatives.

On its merits, the Union contends that the County's frequent and consistent prior educational leave approvals constitute a binding past practice. When a PHN attends a continuing education event that "physically prevents" return to work that day, the employer must grant a full eight hours of educational leave, regardless of how many CEUs are earned.

The practice, argues the Union, was "frequent, regular, and repetitious," thus meeting well-established standards of arbitral past practice. The practice was sufficiently "mutual" since manager Palomo knew of or approved the educational leave requests. Director Brunetto was aware of the out-of-town requests as well, even though she may not have personally approved the educational leave requests.

The past practice, the Union adds, was clearly about a matter involving employee rights and benefits.

The County, the Union asserts, should not be allowed to make *ad hoc* determinations on how much educational leave to grant. The text of the MOA is silent on how many hours are to be granted - it does not create a system for awarding partial educational leave hours.

Alternatively, the Union posits, the arbitrator may find that the contract is ambiguous on the subject of educational leave. In that case, the Union should still prevail based on past practice. While a reasonable interpretation of the contract might favor a "one-for-one" granting of educational leave hours per CEUs, the practice is consistent with a more expansive interpretation.

The Union contends that the restrictive language added to the CBA applies only to PHNs seeking leave after achieving their 30-hour CEU requirement. Neither management witness claimed that the scenario of the instant grievance came up in the bargaining table discussions.

The Union asserts that the Employer has a right to address its concerns about educational leave at the next negotiations, but not before.

[*337] EMPLOYER'S POSITION

The Employer moves to dismiss the grievance based on procedural defect. The grievance does not "properly identify the aggrieved nor does it document how the County of Santa Clara violated Article 2- Discrimination and Appendix C.8 Educational/Licensure Maintenance."

On the merits, the Employer contends that the County has properly followed Appendix C.8. The County carefully reviewed the request and granted educational leave consistent with the CEUs offered.

The Employer asserts that new language was added to the contract in 2013 and 2015 to assure that educational leave would only be granted to meet the continuing education requirement. The language is unambiguous.

The Union's claim that the County was discriminating against the unit members due to union activity is false. The County supported the nurses attending the union-sponsored conference.

The County asks that the arbitrator dismiss the grievance for procedural violations. If the arbitrator considers the grievance on its merits, the County asks that the arbitrator find no violation of the contract. The Employer asks that the arbitrator deny the grievance and the requested remedy in its entirety.

DISCUSSION

The Grievance Filed by the Union Met the Requirements of the CBA and is Properly Before the Arbitrator:

[1] The grievance gave adequate information to the Employer to investigate the allegation and respond accordingly. It is perfectly acceptable for the Union to file a grievance on behalf of a class of employees, even if all affected employees are not named in the grievance.

Even if the grievance were less specific in its initial filing, the proper response of the chosen arbitrator would not be to declare it non-arbitrable. Such deficiencies could, however, limit the scope of the grievance and potential remedies.

The grievance was correctly filed in accordance with the CBA and is properly before the arbitrator.

The CBA is Ambiguous on the Number of Educational Leave Hours to be Granted Under the Circumstances Presented in this Grievance:

[2] The key sentence in the CBA, for the purpose of deciding this dispute ⁶, is the first one in C.8.a.

The County agrees to provide time without loss of compensation and benefits for workers within the Public Health Nursing Unit to participate in educational courses, seminars, in-service training, workshops, and courses taken for certifications and credentials provided it is needed in order to maintain licensure ...

This section requires the employer to provide *time off* with compensation for attending sessions "needed" for licensure maintenance. It does not spell out how *much* time must be granted. The heart of the disagreement is how the parties interpret this section.

The Employer's key witness, Director Brunetto, implied in her testimony that eight hours of educational leave for six CEUs would be appropriate ("pretty normal," she termed it). The Union seemed to be arguing that a full shift (eight hours) of educational leave should be granted, regardless of the number of CEUs earned. The key factor to the Union was the fact that the PHN could not return to duty to complete a shift, due to the travel time involved to and from out-of-town conferences.

What is not clear, from the evidentiary record, is whether the Union would take the position that eight hours of educational leave must be provided for the obtaining of **[*338]** any number (even one hour, for example) of CEUs.

The County was supportive of the PHNs attending out-of-state conferences to obtain CEUs to maintain licensure. The Employer and the Union share a strong interest in PHNs obtaining the required CEUs to maintain licensure. They presumably have an interest in the PHNs obtaining those CEUs through avenues suited to each PHN's interests, availability, and preferences.

The Employer also has an interest in PHNs reporting for duty for as many hours as possible to perform the vital public health services of the department. Hence the Employer has a legitimate interest in limiting the number of hours of educational leave granted to renew licensure.

Since the language is ambiguous, the arbitrator must look to the practice as it had evolved until the events that gave rise to the grievance.

The Parties Have Given Specificity to Appendix C.8 Through a Past Practice of Granting Full Days of Leave:

[3] The Union made a persuasive past practice argument. Evidence was clear that a consistent, longstanding and mutual practice of granting full days of educational leave for out-of-town conferences existed.

Except for one conference sponsored by a local county and attended by PHN Peña, all the prior examples in evidence were similar in all relevant ways to the grieved events. They were either out-of-state three-day Union-sponsored conferences, or two-day Union-sponsored conferences held in Sacramento. They offered the same number of CEUs (or in one case fewer CEUs) as the events in the present dispute.

In each prior instance, the PHNs were granted eight hours per day of educational leave for attending. They received full days of leave, without using leave from their own leave banks,

despite the fact that the CEUs obtained were in some instances less than half the leave hours used.

The Employer's rejoinder to this past practice argument is twofold. One is that the contract language is unambiguous and calls for granting educational leave hours only commensurate with the number of CEUs obtained. As explained above and in the "bargaining history" section below, the contract language is far from clear. And this cut-and-dried employer interpretation is belied by management witness Brunetto's own statement about a "normal" educational leave request (eight hours of leave for six CEUs), as noted above.

The Employer's second counter to the past practice argument is that upper management was not aware of the practice of granting full days of educational leave. This contention is undermined by Ms. Brunetto's testimony that she reviewed all requests for tuition and expense reimbursement for obtaining CEUs. This admission leads the undersigned neutral to the conclusion that the director was aware, or at least *should have been* aware, of the longstanding leave practice.

None of the managers or supervisors who approved the educational leave in the past testified at the hearing. (We do know through the record that they were not members of the PHN bargaining unit.) Their testimony could have possibly shed light on the approval protocol and origin of the practice in question. Without that, the evidence tilts in the direction of supporting the conclusion that the practice was mutually agreed to.

The Employer Presented Insufficient Evidence that the 2013 and 2015 Bargaining Addressed the Scenario Present in the Instant Case:

[4] The County moved, successfully, to modify the PHN appendix in successive bargaining cycles. Management witnesses who participated in those bargaining sessions stated that the changes were intended to clarify that educational leave was to be provided in quantities commensurate only with the number of CEUs earned.

Yet the language added in 2013 was that PHNs "will only be provided with enough paid time required to fulfill the continuing education units." This wording does not resolve [*339] the ambiguity of the pre-2013 language. It does not specify how much paid time is "enough" paid time to fulfill the units.

The undersigned arbitrator's conclusion from the evidentiary record is that this subsection (b) language was added to address a different issue. That issue was the practice of some PHNs requesting educational leave after they had already obtained their required 30 CEUs during a two-year licensure cycle. The examples given of statements made at the bargaining table point in that direction.

Likewise, the change to subsection (a) added in 2015 also served to reinforce that same management concern. Not a single witness recalled any conversation at the bargaining table about PHNs requesting more educational leave for a conference than was warranted by the number of CEUs offered.

Even if the Bargaining History Were Credited in the Employer's Favor, the Practice of Granting Full Days of Leave Continued Under the Newly-Negotiated CBAs:

Several of the past practice examples introduced by the Union in the arbitration hearing concerned conferences attended by PHNs after the changes in the PHN appendix were implemented. If those CBA changes did concern the scenarios in dispute in this grievance, it stands to reason that management would have stopped approving full days of educational leave after the language changed. Yet they continued to approve leave in the same manner as they had prior to CBA modifications.

This absence of a change in practice is further evidence that the 2013 and 2015 changes in the contract are not relevant to this dispute.

Past Practice Determines the Meaning of C.8 Through the Duration of the CBA, But Not Beyond:

The preponderance of the evidence is that a valid past practice existed. That past practice must be considered by the parties as an agreed-upon interpretation of the current CBA. By its actions regarding leave applications to attend the October 2017 conference, the Employer has violated the CBA.

The May 2018 conference took place after the filing of the grievance. A strict view of the authority of the arbitrator might lead to the conclusion that any remedy must be confined to the 2017 conference that precipitated the grievance. However, the Employer did not specifically object to the inclusion of the 2018 conference in the arbitration proceeding. For the sake of streamlining the parties' labor relations process, the undersigned is taking the liberty to include the 2018 conference in the remedy.

[5] The parties have negotiated Article 27, Full Agreement. The undersigned reads that CBA section to incorporate certain rules and practices, even unwritten ones, into the CBA. It also makes clear that any agreements end at the expiration of the agreement.

The Union, in closing brief, has asserted that the Employer can bargain for a change in the practice in the next agreement. The undersigned takes it one step further: the past practice as a part of the parties' agreement expires with the expiration of the CBA on June 16, 2019. The parties may bargain a continuation of this practice or a modification to this practice. If agreement is not reached, the Employer may implement a reasonable interpretation of the contract language, beginning with the next CBA. If the union is not in agreement with that interpretation, it may file a grievance under the new CBA.

In other words, in the view of this arbitrator, this educational leave practice is not automatically continued absent agreement otherwise. The fact that the Employer has put the Union on notice that it no longer agrees with the interpretation allows it to terminate the practice under the successor agreement.

[*340] The Appropriate Remedy is to Make Whole the PHNs Who Were Required to Use Their Own Leave for Attending the October 2017 and May 2018 Conferences:

[6] The remedy is straightforward. The affected employees must be made whole as if the agreement and practice had been followed. Any personal leave conference attendees used on the conference days in October 2017 and May 2018 must be restored to their leave balances.

In addition, the remedy is ongoing. As noted in the prior section, the Employer must continue to honor the past practice of granting full days of educational leave under circumstances the same as or similar to the ones identified in this grievance. It must do so through the expiration of the current CBA, or until the parties negotiate otherwise, whichever comes first.

The Union implied that other PHNs might be entitled to a remedy for the May 2018 conference because they were discouraged from attending due to management's improper imposition of a new policy regarding educational leave. Any loss suffered by these non-attendees is speculative. Their situation does not lend itself to an arbitral remedy.

AWARD

1. The grievance was filed in accordance with the CBA and is properly before the arbitrator.
2. The Employer violated the CBA when it required public health nurses to use their own leave for a portion of the conference days for which they received continuing education units in October 2017 and May 2018.
3. The Employer is ordered to restore any personal or vacation leave used on October 25, 26 and 27, 2017 to the leave balances of Monika Chauhan, Marilyn Mara, Joseph Odias, Aida Peña and Holly Truong.
4. The Employer is ordered to restore any personal or vacation leave used on May 21 and 22, 2018 to the leave balances of Marilyn Mara and Aida Peña.
5. The Employer is ordered to continue the practice of granting eight hours of educational leave for days on which qualifying PHNs receive CEUs toward renewal of their nurse license. Absent an agreement otherwise, the Employer may cease the practice at the expiration of the parties' current Memorandum of Agreement.
6. The arbitrator retains jurisdiction over the implementation of the remedy.

Date: September 13, 2018.

fn 1

Mr. Palomo did not testify at the hearing.

fn 2

Ms. Santos did not testify at the hearing.

fn 3

Ms. Blankenship did not testify at the hearing.

fn 4

"White pages" in this context refers to a general provision in the master agreement regarding use of educational leave for time off for training and education that is not related to acquisition of CEUs.

fn 5

Documents were admitted to the record that a fifth PHN, Monika Chauhan, applied for time off to attend the conference in Maryland. Ms. Chauhan did not testify, and no evidence was presented that she attended the conference and was required to use her own leave. However, the Employer did not contest the inclusion of Ms. Chauhan in the class, so she will be included. If she did not in fact attend the conference and use her own leave, then the remedy applied to her will be moot.

fn 6

The Union's initial grievance raises a discrimination claim. While it does not specify the nature of this claim, the grievance form combined with union counsel's opening statement implies that the Grievants were being discriminated against based on their union activity. However, no testimony pointed in this direction, and the Union's post-hearing brief does not allege discrimination. Therefore, this Opinion will not address the discrimination claim.