FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION

REGIONS HOSPITAL,

EMPLOYER,

- and -

SEIU, HEALTHCARE, MINNESOTA,

UNION.

GRIEVANCE ARBITRATION
FMCS Case No. 090925-61249-3
(Work Assignment – Seniority)

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Nancy Parenteau
DATE OF GRIEVANCE:	June 8, 2009
DATE OF HEARING:	April 20, 2010
DATE OF POST HEARING BRIEFS:	May 14, 2010
DATE OF AWARD:	June 3, 2010

ADVOCATES

FOR THE EMPLOYER:	FOR THE UNION:
Scott Lepak, Attorney Barna, Guzy & Steffen, Ltd.	Roger A. Jensen, Attorney Miller O'Brien Cummins

WITNESSES

Lori Amborn, Clinical Pharmacy Manager.	Nancy Parenteau, Grievant

ALSO PRESENT

Sharon Zopfi-Jordon, Manager, Labor Relations

Awanda Doble, Labor Relations Specialist

Gerda Ottman, Stewart

Steve Sitta, Representative

David Blanchard, Director of Legal Affairs

ISSUE

Whether the Employer violated Article 16.5 of the Collective Bargaining Agreement when it did not select the Grievant for an opening? If so, what is the appropriate remedy?[1]

JURISDICTION

The matter at issue, appointment to vacant position, came on for hearing pursuant to the Collective Bargaining Agreement (CBA) between the Parties. The relevant provisions of the Grievance Procedure (Article 15) are as follows:[2]

> "15.1 Definition of Grievance. A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement. If an employee has a right to utilize a statutory appeal process and elects to do so, the right to appeal under this article is waived except in those instances in which federal non-discrimination law prohibits such waiver."
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> "15.4, Grievance Procedure, "Step 4. Arbitration – If the grievance is not settled in accordance with the foregoing procedure, either party may refer the grievance to arbitration within ten (10) days after the Union's receipt of the Employer's written answer in Step 3. The arbitrator shall be selected from a list of seven (7) candidates, supplied by the Federal Mediation and Conciliation Service in accordance with 29 CFR section 1404.
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> a. The arbitrator shall have no right to amend, modify, nullify, ignore add to, or subtract from the terms and conditions of the contract. The arbitrator

[1] The Parties stipulated to the issue statement.

[2] Joint Exhibit #1.

shall consider and decide only the specific issue(s) submitted in writing by the Employer and the employee and the Union, and shall have no authority to make a decision on any other issue not so submitted.

b. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs, by the parties, whichever be later, unless the parties agree to an extension. The decision shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

c. The fees and expenses for the arbitrator's services and proceedings shall be borne equally by the Employer and the Union, provided that each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record. If both parties desire a verbatim record of the proceedings the cost shall be shared equally."

The provision of the CBA being grieved is Article 16, Seniority, specifically Article 16.5:

"16.1. Seniority means an employee's length of continuous service by classification and from date of hire. Seniority shall be computed on the basis of two thousand eighty (2080) compensated hours, excluding overtime, equaling one (1) year service throughout this agreement. Seniority shall not accrue for unpaid leaves exceeding thirty (30) days.

16.2. On January 15th the Hospital shall establish a seniority list showing the continuous service of each employee. A copy of the seniority list shall be furnished to the Union when it is posted.

16.3. Breaks in Continuous Service. An employee's continuous service record shall be broken by voluntary resignation, discharge for just cause, and retirement.

16.4. Department (Hospital) preference shall be recognized for promotions.

16.5. **Vacant positions will be posted for 5 calendar days in the Pharmacy Departments. Any qualified bargaining unit employee who applies will be given consideration for the assignment to the vacancy. Seniority will prevail when the qualifications of the applicants are equal." [**Emphasis Added]

The Parties selected Rolland C. Toenges to arbitrate the matter in dispute. The arbitration hearing was conducted as provided by the terms and conditions of the CBA and the rules and procedures of the Federal Mediation and Conciliation Service.

The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. Witnesses were sworn under oath and subject to cross-examination. There was no request for a verbatim record of the hearing.

Both Parties filed Post Hearing Briefs that were received by the Arbitrator on or about May 14, 2010.

The Parties stipulated that there are no procedural issues and the matter is properly before the Arbitrator.

BACKGROUND

Regions Hospital (Employer) is a large health care facility located in downtown St. Paul, Minnesota. It is a Level I Trauma Center and recently completed an expansion adding 20 new operating rooms and nearly doubling the size of its Emergency Center.

Pharmacists employed by Regions Hospital provide typical inpatient and out patient drug dispensing services. Some Pharmacists work in Decentralized Pharmacy Services (DCP) as a member of a care team with physicians and nursing staff.

Some forty Pharmacists are employed by Regions Hospital. The Pharmacists are in a collective bargaining unit represented by Service Employees International Union, Healthcare Minnesota (SEIU). Regions Hospital and SEIU are parties to a CBA in

effect from April 1, 2009 through March 31, 2012.[3] Article 16.5 of said Agreement contains provisions establishing employee rights and procedures to be followed in the filling of vacant pharmacist positions.

When an appointment is made to a pharmacist vacancy, the CBA provides that the vacancy be posted for five calendar days in the Pharmacy Department and any qualified bargaining unit employee who applies is to be given consideration for assignment to the vacancy. Further, the CBA provides that seniority will prevail when the qualifications of applicants are equal.[4]

A job opening for a full-time Pharmacist was posted for seven days, beginning May 22, 2009. The announcement identified the responsibilities (IP, IV, & DCP) in the Pharmacy Department, with rotating weekends. Responsibilities specified included in-patient dispensing, IV preparations in SPA and Cancer Center, and Decentralized Pharmacy Services.[5]

The particular position to be filled involved specialized work in "Decentralized Pharmacy Services (DCP)." The qualification requirements for working in Decentralized Pharmacy Services differ from those required to work in Inpatient or Outpatient Pharmacy. The qualification requirement for Decentralized Pharmacy is as follows:[6]

> "Currently functioning in a decentralized capacity (comparable role), or recent completion of a Post-Doctorate Pharmacy Program (i.e., residency or

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[3] Joint Exhibit #1.

[4] Joint Exhibit #1, Section 16.5.

[5] Joint Exhibit #4.

[6] It is noted that Joint Exhibit #6 is dated January 2010, which is subsequent to the event-giving rise to the instant grievance (May 2009). The testimony of the Employer's witness was that these qualification requirements were in effect at the time of the event and had been for at least the previous four years.

> fellowship: e.g. PGY1 or PGY2 American Society of Health System Pharmacists (ASHP) accredited pharmacy program), or Board Certified Pharmacotherapy Specialist (BCPS) credentials is required for Decentralized Role."[7]

A Pharmacist working in Decentralized Pharmacy evaluates patient profiles and determines what medications are appropriate, considering the patient's clinical status. The Decentralized Pharmacist is a member of the patient care team, which includes physicians and nurses.

The Grievant submitted notice to the Human Resources Department that she was interested in the vacancy and attached her resume outlining her education and work history. The Grievant noted that she had previously expressed interest in this position over the last three years but had not been given consideration. The Grievant further noted that the new addition to the CBA, stating non-discrimination per Federal Law, would make previous reasons for her elimination invalid.

Several other Pharmacists also expressed interest in being considered for the vacancy and submitted their resume.

On May 28 and 29, 2009, interviews were conducted with the Grievant and the other applicants. Pharmacists, who were peers of the applicants, conducted the interviews, using a standardized structured interview process, titled "Candidate Competency Profile." Based on the interviewer's assessment of each candidate's qualifications, a numerical value was assigned.

Due to scheduling conflicts, not all of the applicants were interviewed by the same pharmacist interviewers. However, all three of the pharmacists who interviewed the Grievant had experience working with the Grievant, had experience in

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[7] Joint Exhibit #6.

Decentralized Pharmacy. All were members of the same Bargaining Unit as the Grievant.

Clinical Pharmacy Manager, Lori Amborn, also interviewed the Grievant and other applicants. Ms. Amborn informed them that the work was primarily in Decentralized Pharmacy Services and she was seeking a Pharmacist with current experience in this area that, after a short orientation period, could perform the work without further training.

The Interview Panel ranked each of the applicants, using standardized ranking criteria. The Grievant was ranked lowest of the applicants and a higher ranking Non-Bargaining Unit Pharmacist was appointed to the vacancy.

On June 8, 2009 a grievance was filed by the Grievant, alleging that the CBA (Article 16.5, Article 17.3 and Article 19.1) had been violated by appointment of a less senior Pharmacist who was on probation and was not a member of the Bargaining Unit.

The Parties processed the grievance through the CBA Grievance Process, but were not able to resolve the matter to their mutual satisfaction. The matter was then moved to the arbitrations step of the CBA Grievance Procedure. It now comes before the instant arbitration proceeding for resolution.

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement, April 1, 2009 – March 31, 2012.

J-2. Grievance, dated June 8, 2009 and record of grievance step meetings.

J-3. Statement of Issue before Arbitrator.

J-4. Job Opening Posting, May 2009.

J-5. Criteria Based Job Description dated September 2008.

J-6. Criteria Based Job Description dated January 2010.

UNION EXHIBITS:

U-1. Resume of Nancy Parenteau.

U-2. ASHP Resident Matching Program.

U-3. E-mail correspondence, RE: PGY2 Emergency Medicine Pharmacy.

EMPLOYER EXHIBITS:

E-1. Central IP/IV Pharmacist list of activities.

E-2. Decentralized (DCP) Pharmacist Expectations – Daily Activities.

E-3. E-mail to Pharmacists, RE: Internal Pharmacist Posting.

E-4. E-mail responses from applicants, RE: Internal Pharmacist Posting.

E-5. Resume of applicant, Kate Hutson.

E-6. Resume of Anna R. Benson.

E-7. E-mail from Lori Amborn to applicants, RE: Interview Schedule for candidates.

E-8. Hospital Interview Questions and Candidate Competency Profile.

E-9. Candidate Competency Profile – Nancy Parenteau.

E-10. Candidate Competency Profile – Nancy Parenteau.

E-11. E-mail, RE: Pharmacist Interviews for Friday, May 29th.

E-12. Candidate Competency Profile – Nancy Parenteau.

E-13. Candidate Competency Profile – Dee Ann Rumpca.

E-14. Candidate Competency Profile – Kate Hutson.

E-15. Candidate Competency Profile – Anna Benson.

E-16. Required and Elective Educational Outcomes, Goals, Objectives and Instructional Objectives for Postgraduate Year One PGY1 Pharmacy Residency Programs, 2nd Edition – effective July 2008.

E-17. ASHP Accreditation Standard For Postgraduate Year One (PGY1) Pharmacy Residency Programs.

POSITIONS OF THE PARTIES

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Grievant was the only member of the Bargaining Unit to apply for the open position and under the CBA, was the senior applicant.
- The CBA language for posting (16.5) limits it to the Pharmacy Department, which is made up of Bargaining Unit Pharmacists.
- Why would the posting be limited to the Pharmacy Department if it were intended that anyone could apply?
- The second sentence of (16.5) provides that Bargaining Unit employees will be given consideration – it does not say that Non-Bargaining Unit employees will also be given consideration.
- The third sentence of (16.5) is also limited to Bargaining Unit employees and says that seniority will prevail when the qualifications are equal.
- You can't compare seniority between Bargaining Unit and Non-Bargaining Unit pharmacists.
- The Employer can only consider Non-Bargaining Unit pharmacists, if no Bargaining Unit Pharmacists apply.
- Assuming the Grievant has the requisite qualifications, she must be awarded this job.
- To interpret the CBA language the way the Employer contends makes it meaningless, as it provides no benefit to Bargaining Unit employees.
- The Employer's interpretation would grant rights to Non-Bargaining Unit pharmacists, even strangers, over those of qualified Bargaining Unit employees.

- The vast weight of arbitration authority supports the proposition that such an absurd interpretation should be avoided.[8]

- Accordingly, the Union's interpretation should prevail – only qualified Bargaining Unit employees applying during the five-day posting may be considered and, between those applying, the senior employee is entitled to the position if there is a tie in the most qualified.

- The Grievant is entitled to the position as she is the only Bargaining Unit employee who has applied and she meets the minimum qualifications in spades.

- The Grievant has been a pharmacist since 1976 and a "Pharm D" since 2004. She has experience in long-term care, clinical pharmacy, in-patient dispensing, emergency room pharmacy, IV preparation, cancer center pharmacy and as a staff pharmacist at Regions Hospital for five years.

- Although the Employer wanted a pharmacist that had completed residency as a decentralized pharmacist, neither the job posting or the job description in effect at that time, required this qualification.

- It is worthy to note that the post-doctorate residency requirement was not added to the job description until January 2010 - after the appointment to the position.

- The Arbitrator should not retroactively apply a qualification requirement that was not in place at the time the job was to be filled.

- To do otherwise sanctions the Employer's action to avoid the requirements of the CBA by merely adding a qualification requirement that only the favored candidate has.

- The Union does not dispute the Employer's claim that this is a "most qualified" job bidding clause, rather than a "minimum qualification" job-bidding clause.

- It is a "most qualified" clause that applies only to Bargaining Unit employees. Since the Grievant was the only qualified Bargaining Unit employee bidding on the job, it should have been awarded to her.

- The Union requests that the Arbitrator conclude that Section 16.5 was violated and that the remedy is for the Arbitrator to order the Employer to

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[8] Elkouri & Elkouri, How Arbitration Works, 6th Ed., pp 470, 471 (BNA 2003).

immediately assign the Grievant to the job, which was posted in May 2009, Joint Exhibit #4.

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- In accordance with the CBA, the Grievant was given consideration for the vacancy – she received an interview and was one of four candidates considered for the position.

- The instant matter is a relative qualification dispute. The present clause is a simple reference to "equal" – seniority is not a proper consideration unless the candidates are equal in qualification.

- Under the CBA language and accepted arbitration practice, only when the qualification are "simply equal," is the senior employee entitled to the position.[9]

- In the instant matter, meeting the minimum qualification requirements entitles the Grievant to consideration; it does not entitle the Grievant to the job.

- The clear language of the CBA, Section 16.5, is that it is a "relative ability" clause.

- Section 16.5 of the CBA, has been applied in the past to grant the position to the most qualified applicant, without regard to whether the selected applicant was a member of the Bargaining Unit.

- In fact the Grievant was previously passed over several times when a Non-Bargaining pharmacist was selected - for example, per Diem pharmacist Jen Arnold.

- Clinical Pharmacy Manager, Lori Amborn, testified that she has not previously limited the posting to Bargaining Unit employees and has hired Non-Bargaining Unit pharmacists, citing per Diem Pharmacist Jen Arnold as an example.

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[9] See Elkouri & Elkouri, How Arbitration Works, 6th Edition, pp 873-874.

- Ms. Amborn used the same process that she previously used to fill the vacancy at issue, including the Hospital Interview Questionnaire and the Candidate Competency Profile

- Ms. Amborn followed the previous practice of personally interviewing the candidates and using members of the Bargaining Unit as Interview Panelists.

- The Bargaining Unit Pharmacists used as Interview Panelists all were Bargaining Unit members, had decentralized pharmacy experience, and with respect to the Grievant, included both the pharmacist that the Grievant listed on her resume as having detailed knowledge of her work experience and the pharmacist that had the most history of working with the Grievant.

- Although the posting may have been general in describing the duties and requirements, Ms. Amborn testified that she personally informed the candidates of what she was looking for, including decentralized pharmacy skills and experience. Ms. Amborn also informed the candidates that she was looking for strong clinical knowledge and the need for a pharmacist who could fully perform after a short orientation period, as there was no opportunity for training.[10]

- Ms. Amborn further briefed the Interview Panelists that they should assess the candidates clinical knowledge, as their primary role will be Decentralized Clinical Pharmacy, requiring strong clinical knowledge and there would be no opportunity for training, only a brief orientation period.[11]

- The Candidate Competency Profiles revealed distinct difference in the qualifications of the candidates with the Grievant placing lowest.[12]

- Ms Amborn testified that the assessment of the Interviewing Pharmacists confirmed her own assessment of the candidates.

- When informed that the selected candidate would not receive training, the Grievant acknowledged that she would need training, as did one of the other candidates.

- The successful candidate did not require training, had Residency PGY1 background and was currently working in a decentralized capacity.

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[10] Employer Exhibit #9.

[11] Employer Exhibit #11.

[12] Employer Exhibits #9, 10, 12, 13, 14 & 15.

- The Grievant's contended that she sought PGY1 Residency, but this was well after the position had been filled and is speculative, being based on e-mail exchanges.

- Although the Grievant alleged that she had decentralized experience, Ms. Amborn, who supervised the grievant's activity in ED, testified that this was never a clinical DCP position and the work by the Grievant involved validating meds when a patient was admitted to the Hospital from ED.

- CBA, Section 16.5 does not provide that only internal candidates can be considered – rather it simply provides for a posting period.

- The vacancy to be filled was not a promotional situation – therefore, Department (Hospital) preference does not apply. The only job classification in the Bargaining Unit is pharmacist and the vacancy was for a pharmacist.

- Although the Grievant alleged age discrimination, there is no evidence to support this claim.

- Ms. Amborn was uniquely qualified to evaluate and select the best pharmacist for the Decentralized (DCP) position, as she was working in such a position at another hospital during the time in question.

- In a profession, where qualifications have a direct bearing on patient safety, consideration of qualifications is best left to those experienced and knowledgeable about those qualifications.

- The Grievant was not even second in qualifications among the four candidates for the vacancy and light years behind the successful candidate. For this reason, the grievance should be denied.

DISCUSSION

The threshold issue, in the instant case, is whether the language of the CBA (16.5) requires the Employer to fill the vacant position exclusively from pharmacists within the Bargaining Unit, as the Union contends. If that were the case, the Grievant would have right to the vacancy, as she was the only Bargaining Unit employee to apply.

The vacancy at issue did not involve a promotion. It is what is commonly considered a work assignment. There is only one job classification in the Bargaining

Unit, being that of Pharmacist, and only one pay schedule.[13] All Pharmacists, no matter where assigned, are on the same pay schedule. Pay is based on length of service, not where assigned.[14]

Being the vacancy posted was not a promotion, the provisions of Article 16.4, providing that, "Department (Hospital) preference shall be recognized for *promotions,"* does not apply to the instant matter.

Article 16.5 applies to the instant matter, but does contain language that restricts the Employer to consider only bargaining unit employees. A fair reading of 16,5 is that it assures qualified bargaining unit employees, who apply for re-assignment, that they will receive "consideration." The Employer is obligated to post the vacancy for five calendar days so Bargaining Unit employees will have the opportunity to know of the vacancy. In the instant case, the Grievant received notice of the vacancy, submitted notice of her interest in the vacancy including a record of her qualifications.

The record shows that the Grievant received *consideration* for the vacant position. The Grievant appeared before a panel of her peers, who interviewed her using a standard structured interview process and then assigned a numerical value to her qualifications. She was also interviewed and evaluated by two Managers having jurisdiction over the work assignment. The record shows that the Grievant's qualifications were *considered* along with the other candidates who had applied for the assignment.

The Clinical Pharmacy Manager compared the qualifications of the Grievant with the three other candidates to determine which candidate was most qualified. From the

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[13] Joint Exhibit #1, Article 2 and Appendix A.

[14] Joint Exhibit #1, Appendix A.

two highest ranked pharmacists, the Clinical Pharmacy Manager selected the one having the strongest DCP qualifications.

The results of the qualification assessment by the panel of Pharmacists and the Managers is as follows:[15]

Candidate	Manager	Manager2	Panelist 1	Panelist 2	Panelist 3	Average
Grievant	2	2	2	2	5	2.6
DA Rumpca	2	2-3	4	5		3.375
Kate Hutson[16]	5		5	4	4-5	4,625
Anna Benson	4-5		5	4-5	5	4.75

The following provision of 16.5 does not apply in the instant matter because the Grievant was the only candidate covered by the CBA and had the lowest ranking.

> ". . . Seniority will prevail when the qualifications of the applicants are equal."

The Union argues that, if Article 16.5 is not interpreted to give exclusive rights to the vacancy to Bargaining Unit Pharmacists, it causes the language to be meaningless, which is contrary to the weight of arbitration authority.

The Union is correct that a commonly accepted principle of contract language interpretation is that it must be interpreted to have meaning. In the instant case, Article 16.5 establishes the right of Bargaining Unit Pharmacists to be i*nformed* of vacancies and, when qualified, to be *considered* for re-assignment to the vacancy. Further the Article 16.5 establishes the right of the senior Bargaining Unit candidate

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[15] It is noted that, due to work schedule conflicts, not all of the interviewers were available to interview each candidate.

It is also noted that a certain criteria on the "Candidate Competency Profile" required that a minimum score of 4-5 was mandatory for hire. Given none of the candidates met this threshold, it was not applied for any candidate.

[16] Candidate selected was Kate Hutson.

to receive first consideration among other Bargaining Unit candidates when qualifications are equal. Thus, the language of Article 16.5 does have meaning for it conveys rights to Bargaining Unit Pharmacists that would otherwise not exist.

Another common principle of contract interpretation is that it is presumed, absent evidence to the contrary, that the mutual interests of the parties are served by the agreement. Contract language that benefits only one party at the expense of the other may be unenforceable under the principle of "unjust enrichment" holding that "one shall not unjustly enrich himself at the expense of another."[17]

In the instant case, to interpret the language the way the Union contends would bar the Employer from exercising its inherent managerial right of employee selection. The Arbitrator does not find the language of 16.5 to constitute such a bar. The Agreement is for Bargaining Unit employees to be *considered* for re-assignment. A common definition of *consider* is to "think carefully about, with regard to taking some action."[18]

To interpret the language the way the Union proposes would require the Arbitrator to "modify, ignore or add to the terms and conditions of the CBA, which is prohibited under the provisions of Article 15.4, Step 4. (a).

Further, the record shows that Article 16.5 had been applied in filling previous vacancies in the same manner as was done in the instant case, with a pharmacist from outside the Bargaining Unit.

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[17] Elkouri & Elkouri, Fifth Ed. pp 574.

[18] Merriam Webster's Collegiate Dictionary, 10th Ed.

The Union points out the following inconsistencies in the Employer's case:

- Although the Employer wanted a pharmacist that had completed residency as a decentralized pharmacist, neither the job posting or the job description in effect at that time, required this qualification.

- The post-doctorate residency requirement was not added to the job description until January 2010.

The Arbitrator agrees that it would have been best to emphasize the residency and DCP experience requirement in the posting and job description, at the time of the posting, The Grievant's response to the posting shows that she had applied for a vacancy in DCP on three previous occasions, but was not selected. [19] Therefore, the Grievant should have known the requirements of a DCP position and that her qualifications would not likely be considered sufficiently competitive for selection. The Grievant's response to the Posting indicates her mistaken belief that non-discrimination language added to the CBA would now "make previous reasons for [her] elimination invalid."[20]

FINDINGS

1. The provisions of Article 16.5 require posting of Pharmacist vacancies, consideration of Qualified Bargaining Unit Pharmacists that apply and first consideration to the senior Bargaining Unit candidate, in the event qualifications are equal.

2. The provisions of Article 16.5 do not restrict the Employer's inherent managerial right of selection, once the posting and consideration requirements under Article 16.5 have been satisfied.

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[19] Joint Exhibit #7.

[20] Joint Exhibit #7.

AWARD

The grievance is denied.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued the third day of June, 2010 at Edina, Minnesota

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ROLLAND C. TOENGES, ARBITRATOR