VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

REGENTS OF THE UNIVERSITY OF MICHIGAN (HEALTH SYSTEM),
Employer

-and-

HOUSE OFFICERS ASSOCIATION,
Union
_____/

Grievants: [redacted]

Issue: Neurology Completion Date

Grievance # 23-11648

OPINION AND AWARD

SUBJECT

Request to forego paid vacation to change timing of completion of neurology program after House Officers' approved leaves of absence.

ISSUES

Is the grievance arbitrable?
If so, did the Employer violate the parties' collective bargaining agreement when it refused to allow Grievants to forgo their contractual paid vacation time to complete their residencies at the traditional end of the academic year?
If so, what shall be the remedy?[1]

CHRONOLOGY

Grievance Filed: August 21, 2023
Arbitration Hearing: February 6, 2024
Briefs Received: March 8, 2024
Award Issued: May 7, 2024

APPEARANCES

For the Union: Soldon McCoy, LLC, by Kyle A. McCoy, Esq.
For the Employer: Gloria Hage, Esq., University of Michigan Office of the Vice President & General Counsel

SUMMARY OF FINDINGS

The grievance is DENIED. The parties' collective bargaining agreement addresses the terms and conditions of employment but does not extend to oversight of a House Officer's academic training program. The request to forego paid vacation time to offset the time spent in a LOA was denied by Grievants' certifying Board. The time deemed necessary to complete a neurology program is an academic matter excluded from the collective bargaining agreement. The grievance is not substantively arbitrable.

[1] The issue was framed by the Arbitrator with the parties' consent.

BACKGROUND

[redacted] (collectively referred to as "Grievants") have dual status as students and employees ("House Officers") of the University of Michigan (the "University" or the "Employer"). House Officers are represented for collective bargaining purposes by the House Officers Association ("HOA" or "the Union"). The University and HOA are parties to a collective bargaining agreement, in effect from July 1, 2023, through June 30, 2027.[2]

Grievants are enrolled in the University's four-year Neurology residency program, accredited by the Accreditation Council on Graduate Medical Education ("ACGME"), which "provides three years of neurology education, preceded by 12 months of broad clinical experience in general medicine."[3] Upon completing the requirements of the 36-month Neurology Program, most House Officers begin their matched employment or fellowships, which typically begin on or around July 1. Grievant [redacted] has been accepted to such a fellowship at the [redacted].

Each of the Grievants took an approved leave of absence ("LOA") during their twelve-month Internal Medicine ("IM") program. Taking the LOAs extended each Grievant's IM program completion date by the length of leave taken. As a result, the start of each Grievant's Neurology Program was delayed by the same period and Grievants are expected to finish their Neurology Program later than the end of the typical academic year. In summary:

- Grievant [redacted] started the IM program on June 20, 2020, and took a [redacted] LOA in November 2020. [redacted] completed the IM program on July 28, 2021, and started the Neurology program the next day, July 29, 2021. [redacted] is expected to complete the Neurology program on July 28, 2024.

- Grievant [redacted] started the IM program on June 20, 2020, and after taking an approved LOA, completed the IM program on August 25, 2021. [redacted] started the

[2] Joint Exhibit 1
[3] Employer Exhibit 8, p.4 Int.C.1b

Neurology program the next day, August 26, 2021. [redacted] is expected to complete the Neurology program on August 25, 2024.

- Grievant [redacted] started the IM program on June 21, 2021, and took a four-week LOA in the first year, completing the IM program on July 27, 2022. [redacted] started the Neurology program on July 28, 2022. [redacted] is expected to complete the Neurology program on July 27, 2025.

In 2023, Grievant [redacted] contacted Dr. Zachary London, the University's Neurology Residency Program Director, to see whether [redacted] could forego four weeks of paid vacation time at the end of [redacted] neurology block in order to offset his late start, thereby graduating at the end of the regular academic year. Grievants [redacted] sought similar accommodations.

London contacted the Graduate Medical Education ("GME") office requesting that Grievants be allowed to forgo their contractual paid vacation time, effectively moving up their program completion date by the same period. Upon receiving a denial from the GME office, London emailed the American Board of Psychiatry and Neurology ("ABPN") Board with the same request. In response, ABPN's Manager of Credentials Amanda Bishop wrote, "If the resident started late (off cycle), the off cycle MUST stay with the resident, LOA cannot be used to shorten or make up time."[4] Dr. London then asked whether it would be possible to give credit for time doing neurology electives during the IM program and retroactively change Grievants' Neurology start dates. ABPN's Director of Certification Services Jessica Rogers replied, in part;

> If the residents had a delayed start time with the IM program, they definitely cannot use LOA to change that start date either as they must have 12 months of training completed in the pgy-1. The ABPN LOA policy is an optional policy for the programs and does only apply to the residency years, not the pgy-1 in this case because they were appointed to the IM program. They must follow the LOA policy for that year of ABIM and what they allow or don't allow.[5]

On August 9, 2023, HOA Director of Operation Steven Smith was contacted by the Chief Resident in the University's Neurology Department and was informed that the GME had rejected

[4] Employer Exhibit 18, p.3
[5] Employer Exhibit 18, p.1

Grievants' proposal to forgo paid vacation to offset their training extension. On August 11, 2023, Smith wrote to Senior Labor Relations Advisor for the HOA program Brian Sumner, seeking assistance for Grievants:

> We've been contacted by a few residents in our Neurology program. Neurology is a four-year program that includes an intern year in Internal Medicine. Three of the current residents took leave time during their intern year. As described in our CBA, they would like to forgo vacation time in order to graduate on time.
>
> They have been told by GME that this is not allowed, as the time off was technically during Internal Medicine and therefore vacation sacrificed during Neurology would not be acceptable.
>
> This was described by the residents as potentially [devastating]. Fellowship offers are predicated on completing residency on time.[6]

On August 21, 2023, the Union filed a Step 2 grievance and, upon receiving no response from the Employer, moved the dispute to Step 3 of the grievance procedure. The grievance states in part:

> CONTRACT VIOLATION:
> Article XIII (Paid Time Away)
>
> ***
>
> All three House Officers utilized their contractually guaranteed leave for Serious Illness and Maternity. The ABPN policy clearly gives the Program Director the ability to determine whether the resident is meeting training requirements in this circumstance. The GME administration cannot belatedly overrule the Program Director's decision in this manner, particularly in a way that follows neither the HOA CBA nor the written policies of the ABPN, and which contravenes promises made by the Department that these doctors relied upon.
>
> The ABPN Leave of Absence FAQ also makes clear that "the policy requires that training not be extended solely due to a trainee using the allowed leave time." In this case, the affected House Officers are dealing with a training extension for no other reason than for using their contractually permitted leave time and a delayed start date in Neurology that was unnecessary. However, this does not appear to be a situation of any clinical deficiency being observed. House Officers are not trying to reduce their training time, either. Instead, the impacted House Officers are merely foregoing their contractually permitted vacation time to ensure they reach the end of their residencies on time. The CBA and ABPN policy allow this arrangement with Program Director approval…[7]

[6] Union Exhibit 1.
[7] Joint Exhibit 2.

The grievance was denied at the third step of the grievance procedure and thereafter, the parties selected Arbitrator Kathryn A. VanDagens to hear the grievance. A full evidentiary hearing was held on February 6, 2024, in Ann Arbor, Michigan. The parties stipulated that the arbitrator has the authority to determine the substantive arbitrability of this matter and, if deemed arbitrable, to decide the issue presented by the grievance. Both parties had full opportunity to present testimonial and documentary evidence and to examine and cross-examine witnesses, and both parties elected to file post-hearing briefs.

THE UNION'S POSITION

The Union contends that the grievance is substantively arbitrable as the issue raised is purely contractual and employment-related, and not an academic matter. The Union contends that the grievance does not seek a reduction in training but rather to allow Grievants to forego four weeks of their contractual paid vacation benefit in order to complete their Neurology training program at the traditional end of the academic year. The Union contends that all doubts should be resolved in favor of arbitrability.

As to the merits, the Union contends that Grievants' request to forego paid vacation to off-set time missed due to LOA does not contravene ABPN policy. The Union contends that the ABPN leave of absence does not supersede institutional policies and applicable laws. The Union contends that the ABPN leaves it up to the Employer to determine how to make up time lost due to a leave of absence, in accordance with its own policies.

The Union contends that Grievants' ability to forgo paid vacation is a contractual benefit pursuant to ¶ 110 of the collective bargaining agreement. The Union contends that Grievants do not seek to reduce the amount of training they will receive, but rather exercise this contractual benefit to ensure timely graduation from the program. The Union contends that this contractual benefit should not be forfeited absent clear evidence that the parties intended that result.

Finally, the Union contends that not allowing Grievants to forfeit their paid vacation time will lead to absurd and inequitable results. For example, Grievant [redacted] applied for and was accepted to a fellowship scheduled to begin July 1, 2024. The Union contends that if [redacted] is not allowed to forego his paid vacation to end his Neurology program before July 28, 2024, he will spend those four weeks on paid vacation rather than beginning his new fellowship on time.

THE EMPLOYER'S POSITION

The Employer contends that the grievance is not substantively arbitrable because the collective bargaining agreement expressly "addresses the terms and conditions of employment but does not extend to oversight of a House Officer's academic training program." The Employer contends that the arbitrator lacks jurisdiction to decide an issue related to Grievants' academic training, and thus, the grievance should be denied.

As to the merits of the grievance, the Employer contends that there is no violation of the vacation provisions of the collective bargaining agreement because Grievants were not denied their vacation allowance or pay for days off. The Employer contends that there is no contractual provision allowing Grievants to forfeit paid vacation days. The Employer further contends that ¶110 was not violated because Grievants are not seeking to offset Neurology training deficits. The Employer contends that all three Grievants will complete their Neurology program thirty-six months after their start dates, an on-time completion. The Employer further contends that even if this provision were applicable, all requests to offset are permitted only "to the extent allowed by the national certifying Board" and the Board disallowed the request.

The Employer also contends that the ABPN training requirements make clear that the Program Director has no discretion to use leave or vacation time to shorten Grievants' Neurology training time from the required thirty-six months, despite initially trying to help Grievants.

DISCUSSION AND FINDINGS

The purpose of labor arbitration is, first and foremost, to resolve disputes between the parties regarding the application and intent of language negotiated by them.

> It is the duty of the arbitrator, as a creature of the contract between the parties, to apply and enforce the terms of the contract. Unless those terms are ambiguous or uncertain, he has no authority to substitute his judgment for that of the parties.

Fox River Paper Co., 114 LA 9, 10 (Daniel, 1999). As with any contract interpretation case, the moving party, in this case the Union, bears the burden of proving that the Employer violated the agreement by some action or inaction.

Here, however, the Employer claims that the subject matter of the grievance is not arbitrable, and the arbitrator lacks jurisdiction to render a decision on the merits. Therefore, the first question to be resolved is whether the grievance addresses a matter the parties agreed to resolve in arbitration.[8]

Substantive arbitrability concerns the lack of jurisdiction over the subject matter of the grievance. The right to have disputes resolved in arbitration is conferred by the parties' collective bargaining agreement. A party cannot be forced to arbitrate matters which have been excluded from the grievance and arbitration provision. But the United States Supreme Court has opined that an order "to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Therefore, arbitrators, including this one, typically interpret grievable matters in the broadest possible manner.

The House Officers have been determined to hold dual status, as they are simultaneously students and employees. While they were permitted to unionize, in *Regents of the University v.*

[8] Generally, it is up to the courts to determine whether a grievance is substantively arbitrable, unless, as here, the parties authorize the arbitrator to determine the arbitrability of the grievance.

Employment Relations Commission, 389 Mich. 96, 112-13 (Mich. 1973), the Michigan Supreme Court ruled, "[T]he scope of bargaining by the Association may be limited if the subject matter falls clearly within the educational sphere." As a result, the parties' collective bargaining agreement expressly limits the scope of the Agreement in several respects. The Employer cited several recent arbitration cases[9] between the University and HOA related to the arbitrability of disputes which were found to be related to the University's academic training program and therefore, not arbitrable.

The Union's grievance on behalf of the three House Officers alleges a violation of Article XIII, PAID TIME AWAY, which reads, in part:

> ¶ 110 Paid vacation time may be used to off-set deficits in training due to a Leave of Absence (LOA), to the extent allowed by the national certifying Board and following the processes and procedures identified by the Employer.

The Union argues that paid vacation time is a contractual employment benefit and therefore, the denial of that benefit is an arbitrable issue.

The Employer's response is that the Union does not seek to enforce a contractual benefit, as no Grievant has been denied paid vacation time. Instead, the Union seeks to forego paid vacation time to reduce Grievants' training time. The Employer argues that decisions regarding time in training are academic in nature and are therefore, expressly excluded from collective bargaining in Article XII, LEAVES AND IMPACT ON TRAINING, ¶82, which reads:

> Separately negotiated benefits contained within the collective bargaining agreement such as paid vacation during an appointment year may be used to off-set deficits in training due to leave time as defined in Article XIII and Article XIV, to the extent allowed by the individual's national certifying Board and following the processes and procedures identified by the Employer. Reductions in training are not assured or guaranteed and are always subject to the applicable national certifying Board's approval, upon request of the Program Director in his or her sole discretion. In no case may the Program Director be compelled to make the request of the national certifying Board. The request is made solely on the assessment of

[9] *HOA v University of Michigan*, FMCS 21-10818 (Arb. Rimmel, 2021); *HOA v University of Michigan*, FMCS 221217-02000 (Arb. Nowakowski, 2022); *HOA v University of Michigan* (Arb. Chiesa, 2021); *HOA v University of Michigan*, (Arb. Statham, 2024).

> readiness for independent practice. The Program Director's determination regarding reductions-in-training are not subject to the grievance and arbitration proceedings of the Parties' Collective Bargaining Agreement. (emphasis added)[10]

The clear and unambiguous language of the parties' collective bargaining agreement demonstrates the parties' intention that the Agreement not extend to the academic training program. Numerous arbitrators have previously so held when considering a variety of issues. Most recently, Arbitrator Statham considered whether a grievance protesting an Employer promulgated Absence From Training Policy in the Anesthesiology Program was arbitrable. As here, the parties disagreed as to the effect of ¶ 82 on contractually guaranteed benefits.

Arbitrator Statham recognized that ¶ 82 leaves it up to the discretion of the Program Director of the particular program to seek a reduction in training, to the extent allowed by the national certifying board. Paragraph 82 goes on to say that reduction in training should only be sought if the training director can attest that the resident has achieved the required competence.[11] Arbitrator Statham wrote, "It is clear to me that the time required by the [American Board of Anesthesiology] to complete its anesthesiology program is part of an academic program and is, therefore, outside the scope of the CBA, and beyond my jurisdiction."[12]

Generally speaking, a prior arbitration award between the same parties involving the same contractual term should be given great weight, unless the second arbitrator is convinced that the prior award is substantially flawed. Whether a prior award is "binding" on a subsequent arbitrator is a matter of contract interpretation for the arbitrator. *See, e.g., American Nat'l Can Co. v Steelworkers Local 3628*, 120 F.3d 886, 891-92 (8th Cir., 1997).

[10] Joint Exhibit 1. In addition, Article XIX, DISCIPLINE, ¶197, reads, "It is understood that the collective bargaining agreement addresses the terms and conditions of employment but does not extend to oversight of a House Officer's academic training program."
[11] There has been no assertion in this case that any of the Grievants has not achieved the required competence.
[12] *HOA v University of Michigan*, (Arb. Statham, 2024), p. 13.

In this case, not only do I find Arbitrator Statham's reasoning not to be flawed, I find no reason not to adopt his interpretation of ¶ 82, that reductions-in-training are an academic, not an employment, matter. In this instant dispute, the time required by the ABPN to complete training in Neurology is at its heart, an academic matter, and is, therefore, not covered by the collective bargaining agreement. Additionally, any determinations by the Program Director regarding reductions-in-training have been expressly excluded from the grievance and arbitration process.

AWARD

For the reasons stated above, the subject matter of this grievance is not arbitrable and therefore, the grievance is DENIED.

May 7, 2024
Date

Kathryn A. VanDagens, Arbitrator