

evidence was received concerning a matter in dispute between the Minnesota Nurses Association (the "Association") and the Twin City Hospitals, a multi-employer group of corporations. Hereafter, I may sometimes refer to the Twin City Hospitals as the "Participating Employers" or simply as the "Employers." The parties' post-hearing briefs were received by the Arbitrator on December 18, 2008, and their reply briefs, on January 8, 2009.

FACTS

The Association is the collective bargaining representative of Registered Nurses ("Nurses") employed at hospitals throughout Minnesota, including those employed at fourteen hospitals in the Minneapolis and St. Paul metropolitan area that are operated by the members of the Twin City Hospitals. Periodically, each member of this multi-employer group negotiates with the Association to reach a labor agreement, the provisions of which establish the terms and conditions of employment of the Nurses employed in the hospitals operated by that member.

In 1962, the Association and the Twin City Hospitals first entered into an agreement (the "Pension Agreement") establishing a pension plan (the "Plan") for Nurses employed by members of the Twin City Hospitals; they have entered into a series of such Pension Agreements since 1962. These Pension Agreements have been agreements separate from the labor agreements between the Association and the members of the Twin City Hospitals -- those that establish the Nurses' terms and conditions of employment.

The Plan covers about 10,000 Nurses who are currently employed by the Participating Employers. At the beginning of

2008, about 2,800 Nurses were receiving pension payments after qualifying by retirement at the age of 65 or through early retirement or disability, and, in addition, about 4,000 Nurses, not yet retired, had earned vested benefits. The value of the Plan's assets was about \$550,000,000.

My Authority as Impartial Umpire.

Article IX of the Plan provides that the Plan is to be administered by a Pension Committee of six regular members (or, as appropriate, alternate members), three appointed by the Association and three appointed by the Participating Employers. Section 9.7 of the Plan, set out below, is a general statement of the powers of the Pension Committee:

The Pension Committee shall have full power and authority to do each and every act and thing which it is specifically required or permitted to do under the provisions of the Plan and in addition shall have the following powers and authorities in connection with the administration of the Plan:

- (a) To keep records from which pensions for Participants and their eligible survivors can be determined.
- (b) To determine pensions in individual cases and to direct the Funding Agency as to the distribution of pension payments and as to the payment of other amounts payable from the Fund in accordance with the provisions of the Plan.
- (c) To establish rules and procedures for its administration of the Plan.
- (d) To enforce payment both of employer contributions under the Plan and of withdrawal liability determined under Title IV of the Employee Retirement Income Security Act.
- (e) To receive for information and review at the time of their initial distribution copies of all actuarial reports, records of employer contributions, trust accountings, and insurance company reports.
- (f) To exercise general administration of the Plan except to the extent responsibilities are expressly conferred on others.

All actions and decisions of the Pension Committee and the impartial umpire appointed pursuant to Section 9.5 shall be in accordance with the provisions of the Plan. No such actions or decisions shall alter any provision of the Plan or be inconsistent therewith. In reaching decisions as to the right of a person to a pension under the Plan and as to the amount of the pension, the Pension Committee shall rely first, on official employer records as reported to the Pension Committee by the Participating Employers, second, on questionnaires completed by Active RNs for actuarial purposes, and third, on such other proof as appears appropriate to the Pension Committee in a given case. However, in resolving disputes which arise as to facts which must be established in reaching said decision, the Pension Committee shall rely on the source or sources which it considers to provide the best evidence of the facts in question. In carrying out its Plan responsibilities, the Pension Committee shall have discretionary authority to construe the terms of the Plan.

Parts of Section 9.4 of the Plan, which is entitled,

"Meetings and Actions of Pension Committee," are set out below:

The Pension Committee shall hold such meetings upon such notice at such place or places and at such time or times as it may from time to time determine. . . [Four of the Committee's six members] shall constitute a quorum for the transaction of business. . . All resolutions adopted or actions taken by the Committee at a meeting shall be by concurrence of at least four members of the Committee present at the meeting and entitled to participate therein and vote thereat. . . .

Section 9.5 of the Plan, which is entitled, "Arbitration," establishes a dispute resolution process to be used when an action proposed to be taken by the Pension Committee does not achieve "concurrence of at least four members," as provided in Section 9.4, set out just above. Section 9.5 of the Plan and Section 6(g) of the Pension Agreement establish my authority in this proceeding. Parts of those provisions are set out below:

Section 9.5 of the Plan.

Failure to obtain concurrence of at least four members of the Committee, as provided in Section 9.4, on any matter within its jurisdiction shall result in the appointment by the Committee of an impartial umpire who shall make a

decision regarding the matter in dispute. . . Unless the Committee by a vote of at least four members specifies to the contrary, the impartial umpire shall conduct a hearing as to each dispute and render an opinion in writing setting forth his findings of fact, the basis for his decision, and his conclusion. . . .

Section 6(g) of the Pension Agreement.

The Pension Committee shall appoint Thomas P. Gallagher as "permanent" impartial umpire in accordance with the provisions of Section 9.5 of the Plan for the duration of this Agreement, subject to the provisions of said Section 9.5.

Relevant Definitions.

The Plan contains many definitions that include many modifications and exceptions. In the following reproduction of definitions, I do not include exceptions and modifications that are not directly relevant to the present dispute:

Section 2.8. Normal Retirement Age. "Normal Retirement Age" is the time a person attains age 65. Unless otherwise required by law, time of attainment of age 65 shall mean the date of the person's 65th birthday.

Section 3.2. Termination of Employment. The "Termination of Employment" of an employee for purposes of the Plan shall be deemed to occur upon her resignation, discharge, retirement, death or

Section 3.8. Year of Service. A "Year of Service" means any computational period [generally, a calendar year] in which there are 1000 or more Hours of Service.

Section 3.10. Year of Vesting Service. A "Year of Vesting Service" means a Vesting Computation Period (Plan Year) in which an employee has at least 1000 Hours of Service, subject to the following:

- d) If an employee has at least 10 Years of Vesting Service based on 1000 or more Hours of Service per year, she shall also have a Year of Vesting Service for each Vesting Computation Period after December 31, 1975 in which she has at least 832 Hours of Service but fewer than 1000 Hours of Service. . . .

Section 5.1. Normal Pension. A Participant's Normal Pension is a pension payable monthly for life, the first payment to be made as of the first day of the month

following her Normal Retirement Age (if she is living on said first day of the month) and the last payment to be made as of the first day of the month in which her death occurs, in a monthly amount equal to her Accrued Monthly Pension.

Section 5.2. Normal Retirement. "Normal Retirement" means Termination of Employment of a Participant (except termination by her death) occurring at her Normal Retirement Age. After December 31, 1987 "Normal Retirement" also means attainment of Normal Retirement Age prior to Termination of Employment.

Section 5.4. Early Retirement. "Early Retirement" means any Termination of Employment of a Participant (except termination by her death) that satisfies all of the following requirements:

- (a) The termination is at a time when either (i) the sum of the Participant's years of age and Years of Vesting Service is 85 or more or (ii) the Participant has both attained the age of 55 and completed 10 years of Vesting Service.
- (b) The termination occurs before the Participant's Normal Retirement Age.
- (c) The termination occurs at the end of a period of employment during which the Participant has at least 1000 Hours of Service during a Vesting Computation Period (Plan Year).

Notwithstanding the foregoing provisions of this section, if a Participant has an Early Retirement, is subsequently reemployed by a Participating Employer, and has a Termination of Employment thereafter before her Normal Retirement Age, such Termination of Employment shall be an Early Retirement.

Section 5.7. Accrued Monthly Pension. The "Accrued Monthly Pension" of a Participant determined as of any time is the then sum of her Benefit Credits. Any Benefit Credit earned by a Participant after the later of December 31, 1987 or the last day of the month in which she attains Normal Retirement Age shall be reflected in her Accrued Monthly Pension as of the first day of the Plan Year following the year in which it is earned or, if earlier, the first day of the month following her Termination of Employment.

Section 5.8 of the Plan sets forth complex formulas for determining Benefit Credits. Generally, Benefit Credits are earned during each Year of Vesting Service, as defined in

Section 3.10 of the Plan, set out above. During each such year, a percentage is applied to the Participant's qualifying earnings to yield a Benefit Credit for that year. A Participant's Accrued Monthly Pension is equal to the total of these annually earned Benefit Credits.

The Present Dispute.

In this proceeding, the Association seeks an adjustment in the pensions of thirty-six Participants, as I describe below. Hereafter, I refer to these thirty-six Participants as the "Claimants." All of the Claimants retired early before the start of 2007 and were receiving pensions in accord with Section 5.4 of the Plan. All of them earned additional Benefit Credits during 2007 after being reemployed by a Participating Employer, and all of them continued to receive monthly pension payments during the time of their reemployment.

The Association now seeks an adjustment in the pension received by each Claimant for Benefit Credits earned for Hours of Service performed for a Participating Employer during 2007. None of the Claimants performed more than 600 Hours of Service for a Participating Employer during 2007, and none of them reached Normal Retirement Age before or during 2007.

All of the Claimants qualified under what the parties refer to as the "25 Years of Service Accrual Rule," established in Section 5.8(c)(6) of the Plan, which I set out below:

Notwithstanding the Hours of Service requirements of paragraph (1), if a Participant has at least 25 Years of Vesting Service, the Participant shall have a Benefit

Credit for each Accrual Computation Period beginning on or after January 1, 2000, and after the Participant's 25th Year of Vesting Service, equal to 1/12 of 1.65% of her W-2 Earnings from her Participating Employer or Participating Employers for such Period for service as an Active RN, regardless of the number of her Hours of Service during such Period; provided, however, that for any such Accrual Computation Period beginning on or after January 1, 2005, her Benefit Credit for the Accrual Computation Period is 1/12 of 1.75% of her W-2 Earnings from her Participating Employer or Participating Employers for such Period for service as an Active RN. . . .

The "Hours of Service requirements of paragraph (1)," referred to in the opening phrase of this provision are substantially the same as those established by Section 3.10 of the Plan, set out above -- 1) that a Participant must have at least 1,000 Hours of Service in a Plan Year to have that year qualify as a Year of Vesting Service (thus entitling her to have her Hours of Service during that year earn Benefit Credits to be added to her Accrued Monthly Pension, but 2) that after a Participant has ten Years of Vesting Service, she need have only 832 Hours of Service during a Plan Year to have that year qualify as a Year of Vesting Service.

Thus, because all of the Claimants qualified under the 25 Years of Service Accrual Rule established by Section 5.8(c)(6) of the Plan, the parties agree that each was entitled to "have a Benefit Credit" for her Hours of Service during 2007, even though each Claimant had fewer than 600 Hours of Service during the year. In other words, the parties agree that each Claimant is entitled to receive an addition to her Accrued Monthly Pension to reflect the Benefit Credits she earned during 2007. They disagree, however, whether, as the Association argues, the adjustment to reflect that addition to the monthly pension of each Claimant should be paid as of January 1, 2008, or, as the

Employer argues, it should not be paid until the Claimant has a new Termination of Employment.

The Participating Employers make the following arguments. They argue that Section 6.10 of the Plan, parts of which are set out below, prohibits payment of the adjustment until a new Termination of Employment has occurred:

Section 6.10. Suspension of Benefits and Effect of Reemployment. If a Participant has a Termination of Employment before Normal Retirement Age and commences receipt of a monthly pension before Normal Retirement Age, and is subsequently reemployed by a Participating Employer before Normal Retirement Age, the following shall be applicable:

- (a) If the Participant is reemployed by a Participating Employer within two months following an Early Retirement, any pension payments for months thereafter shall be permanently withheld and shall not resume until the first day of the month following the earlier of the Participant's subsequent Termination of Employment or the date the Participant reaches Normal Retirement Age.
- (b) If in any calendar year the Participant completes 600 or more Hours of Service with a Participating Employer after such reemployment and before the Participant has attained Normal Retirement Age, any pension payments for remaining months of that year shall be permanently withheld. If pension payments are to be withheld pursuant to the preceding sentence and the Participant completes 832 or more Hours of Service during the year, pension payments shall not resume until the first day of the month following the earlier of the Participant's subsequent Termination of Employment or the date the Participant reaches Normal Retirement Age. Otherwise, if the Participant completes 600 or more, but less than 832, Hours of Service in a calendar year, pension payments shall resume as of the first day of the following calendar year (subject to suspension in the following year under this subsection). [I omit Subparagraph (c).]
- (d) Upon Termination of Employment following the period of reemployment, the pension to which the Participant is entitled under the Plan shall be redetermined giving appropriate effect to all periods of employment. . . .

The Participating Employers concede that, because each of the Claimants had fewer than 600 Hours of Service during 2007, the "Suspension of Benefits Rule" established by Section 6.10(b) does not apply. They argue, however, that Section 6.10(d) is the only provision in the Plan that describes when "the pension to which the Participant is entitled" is to be "redetermined," i.e., adjusted, to give "appropriate effect to all periods of employment." The Employers argue that this provision expressly requires that a Participant who has retired early and has then been reemployed must have a Termination of Employment subsequent to the new period of employment to have her pension adjusted to reflect the Benefit Credits earned during that reemployment.

The Employers argue that this requirement contrasts with the provisions of the Plan that clearly permit annual adjustments for Hours of Service earned by a Participant after Normal Retirement at age 65 without a new Termination of Employment.

The Employers argue that their interpretation of the Plan is consistent with the requirements of United States Treasury Department Regulations under Section 401(a) of the Internal Revenue Code, which prohibits payment of a retirement pension before retirement unless the still employed recipient has reached the retirement age of 65. The Employers argue 1) that, under these regulations, the Claimants are entitled to receive their pensions for Benefit Credits earned in years before their early retirement, which, for each, was effected by a first Termination of Employment, 2) that Benefit Credits accrued

during the period of their reemployment are not payable by virtue of that first Termination of Employment, but, 3) that, under the regulations, a new Termination of Employment (or reaching the age of 65) is required to entitle them to payment of a pension adjustment for the Benefit Credits earned after the first Termination of Employment.

The Employers maintain that the members of the Pension Committee have a fiduciary duty to administer the Plan in accord with its provisions and as required by Section 1.5 of the Plan, which I set out below:

Construction and Application. The Plan is intended to meet the requirements for qualification under Section 401(a) of the Internal Revenue Code. The Plan is also intended to be in full compliance with applicable requirements of the Employee Retirement Income Security Act [ERISA]. The Plan shall be administered and construed consistent with said intent. . . .

The Association's primary arguments, which I describe below, are based upon the following additional facts. The 25 Years of Service Accrual Rule became effective in 2001. On June 13, 2003, the Pension Committee considered whether to approve the same kind of adjustments that are at issue in this proceeding, i.e., whether to adjust the pensions of Participants 1) who had retired early, 2) who had qualified under the 25 Years of Service Accrual Rule, 3) who were reemployed by a Participating Employer for fewer than 600 Hours of Service in a Plan Year, 4) who had not yet reached Normal Retirement Age and 5) who did not have a new Termination of Employment after the period of reemployment. (Hereafter, I refer to adjustments thus described, i.e., the kind of adjustment here at issue, as

"Adjustments.") In August of 2003, the Pension Committee decided by a unanimous vote to approve Adjustments for Participants who fell within this description for Plan Years 2000, 2001 and 2002, making the Adjustments payable on the first day of the year following service and without requiring a new Termination of Employment subsequent to the period of reemployment.

During the summers of 2004, 2005, 2006 and 2007, the Pension Committee approved, for Hours of Service in each preceding Plan Year, Adjustments in the pensions of Participants similarly situated without requiring a new Termination of Employment subsequent to the period of reemployment. In each case, in 2003, 2004, 2005, 2006 and 2007, the vote for approving these Adjustments was unanimous -- with the three members who represented the Participating Employers joining the three members who represented the Association.

As noted above, in the summer of 2008, when the Association sought the Pension Committee's approval of Adjustments in the pensions of the Claimants for Hours of Service provided during 2007, the Pension Committee deadlocked, with the three members who represented the Participating Employers voting against paying the Adjustments in the absence of a new Termination of Employment and the three members who represented the Association voting in favor of paying the Adjustments without requiring a new Termination of Employment. This tie vote resulted in the present proceeding to resolve the deadlock under Section 9.5 of the Plan.

The Association makes the following primary argument. The Pension Committee's unanimous votes -- first in 2003, and repeated in 2004, 2005, 2006, and 2007 -- in favor of paying the same kind of Adjustment that is at issue here should be accepted as a final disposition of the issue. It is disruptive to allow the three members of the Pension Committee representing the Employers to deny the same kind of pension adjustments that have had unanimous approval by votes in each of the past five years. Allowing such a change through a tie vote is poor policy because it destroys continuity of administration.

The Association argues that Section 9.7 of the Plan, which establishes the powers of the Pension Committee, provides that "in carrying out its Plan responsibilities, the Pension Committee shall have discretionary authority to construe the terms of the Plan." The Association urges that the unanimous approvals of the Adjustments by the Pension Committee in 2003, 2004, 2005, 2006 and 2007 were "discretionary [constructions] of the terms of the Plan" within the authority conferred on the Committee by Section 9.7.

The Association argues that the Pension Committee's prior consistent approvals of such Adjustments should be regarded as creating a "general rule" that should not be changed unless there is a significant change in circumstances that requires the change. It also argues that the Committee's prior consistent approvals of the Adjustments have created a binding past practice that prevents the change that the Employers' members would now cause by changing their votes.

The Association notes that the relevant language of the Plan was the same from 2003 through 2008, and it argues that in all the years the Employers' members voted to approve the Adjustments they had the advice of separate legal counsel.

The Association also makes the following argument that the doctrine of estoppel should be applied in this case. Each year after the Pension Committee approved the Adjustments -- 2003, 2004, 2005, 2006 and 2007 -- early retirees who qualified for those Adjustments (including many who are now among the thirty-six Claimants) received notice of the forthcoming Adjustments to their pensions, and they were paid those Adjustments as of the start of the Plan Year following their Hours of Service. These early retirees were not required to have a new Termination of Employment to receive those Adjustments. The Association presented the testimony of Claimants who testified that, in reliance on the Pension Committee's past approvals of Adjustments without a new Termination of Employment, they continued the period of their reemployment at the end of 2007 into 2008, expecting to receive the Adjustments for their 2007 Hours of Service, in accord with what the Pension Committee had approved in prior years. The Association argues that these Claimants could have assured the receipt of Adjustments for their 2007 work by satisfying the requirements for a new Termination of Employment -- giving notice of termination and then remaining off work for two months until starting a new period of reemployment. The Association urges that the Employers should be estopped from changing the general rule created by their past practice of approving

Adjustments because the Claimants relied on a continuation of that general rule and suffered a detriment by not establishing a new Termination of Employment.

In addition, the Association makes the following argument. The Employers should not be permitted to change the way in which the Plan has been administered in the past merely by causing the vote of the Pension Committee to deadlock. Rather, a new way of administering the Plan should require the vote of a majority -- at least four votes. In a similar argument, the Association draws an analogy to rules imposing the "burden of proof" on a proponent of change. In the present case, because the parties are in substantial agreement about relevant facts, and the primary issues are issues of contract interpretation, I read this argument as an argument that the Employers, as the proponents of change, should have the "burden of persuasion" with respect to their interpretation of the Plan.

DECISION

The Authority of the Pension Committee.

At the core of the parties' dispute is their disagreement about the authority of the Pension Committee. As noted above, the Association argues that the Committee's approvals of the Adjustments in 2003, 2004, 2005, 2006 and 2007 were within its discretionary authority as established in the last sentence of the last paragraph of Section 9.7 of the Plan. The Employers argue, however, that the first sentence of that paragraph limits that discretion. Below, I repeat the last paragraph of Section 9.7, underlining those sentences:

All actions and decisions of the Pension Committee and the impartial umpire appointed pursuant to Section 9.5 shall be in accordance with the provisions of the Plan. No such actions or decisions shall alter any provision of the Plan or be inconsistent therewith. In reaching decisions as to the right of a person to a pension under the Plan and as to the amount of the pension, the Pension Committee shall rely first, on official employer records as reported to the Pension Committee by the Participating Employers, second, on questionnaires completed by Active [Nurses] for actuarial purposes, and third, on such other proof as appears appropriate to the Pension Committee in a given case. However, in resolving disputes which arise as to facts which must be established in reaching said decision, the Pension Committee shall rely on the source or sources which it considers to provide the best evidence of the facts in question. In carrying out its Plan responsibilities, the Pension Committee shall have discretionary authority to construe the terms of the Plan.

I give meaning to both of these provisions, as follows.

The grant to the Pension Committee of "discretionary authority to construe the terms of the Plan" allows interpretation, but it does not overcome the requirement established in the first two sentences that the Committee's "actions and decisions" must be "in accordance with the provisions of the Plan." The three sentences, taken together, mean that the Pension Committee, under its discretionary authority to interpret the Plan's language, cannot disregard or amend clear Plan language.

The Meaning of Section 6.10(d).

Below, I repeat Section 6.10(d) of the Plan:

- (d) Upon Termination of Employment following the period of reemployment, the pension to which the Participant is entitled under the Plan shall be redetermined giving appropriate effect to all periods of employment. . . .

The Employer argues that this language is a clear statement that a Participant who has been reemployed after an early retirement must have a new Termination of Employment as a

precondition to having her pension redetermined, i.e., having it adjusted, to reflect new Benefit Credits for Hours of Service worked during the period of reemployment. As I interpret the Association's arguments, it urges that this language is open to interpretation and that the interpretations made by the Pension Committee in 2003, 2004, 2005, 2006 and 2007 -- that such a Participant is entitled to an Adjustment without a new Termination of Employment -- should be regarded as within the Committee's discretionary authority to interpret the Plan.

The language of Section 6.10(d) has at least its literal meaning -- that a Participant who has been reemployed after an early retirement is entitled to have her pension adjusted when she has a new Termination of Employment. The parties disagree, however, whether the language should be read in its restrictive meaning -- that such a Participant is entitled to the adjustment only when she has a new Termination of Employment. As I read the language, its authors intended to require a new Termination of Employment as a precondition to an adjustment for new Benefit Credits earned after the first Termination of Employment. This interpretation, which is clearly implied, is consistent with the maxim of contract interpretation that, by implication, the expression of one thing excludes others. Here, because the drafters of the Plan specified only one circumstance that would entitle a Participant to such an adjustment -- a new Termination of Employment -- it is implied that they intended to exclude such an adjustment except in that circumstance.

This interpretation of Section 6.10(d) is confirmed by the requirements of other subdivisions of Section 6.10. Thus,

Section 6.10(a), which establishes conditions for the resumption of pension payments to a Participant who is reemployed within two months of her Early Retirement, also requires a new Termination of Employment (or reaching Normal Retirement Age) as a precondition to that resumption. Section 6.10(b) requires a new Termination of Employment (or reaching Normal Retirement Age) for the resumption of pension payments to an early retiring Participant who, upon reemployment, exceeds 832 Hours of Service in a year. This context reinforces the restrictive meaning implied in Section 6.10(d) -- that a new Termination of Employment is a precondition to an adjustment for Benefit Credits earned during the reemployment of an early retiring Participant.

Past Practice.

As I understand the Association's argument, it urges that, even if the language of Section 6.10(d) is interpreted to require a new Termination of Employment as a precondition to the Adjustments sought by the Claimants, that meaning has been obviated by the consistent votes of the Employer's Pension Committee representatives not to require such a new Termination of Employment. I make the following rulings with respect to this argument.

Past practice may be used in several ways as an aid to determining what terms the parties to a contract have agreed to. First, a consistent manner of administering an ambiguous contract provision, fully understood and accepted by both parties, may be used to show their common understanding of the meaning of that provision, thereby resolving the ambiguity.

Second, a consistent manner of administering even clear contract language may sometimes be used to show that the parties to the contract have reached an agreement, unexpressed in writing, but evidenced by their consistent conduct, to change what was required by that clear contract language.

The Pension Agreement and the Plan are contracts entered into by the Association and the Participating Employers as the contracting parties. The members of the Pension Committee are agents of the contracting parties -- three members representing the Association and three members representing the Participating Employers. Section 9.7 of the Plan is a written description of the authority given to these agents by the contracting parties, and, as I have ruled above, that provision gives members of the Committee, as agents of the Association and the Participating Employers, discretionary authority to interpret Plan provisions that are not clear, but it withholds authority to change what Plan language clearly requires. In addition, Section 14.1 of the Plan reserves the power to amend the Plan to the Association and to the Participating Employers as contracting parties, with the requirement that Plan amendments be furnished to the Pension Committee -- thus implying that members of the Committee are not empowered to amend the Plan.

I make the following rulings with respect to the Association's argument that the Employer's Pension Committee representatives should be required to approve the Adjustments for the Claimants because of their past votes to approve Adjustments in 2003, 2004, 2005, 2006, and 2007. First, as I have decided above, the language of Section 6.10(d) clearly requires

an early retiring Participant to have a new Termination of Employment as a precondition to a pension adjustment for Benefit Credits earned during reemployment. Because the language is not ambiguous, the use of past practice is not available to show a mutually understood clarification of unclear language. Without ambiguity, there is nothing that practice can clarify.

Second. Though Pension Committee members are agents of the contracting parties, the Committee representatives of neither the Employer nor the Association have authority to form or amend contracts in behalf of the contracting parties. Section 9.7 of the Plan expressly withholds authority to change clear Plan language. Because the Employer's representatives on the Pension Committee had no authority to amend the Plan, they were without authority to eliminate the requirement of Section 6.10(d) that an early retiring Participant have a new Termination of Employment to obtain a pension adjustment for Benefit Credits earned during reemployment. Without authority to amend a contract, an agent administering it cannot change it, whether the change is evidenced by an overt agreement to do so or by past practice that implies such an agreement.

The parties disagree how the holding in Finley v. Special Agents Mutual Benefit Association, Inc., 957 F.2d 617 (8th Cir. 1992), should be applied in this case. There, the court applied the following five factors (the "Finley factors") to determine whether plan administrators, charged with the fiduciary duty to administer a plan in accord with its terms, interpreted plan terms reasonably:

1. Whether the interpretation is consistent with the goals of the plan,
2. Whether the interpretation renders any language in the plan meaningless or internally inconsistent,
3. Whether the interpretation conflicts with the substantive or procedural requirements of ERISA,
4. Whether the words at issue have been interpreted consistently, and
5. Whether the interpretation is contrary to the clear language of the plan.

The Employers and the Association disagree how the Finley factors should be applied to determine which of their conflicting interpretations of the Plan is reasonable. Each party urges that the first, second and third factors should be applied to favor its interpretation, but it appears that the fourth and fifth factors have primary relevance in this case. The fourth factor -- whether the language at issue has been interpreted consistently in the past -- favors the Association's position, and the fifth factor -- whether the meaning of the language at issue is clear -- favors the Employers' position. The Employers argue that cases subsequent to Finley give primacy to the fifth factor, citing Licktieg v. Bus. Men's Assurance Co. of America, 61 F.3d 579 (8th Cir. 1995) as holding that other factors are insufficient to overcome clear plan language, and Lao v. Hartford Life and Accident Ins. Co., 319 F.Supp. 2d 955 (D.Minn. 2004), as holding that prior interpretation, inconsistent with clear plan terms, should be given no deference.

It appears that Finley and subsequent cases that apply its principles favor the interpretation reached by the Employers' representatives in 2008 -- that Section 6.10(d) of the Plan clearly requires that the pension Adjustments of the Claimants for the Benefit Credits they earned during 2007 must await a new Termination of Employment.

Estoppel.

The Association argues that the equitable doctrine of estoppel should be applied to require the Employers to approve the Adjustments sought by the Claimants. As I have noted, in support of this argument the Association established that the Claimants provided Hours of Service to Employers during 2007 with the expectation that Adjustments in their pensions for that work would be approved by the Pension Committee in 2008 without the requirement that they have a new Termination of Employment. The Association argues that the Claimants did not seek employment by an employer not a member of the Twin City Hospitals and, instead, agreed to be reemployed by one of the Participating Employers because they expected that they would obtain a pension Adjustment payable in 2008. The Association argues that, because the Claimants are highly skilled, experienced Nurses, the Employers benefited from the Claimants' reliance on that expectation.

The Employers argue that 1) that the Pension Committee's past approvals of Adjustments were in error, 2) that any reliance the Claimants placed on the Pension Committee's past erroneous administration of the Plan was misplaced, and 3) that, just as the members of the Committee have a fiduciary duty to administer the Plan according to its terms, the Claimants, as Participants, have a corresponding duty to place their reliance on the plain language of the Plan. The Employers cite Antolik v. Saks, Inc., 463 F.3d 796, 801 (8th Cir. 2006) ("ERISA precludes oral or informal amendments to a plan, by estoppel or otherwise."); Fink v. Union Central Life Ins. Co., 94 f.3d 489, 492 (8th Cir.

1996) ("common law estoppel principles cannot be used to obtain ERISA benefits that are not payable under the terms of the ERISA plan."); Ravenscraft v. Hy-Vee Employee Benefit Plan & Trust, 85 F.3d 398, 402 (8th Cir. 1996) ("Estoppel may not otherwise be employed to vary the terms of an ERISA plan.").

The cases cited by the Employer confirm that ERISA requires clear plan language to prevail -- not only over the argument that administrative actions by the Pension Committee have served to amend that language by practice, but over the claim that such actions caused a reliance by Participants that defeats clear plan language.

The Burden of Persuasion.

The Association argues that, because the Employers' representatives on the Pension Committee have now voted not to approve Adjustments, thus changing their past votes to approve them, the Employers, as the proponents of change, should carry the burden of persuasion in this proceeding.

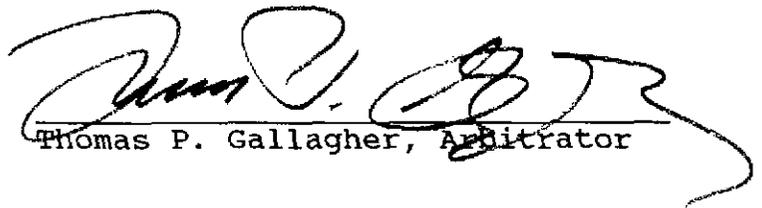
I rule as follows with respect to this argument. The parties are in substantial agreement about the relevant facts, and I have not had to weigh conflicting evidence in the fact finding process. As I have described above, the issues presented have required contract interpretation and the application of law -- primarily deciding the meaning of Section 6.10(d) of the Plan and its other provisions that establish the authority of the Pension Committee. I have found none of these issues to be in such close balance that application of a burden of persuasion argument was necessary to decide them.

AWARD

I conclude that the Employers' representatives on the Pension Committee properly exercised their fiduciary duty to apply the Plan according to its terms, voting not to approve the Adjustments sought by the Claimants because the Employers' representatives properly determined that Section 6.10(d) of the Plan requires an early retiree who is reemployed by a Participating Employer to have a new Termination of Employment (or reach Normal Retirement Age) as a precondition to having her pension adjusted to include Benefit Credits earned during that reemployment.

Accordingly, as the impartial umpire appointed by the parties to resolve the deadlock of the Pension Committee, I vote with the Employers' representatives on the Committee not to approve the Adjustments sought by the Claimants.

March 10, 2009


Thomas P. Gallagher, Arbitrator