

**House Officers Association
Grievance #20-10679**

RESPONSE TO ASSOCIATION GRIEVANCE

I. Introduction

On December 9, 2020, the University of Michigan (“University” or “Employer”) received House Officers Association (“HOA” or “Union”) Grievance #20-10679, alleging that the University violated the parties’ collective bargaining agreement when the Anesthesiology Residency Clinical Training Program reduced the number of paid release days it plans to make available in 2021 for House Officers to attend job or fellowship interviews. The Union alleged a violation of:

Past Practice, Articles XII & XIV and all other implicated provisions of the Collective Bargaining Agreement (CBA) between the University of Michigan Regents and the University of Michigan House Officers Association (HOA).

II. Analysis

The University’s Anesthesiology Residency Clinical Training Program (hereinafter the “Program”) is one of over 100 clinical training programs offered by the University. The Program currently enrolls approximately 115 House Officers (or “Residents”). The Program requires four (4) years of training. Residents typically apply for post-Residency fellowships or jobs, and attend interviews for such positions, during their final two years in the Program.

The 2020-2023 CBA between the University and the Union provides in Article XII, “Vacation/Paid Time Off,” Section A, for four (4) weeks of paid vacation annually. Section B of that Article specifies in paragraph 85 that “Vacation time may be requested for job interviews.” This sentence is the sole reference in the CBA to the subject of taking paid time away from the Program for interviews. Section D, “Additional Paid Time Off,” provides for numerous other types of time off without loss of pay, including: for taking required Board examinations (paragraph 91), for attending conferences approved by the Program Director (paragraph 92), for attending lifesaving recertification courses (paragraph 93), and for taking the USMLE Step 3 or COMLEX Level 3 examination (paragraph 95).

Article XIV, also cited by the Union in its Grievance, provides for nine (9) additional types of paid time away from the Program, including: Sick Leave, Serious Illness Leave, Bereavement Leave, Jury Duty, Long-Term Disability, Preventative Care, Personal Days, Maternity Leave, and Parental Leave. The Personal Day and Parental Leave are new benefits that were negotiated by the Union during the parties’ spring 2020 negotiations. The annual Personal Day, as provided for in paragraph 109, “may be used for any personal need.”

The Program exceeded the requirements of the CBA in 2020 by allowing Residents in their third or fourth year of training to take up to three (3) days away from the Program, with pay, to attend interviews, without requiring use of vacation or other form of paid time off. Due to patient coverage needs, the Program exercised its discretion to allow two (2) such paid interview days starting in 2021. The Union alleges that the Program's decision to offer fewer paid interview days in 2021 violates the collective bargaining agreement and "past practice."

As a threshold matter, the Union's Grievance fails to allege a dispute that is arbitrable because it cannot cite to a provision of the CBA that has been violated. The CBA does not provide for paid time away from the Program for attending job or fellowship interviews. In fact, the CBA specifically provides in paragraph 85 for vacation days to be made available for this purpose. Therefore, not only has the Union failed to point to any provision of the CBA that has been violated, but the Union's position is actually contradicted by the plain language of paragraph 85, which specifies how House Officers may be paid for interview days, if at all, and requires only that vacation days may be requested for interviews. Regarding the Union's allegation of a "past practice" violation, to the extent that the Program has chosen to release Residents from work responsibilities to attend interviews, without requiring use of paid vacation, this paid time is above and beyond the requirements of the plain language of the CBA and cannot constitute a binding past practice. The Program's decision about whether to offer any such paid days to interview, or the number of such days provided, cannot serve as the basis for a grievance under the CBA.

In addition to lacking substantive arbitrability, this Grievance is also fails to establish a contract violation on two other, alternative bases.

First, the Union cannot establish the existence of any consistent past practice by the Program in making a certain number of paid interview days available outside of paid vacation. The Union asserts incorrectly in its Grievance that "House Officers in the Anesthesiology Department were granted up to three paid interview days during their final two years of training for travel and interviews. This has always been a clear, consistent policy..." If fact, the Program has previously exercised its discretion to make changes to its practice in this area, without challenge from the Union. For instance, in 2018 and 2019, the Program made up to five (5) paid interview days available to Residents who were in their third and fourth years of training, over and above the availability of paid vacation as required by the CBA (see e-mail to Residents dated January 12, 2018, attached as Exhibit A). On January 1, 2020, the Program announced in writing to all Residents (see email attached as Exhibit B) that the number of such days would be three (3) days in calendar 2020. The Union did not raise any objection or bring any grievance regarding this announced change, nor did it make any demand to bargain over the issue of paid days for interviews, despite the fact that the parties opened contract negotiations only 12 days later on January 13, 2020, and those negotiations continued through June 2020.

Second, to the extent the Union seeks to bargain over the availability of paid interview days for Residents in the Program, the Union has waived any right to bargain. The CBA contains a "Waiver" clause in Article XXXVI, which provides in paragraph 269 that the parties "each voluntarily and unqualifiedly waives the right, and agrees the other shall not be obliged, to bargain

collectively *with respect to any subject or matter referred to or covered in this Agreement*” [emphasis added]. The subject of interview days is, in fact, specifically referred to and covered in the CBA: as cited above, Article XII, Section B, paragraph 85, provides that “Vacation time may be requested for job interviews.” The “Waiver” clause therefore bars the Union from asserting a right to demand bargaining over the subject of interview days, including any requirement to provide them or the number to be provided. It should also be noted that during 2020 contract negotiations, which began January 13, 2020 and concluded in June 2020, the Union did not propose any change to the provision in Article XII stating that “Vacation time may be requested for job interviews,” nor did the Union make any proposal at all regarding pay for interview days. However, the Union made numerous other proposals related to paid time off, including the addition of: (1) Personal Days, (2) Parental Leave, (3) days off without loss of pay for attending lifesaving recertification courses, and (4) days off without loss of pay for taking the USMLE Step 3 or COMLEX Level 3 examination. All of these proposals were accepted by the University in some form and incorporated into the CBA in Articles XII and XIV. In contrast, the Union made no proposal at any time for paid interview days.

Finally, to the extent the Grievance asserts a violation of the CBA based on the Program having informed Residents that they may utilize Personal Days for interviews, the Union’s position flatly contradicts the plain language of the “Personal Days” provision of the CBA, which states in paragraph 109 that Personal Days “may be used for any personal need.” Use of a Personal Day for a job or fellowship interview would certainly be within the discretion of the Resident, and reminding Residents that this option exists does not constitute a violation of the CBA.

III. Conclusion

The Program has exercised its discretion to offer a limited number of paid days off for interviews. This benefit is not required by the CBA, and the Program is therefore under no obligation to continue offering these paid interview days, or to offer any specific number of days. The Grievance fails to state a claim that is arbitrable, because it asserts a right to a paid time off benefit that does not exist in the CBA and is actually contradicted by the language of the CBA, which specifies vacation may be requested for interviews. The Union’s “past practice” argument is without merit, in that there is no consistent past practice, there is no ambiguous contract language to interpret and the Program has previously exercised its discretion to change the number of interview days offered. Finally, the Union failed to raise the issue on a timely basis through the grievance process or during 2020 contract negotiations. The Waiver clause in the CBA acts as a bar to the Union’s assertion of a right to demand bargaining over the issue of paid interview days. Finally, the suggestion that Residents may use Personal Days for interviews is entirely consistent with the language of the CBA. For all of these reasons, the Grievance is denied.

FOR THE UNIVERSITY REVIEW COMMITTEE: s/ Wade Baughman
Lead Labor Relations Advisor

Date emailed to the HOA: January 8, 2021