

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Case No. 07-CA-205394

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VHS OF MICHIGAN, INC., )  
d/b/a DETROIT MEDICAL )  
CENTER (DMC), )  
 )  
Respondent, )  
 )  
and )  
 )  
LOCAL 283, INTERNATIONAL )  
BROTHERHOOD OF )  
TEAMSTERS (IBT), )  
 )  
Charging Party. )

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**BRIEF IN SUPPORT OF RESPONDENT VHS OF MICHIGAN, INC.'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Dated: September 3, 2019

## INTRODUCTION

VHS of Michigan, Inc. (“DMC”) and Local 283 International Brotherhood of Teamsters (“Teamsters” or “Union”) have collectively bargained since 2006. Each of their three bargaining agreements contain the following provision:<sup>1</sup>

Recognizing that the provisions of health care services may require regular work on seven days per week the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours, per week.

Between 2006 and 2017, DMC chose to calculate overtime for Union employees based on an “80-and-8” schedule. Then, in June 2017, DMC exercised its right, reserved to it under the bargaining agreement, to calculate overtime based on a forty-hour per week schedule. Notwithstanding the plain language of the parties’ agreement, the Union demanded that DMC bargain regarding this change. After DMC refused to do so, the Union filed a charge alleging that it violated § 8(a)(5) and (1) of the National Labor Relations Act (“Act”).

On March 29, 2018, the General Counsel issued a complaint. And on June 4, 2019, the parties tried this case. On July 23, 2019, Administrative Law Judge Arthur J. Amchan (“ALJ”) issued his Decision. As set forth below, the ALJ erroneously decided that DMC violated Section 8(a)(5) and (1) of the Act by “unilaterally changing its policies as to when unit employees were eligible for overtime pay.” In reaching this conclusion, the ALJ erroneously relied on the Board’s decision in *Intermountain Rural Electric Association*, 305 NLRB 775 (1985). In addition, the ALJ erroneously declined to defer this controversy to arbitration pursuant to *Collyer Insulated Wire and United Technologies*, 192 NLRB 837 (1971).

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<sup>1</sup> General Counsel Exhibits 2, 3, and 4.

## STATEMENT OF FACTS

Article VII of the parties' bargaining agreement covers work schedules and overtime computations. Specifically, Article VII identifies two alternative schedules for purposes of overtime computation:<sup>2</sup>

Recognizing that the provisions of health care services may require regular work on seven days per week the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period and eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours, per week.

Therefore, under Article VII, DMC specifically reserved the right to use either schedule to calculate overtime, i.e., a forty-hour or an "8-and-80" schedule.<sup>3</sup> As acknowledged by the ALJ, the alternative "8-and-80" schedule is authorized by Section 7(j) of the Fair Labor Standards Act ("FLSA") for healthcare employers.<sup>4</sup>

Consistent with the parties' bargaining agreements, the DMC Pay Administration Policy has continuously provided as follows:<sup>5</sup>

For hourly-paid classifications, each Operating Unit will determine which of the following methods is used to pay overtime:

- 1) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (40 hours).
- OR
- 2) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (80 hours) or in excess of eight (8) hours in a workday.

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<sup>2</sup> General Counsel Exhibit 1. In addition, Article VII provides that "[s]chedules will be made based on management determination of the most expeditious and cost-effective way to schedule overtime[.]" *Id.*, § 4.

<sup>3</sup> Under the 8/80 Structure, the employer pays overtime for hours worked in excess of 8 hours a day and 80 hours in a two-week period.

<sup>4</sup> Decision at fn. 3.

<sup>5</sup> Respondent Exhibit 1 (HR 202).

This DMC policy illustrates the “8-and-80” schedule with the following example:

**Example-** If overtime option 2 is applicable and an employee works 84 hours in fourteen-day standard work period and 12 hours in an individual workday, the employee will receive overtime once, for the hours worked in excess of an 8-hour workday. The employee is not also eligible for overtime for the hours in excess of 80 in the work period.

On July 9, 2017, and pursuant to the express language of the parties’ bargaining agreement, DMC began calculating overtime based on a forty-hour workweek rather than the “8-and-80” schedule.<sup>6</sup> This decision, and DMC’s refusal to negotiate it, precipitated this controversy.

### **STATEMENT OF CASE**

The ALJ erred by *sua sponte* applying *Intermountain* to conclude that DMC violated the Act when it exercised its express right under the bargaining agreement to change overtime calculation schedules. *Intermountain* simply has no application here. Instead, binding Board precedent requires enforcement of the express waiver in Article VII of the parties’ bargaining agreement. In addition, the ALJ erred by not deferring this contract dispute to the grievance and arbitration procedure in the bargaining agreement. For these reasons, DMC respectfully requests that the Board dismiss the Union’s Charge in its entirety.

### **ARGUMENT**

#### **I. The ALJ Erred in Concluding that the Parties’ Past Practice Superseded Article VII on the Basis of *Intermountain***

##### **A. Controlling Legal Principles**

First, “[m]any of the basic principles of contractual interpretation are fully appropriate for discerning the parties’ intent in collective bargaining agreements. For example, the court should first look to the explicit language of the collective bargaining agreement for clear manifestations

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<sup>6</sup> Hr’g Tr. at p. 21 (Perry); Hr’g Tr. at p. 32 (Melissa Burger); Hr’g Tr. at p. 43 (Steve Hicks).

of intent.” *Kellogg Co. v. NLRB*, 457 F.2d 519, 524 (6<sup>th</sup> Cir. 1972). In this regard, “collective bargaining agreement’s terms must be construed so as to render none nugatory[.]” *Int’l Union v. Yard-Man*, 716 F.2d 1476, 1479 (6<sup>th</sup> Cir. 1983); *see also Cordovan Associates, Inc. v. Dayton Rubber Co.*, 290 F.2d 858, 861 (6<sup>th</sup> Cir. 1961).

Second, the parties can waive an employer’s statutory duty to bargain. “Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.” *American Diamond Tool, Inc.*, 306 NLRB 570, 570 (1992) (citing *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)). To determine whether there has been a waiver, the Board must look to the precise wording of the relevant contract provisions. *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995). Furthermore, an employer can lawfully act unilaterally if the employer has a sound basis for its interpretation of the contract. *Vickers, Inc.*, 153 NLRB 561, 570 (1965).

**B. The Union Waived Its Right to Bargain Regarding DMC’s Decision to Use A Forty-Hour Schedule to Calculate Overtime Compensation and *Intermountain* has No Application Here**

First, Section 1(A) of Article VII contains specific language negotiated in the context of the FLSA and DMC policies. Indeed, the ALJ acknowledged that the “provision is consistent with Section 7(j) of the Fair Labor Standards Act, which has special provisions for the health care industry.”<sup>7</sup> Therefore, based on this plain language, DMC reserved exclusive authority to itself to calculate overtime based on either an “8-and-80” or a forty-hour schedule. As such, the Union waived its right to bargain regarding this decision. *See e.g. Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255 (6<sup>th</sup> Cir. 1995) (holding that provision stating “[t]he Director of Nursing will decide

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<sup>7</sup> Decision at fn. 3.

the number of assignments and work areas that will be under the Seventy Hour shift” clearly authorized employer’s unilateral abolishment of the program altogether).

Second, the ALJ’s reliance on *Intermountain* is misplaced. In *Intermountain*, the employer and union had, over a long period of time, included employees’ paid time off—e.g., vacation and sick leave—in determining overtime pay eligibility. In time, the parties negotiated a bargaining agreement which, contrary to the parties’ past practice, precluded consideration of paid time off in calculating overtime compensation. Though this provision remained in subsequent bargaining agreements, the parties’ practice remained as before, i.e., paid time off counted toward overtime calculations.

Then, after years of performing a practice contrary to the bargaining agreement, the employer notified the union that it planned to unilaterally apply the terms of the bargaining agreement. The Board found that this unilateral action violated the Act, reasoning in part:

The evidence establishes that the parties' practice was to credit all time for which employees were paid, including excused time off, toward eligibility for overtime premium pay. *For at least 7 years after the contract language was changed, the Respondent continued to use the old overtime formulation.* This uninterrupted and accepted custom had thus become an implied term and condition of employment by mutual consent of the parties. Once an implied term is so established, a unilateral change in that term is unlawful.

*Intermountain Rural Elec. Ass'n*, 305 N.L.R.B. at 787-788 (emphasis added).

Therefore, in *Intermountain*, the Board found that the parties waived the terms of their bargaining agreement regarding the determination of overtime eligibility by engaging in a contrary practice for seven years. However, unlike *Intermountain*, the parties here did not perform inconsistently with Article VII of their bargaining agreement; indeed, their practice was entirely consistent with it. Therefore, *Intermountain* is inapposite and DMC did not waive its right to unilaterally change overtime compensation schedules.

Accordingly, the ALJ erred in concluding that DMC violated Section 8(a)(5) and (1) by “unilaterally changing its policies as to when unit employees were eligible for overtime pay.”

**II. The ALJ Erred by Failing to Defer this Contract Dispute to the Parties’ Grievance and Arbitration Procedure**

**A. Controlling Legal Principles**

“Whether deferral to the grievance and arbitration process is appropriate is a ‘threshold question’ which must be decided prior to addressing the merits of the allegations at issue.” *Sheet Metal Workers Local 18--Wisconsin (Everbrite, LLC)*, 359 NLRB No. 121, at p. 2 (2013), quoting *L.E. Myers Co.*, 270 NLRB 1010, fn. 2 (1984).

In deciding the appropriateness of deferral, the following factors must be considered: “(1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees’ exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration.” *San Juan Bautista Medical Center*, 356 NLRB No. 736, 737 (2011). Importantly, “[a] dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute.” *Id.*

**B. The ALJ Erred in Failing to Defer this Case to Grievance Arbitration**

Here, the foregoing factors weigh in favor of deferral. First, the parties share a productive collective bargaining relationship spanning thirteen years, three bargaining agreements, and numerous extensions to these agreements.<sup>8</sup> In addition, there are no allegations of employer

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<sup>8</sup> General Counsel Exhibits 1-3; Hr’g Tr. at pp. 7-8.

animosity here, and DMC asserted its willingness to arbitrate this dispute. Indeed, the parties' bargaining agreement covers "matters of interpretation and application of this Agreement,"<sup>9</sup> which is sufficiently broad to encompass this dispute. As such, the ALJ should have deferred this controversy to the parties' grievance and arbitration procedure.

Accordingly, the ALJ erred in not deferring this case to the grievance and arbitration procedure in the parties' bargaining agreement.

### **CONCLUSION**

For the foregoing reasons, Respondent VHS of Michigan, Inc. respectfully requests that the National Labor Relations Board reverse the Administrative Law Judge's Decision in its entirety and dismiss the Complaint in this matter.

Respectfully Submitted,

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<sup>9</sup> General Counsel Exhibit 1.

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing document via the Board's electronic filing system, and served copies on the Reginal Director, Counsel for the General Counsel, and the Charging Party's Counsel on September 3, 2019 as follows:

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