

IN THE MATTER OF ARBITRATION BETWEEN

DOUGLAS COUNTY HOSPITAL	)	
"Employer"	)	
	)	BMS Case No. 11RA0211
AND	)	Transfer of Unit Work
	)	
IUOE, LOCAL NO. 70	)	
"Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: December 14, 2010; Alexandria, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: January 18, 2011

APPEARANCES

FOR THE EMPLOYER:     Cyrus F. Smythe, Professor Emeritus & Economist  
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THE ISSUES

Whether the Employer violated the Collective Bargaining Agreement through the assignment of bargaining unit work to non-unit employees?

If so, what is the remedy?

## BACKGROUND

Local 70 (“Union” or “Local 70”) has a collective bargaining agreement (“CBA”) with Douglas County Hospital (“Employer”). The bargaining unit consists of approximately 84 employees. Under the express language of the CBA’s Recognition Clause (Article II), Local 70 is the recognized representative for all “Dietary” employees (dietary aides and cooks). CBA’s Union Security language mandates that all employees covered by Article II “shall be covered” by the CBA.

In the Spring of 2010, the Union became aware that the Employer was assigning bargaining unit cooking shifts to an alleged supervisor. The Union charges that naming Menk a supervisor violated the Public Employment Labor Relations Act (“PELRA”), Section 179A.03, Subdivision 17 which provides in pertinent part that:

The removal of employees by the employer from a nonsupervisory appropriate unit for the purpose of designating the employees as “supervisory employees” shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective.

Here, the Employer has secured neither the approval of Local 70 nor a determination by BMS’s Commissioner for redesigning unit employees as supervisors.

## RELEVANT CONTRACT LANGUAGE

### ARTICLE II Recognition

2.1 The Employer recognizes the Union as the exclusive representative for all employees in a unit composed of: “All regularly scheduled full-time and part-time Sterile Processing Aides, Nurse Aides, Housekeeping employees, Unit Support employees, and Dietary employees employed by the Douglas County Hospital, Alexandria, Minnesota.”

### ARTICLE IV Employer Authority

4.1 The Employer retains the full and unrestricted right to operate and manage manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules and to perform any inherent managerial function not specifically limited by this agreement.

ARTICLE V  
Union Security

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5.1 All full-time and part-time employees covered by Article II employed by Douglas County Hospital shall be covered by this Agreement and shall become members of this Union upon completion of their Probationary Period as defined in Article 3.11 of this Agreement.

ARTICLE VI  
Employee Rights – Grievance Procedure

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6.4 Arbitrator Authority:

- A. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of the Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.
- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law.

ARTICLE XVIII  
Work Schedules

18.1 The Employer shall establish regular work schedules consisting of consecutive hour shifts. Work Schedules will be posted covering a two (2) week period at least three (3) days in advance of the time covered by such schedule.

POSITION OF THE UNION

Local 70 is the “exclusive representative” of the bargaining unit at issue here within the meaning of Sec. 179A.03, Subd. 8 of PELRA. The Union is a party to a CBA with the Employer and represents the Sterile Processing Aides, Nurse Aides, Housekeeping employees, Unit Support employees and Dietary employees employed by the Douglas County Hospital. Cooks and dietary aides fall within the Collective Bargaining Agreement as “Dietary employees.”

The Hospital has about 600 employees and approximately 110 patient beds. The Hospital expanded in 2007 and has, this year, completed an expansion.

The Employer recognizes the Union as the exclusive representative for all full-time and part-time “Dietary employees.” The CBA clearly provides that all full-time and part-time employees covered by Article II, which includes Dietary employees, “shall be covered by this Agreement and shall become members of this Union.”

Sandy Majerus-Lieser, the Director of the Dietary Department, acknowledged that job routines 3-10 depict bargaining unit duties, and depict as well that the employees assigned to those routines report to supervisors. She created these job routines so that the employees would know precisely what daily duties and tasks they are to perform. Majerus-Lieser also created the schedules that depict which of the established “routines” each employee is to perform on a given day. The numbers on the schedules correspond to the numbered job routines. Thus these are records of the daily assignment of bargaining unit work.

On November 16, 2009 the Employer removed Darrick Menk (“Grievant”), a Cook, from the bargaining unit and promoted him to supervisor. However, since his “promotion,” the Grievant has continued to work regular shifts as a bargaining unit Cook. During the January 4<sup>th</sup> week, he performed job routine 3 (Early Cook). On July 5<sup>th</sup> and 12<sup>th</sup> week, as well as during the September 27<sup>th</sup> and October 4<sup>th</sup> week, he performed the Early Cook job routine as well. This purported supervisor has routinely been assigned bargaining unit shifts since his removal from the Unit according to Hospital schedule sheets.

The Employer has been similarly assigning bargaining unit work to other supervisors. The Employer identified its supervisors as Beth Ward, Kae Eblem, Tammy Roth, Karen Pollard, Melissa Roers, and Darrick Menk. The Employer’s scheduling records reveal that the Hospital has been directing its other supervisors to perform Unit work.

On January 27<sup>th</sup> and 28<sup>th</sup> supervisor Kae Eblem, performed job routine 3 (Early Cook). On March 29<sup>th</sup>, she performed job routine 8 (Early Dining). On April 26<sup>th</sup> and 29<sup>th</sup>, she also performed job routine 8 (Early Dining). On June 24, she performed job routine 6 (Cook’s Helper). On July 12<sup>th</sup> and 14<sup>th</sup>, she performed job routine 8 (Early Dining). On July 15<sup>th</sup>, she performed job routine 6 (Cook’s Helper).

According to the schedule, the Hospital assigned supervisor Tammy Roth to job routine 6 (Cook’s Helper). Similarly, during the April 26<sup>th</sup> week, she performed supervisor shifts, job routine 1 (Early Supervisor) and job routine 2 (Late Supervisor), but also bargaining unit shifts, job routine 4 (Late Cook), and job routine 7 (Late Tray Helper).

Similarly, the Employer assigned supervisor Melissa Roers to perform bargaining unit work. During the January 11<sup>th</sup> week, Pollard performed job routine 1 (Early Supervisor), but also job routine 5 (Early Tray Helper). During the July 5<sup>th</sup> week, Roers performed job routine 8 (Early Dining). During the July 12<sup>th</sup> week, Roers performed job routine 8 (Early Dining), and job routine 9 (Late Dining Room). During the September 27<sup>th</sup> week, Roers was again assigned to job routine 8 (Early Dining), and job routine 9 (Late Dining Room), both bargaining unit shifts.

The Employer states that “Beth Ward, Tammy Roth, and Melissa Thoennes are employed as our Food Service Supervisor(s).”

The Employer violated the express language of the Collective Bargaining Agreement by transferring unit work to non-unit employees. Bargaining unit work is the touch stone of a cohesive labor relations system. The protection of the integrity of the bargaining unit work is

one of the essential benefits derived by collective bargaining. It has been a long-held arbitral principle that an employer cannot transfer unit work to non-unit employees.

The division between bargaining unit work and non-bargaining unit work is a fundamental concept in American labor relations. It predates both the Wagner Act and Public Employment Labor Relations Act (“PELRA”).

The unilateral removal of bargaining unit work tramples upon a core value of labor-management relations. Consequently, arbitrators have repeatedly sanctioned employers for the redirection of bargaining unit work to non-unit employees.

The Collective Bargaining Agreement prohibits the transfer of unit work to non-unit employees. It has long been established that an employer unit work may not be assigned to non-unit employees except under extraordinary circumstances, even in the absence of an express provision covering bargaining unit work. See Yeshiva Univ., 125 LA at 888-89; ISD 112, Chaska, BMS Case No. 07-PA-0893 (O’Toole, Sept. 9, 2007).

In an analogous arbitration, these long-established doctrines were reaffirmed. In Yeshiva Univ., 125 LA 885, the University assigned two supervisors who had previously been in the bargaining unit to do bargaining unit work. The University argued that this was permissible because the collective bargaining agreement lacked an express provision prohibiting supervisors from doing unit work. Arbitrator Gregory disagreed. Rather than identify a single provision of the CBA that proscribed the University’s actions, Arbitrator Gregory pointed to a number of decisions recognizing that unilaterally transferring work outside of a bargaining unit is incompatible with the most basic protections in a collective bargaining agreement:

*Job security is an inherent element of the labor contract, a part of its very being. If wages are the heart of the labor agreement, job security is considered its soul. The transfer of work customarily performed by the employees in the bargaining unit to others outside the unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract’s basic purposes.*

(New Britain Machine Co., 8 LA at 722). Arbitrator Gregory stated if an employer is allowed to unilaterally have supervisors perform bargaining unit work, “the CBA would be rendered meaningless and the members of the Union would be without protection from job erosion...the [bargaining unit] will be decimated and the Union rendered impotent.” Id. at 888.

Here, the CBA requires that all Unit work is to be performed by the Unit. Pursuant to the management rights clause, the Employer’s inherent managerial function is limited as specified by the CBA. Article II of the CBA expressly states that the union is the “exclusive representative for all employees in a unit composed of...dietary employees...” This is again reinforced by Article V, which states “All full-time and part-time employees covered by Article II employed by Douglas County Hospital shall be covered by this Agreement and shall become members of this Union.” The Director of the Dietary Department, admitted that Dietary employees are employees who perform Unit work, as delineated by job routines.

The Employer also presented no evidence that the transfer of work was done pursuant to an emergency.

The Employer violated the Collective Bargaining Agreement by transferring unit work to non-unit employees. According to the testimony of the Director of the Dietary Department, Unit work is delineated in job routines 3-10 and non-Unit Supervisory work is precisely delineated in job routines 1-2. The shift assignment numbers on the Employer's work schedules when cross-referenced to the Employer's numbered "job routines" reveals that the Hospital frequently violated the CBA in the assignment of unit work to purported supervisors.

The improper use of supervisors appears to provide the explanation for how the number of bargaining unit food service/dietary employees has decreased as the size of the Hospital has dramatically expanded. In 2007 the Employer completed an expansion, and in 2010 the Employer completed an even larger expansion. Instead of hiring more Unit employees, the Employer transferred Unit work to non-unit Supervisory employees. This behavior is, in fact, diminishing the size of the Unit during a period of expansion.

Although the Employer claims the Grievant as a supervisor, he is not depicted as such on the schedules, even those devised since his supervisor designation in November of last year. Those same schedules show that the Employer, since November, has routinely continued to assign him Cook shifts. While the Employer has attached the supervisor label to the Grievant, the Hospital recognizes that he is not truly a supervisor, which is borne out by the fact that he continues to regularly perform the same Cook duties that she performed while in the bargaining unit.

Here, the Employer neglected to secure the BMS Commissioner's or the Union's approval, and neglected to secure a determination from BMS when removing the Grievant from the unit and assigning him to a supervisory role.

The party alleging the existence of a past practice has the burden of proof. In order for past practice to be binding, it must be "(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Celanese Corp. of Am., 24 LA 168, 172.

Here, the Union never accepted the Employer's practice of transferring Unit work to non-Unit employees. The Union submitted a formal grievance in July of 2010 because the Employer was continuing to assign Cook duties to the Grievant. On July 26, 2010, the Union wrote to the Employer:

It has recently been brought to my attention that the Dietary Department of Douglas County Hospital has been routinely scheduling and assigning non-Union employees to Union work positions identified and covered under Article II – Recognition, of the current Collective Bargaining Agreement.

Therefore, it is the position of the Union that this practice ceases and that all Union work positions, those identified as numerical positions 3 through 10 in the Dietary Department

“Job Routine” description, and the departments referring to these numerical “Job Routine” positions as they are identified on Dietary Departments schedule.

Past practice should not be considered because it is inconsistent with the Collective Bargaining Agreement and its application will render the Collective Bargaining Agreement meaningless. If a past practice is inconsistent with the plain meaning of the contract, arbitrators will refuse to consider the past practice. An interpretation allowing the Employer to transfer Unit work to non-Unit employees would result in circumvention of the CBA Recognition and Union Security provisions and should, therefore, be rejected.

Remedy: The Arbitrator to direct that the Employer ceases to assign supervisors to unit work and to restore the Grievant to bargaining unit with all rights restores.

### POSITION OF THE HOSPITAL

The Union grievance allegations ignores the following facts:

The Union’s allegation that “non-Union employees” are assigned to “Union positions” represents a misunderstanding by the Union of the Minnesota PELRA and CHA legislation and the Labor Agreement between the Hospital and the Union. “Union positions” do not exist at Minnesota public employers. Job classifications are created by employers and positions exist in job classification. Unions have an opportunity by law to represent certain employees in positions established in job classifications created by employers.

There are no “union positions” at the Hospital. The Hospital has job classifications and positions in these job classifications for employees employed by the Hospital. The Hospital, over the years of its existence, has unilaterally created and abandoned a substantial number of job classifications and positions. It has determined that the classifications created will be filled by persons in positions which vary based on the needs of the Hospital. The positions may be full-time, part-time, casual, temporary, permanent, supervisory, and non-supervisory. The job classifications created have job descriptions (required by the State of Minnesota Local Government Pay Equity Act implemented in 1991) designed and written unilaterally by the Hospital and not included in any labor agreement.

Some of the Hospital job classifications and employees in those classifications are eligible for representation by labor organizations under the standards established by the Minnesota PELRA. Employees ineligible for representation are described in Subd. 14 and Subd. 17 of PELRA. The ineligible employees are described as:

Subd. 14 – (e) part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee’s appropriate unit.

Subd. 14 – (f) employees whose positions are basically temporary or seasonal in nature.

Subd. 17 – supervisory employees – employees with the authority to undertake a majority of the supervisory functions listed in the interests of the employer – ten specific functions are listed. All ten involve the ability to exercise authority. None involve duties performed.

A supervisor is thus defined in the PELRA and utilized by the Bureau of Mediation for determinations under the CHA solely on the basis of the extent/degree of authority possessed. This definition was a deliberate act of the MN Legislature in 1971 to ignore a supervisor's work duties so that determination of supervisory status could be exclusively based on authority.

Thus certain non-supervisory employees, by deliberate intent of the PELRA and CHA, are exempted from unit membership and representation. Supervisors are not exempted from representation, however, they cannot be represented by a labor organization in the same unit as non-supervisory employees. Employees exempt from unit membership based on supervisory status are nevertheless employees and perform work as directed. Nowhere in either the PELRA or CHA is there any provision prohibiting non-bargaining unit employees from being assigned to and/or performing the same work as bargaining unit members.

Practices in Douglas County Hospital: Local 70 Bargaining Unit. Local 70 is the fifth (5<sup>th</sup>) labor organization to represent this bargaining unit of employees within the past forty (40) years. During that period both casual and supervisory employees have, with the full knowledge of the Union, performed job duties established by the Hospital. Casual employees have been regularly scheduled to work. Supervisory employees have been regularly scheduled to work as supervisory employees. Supervisors have also, by necessity, been involved in the performance of non-supervisory duties based on such factors as sickness, vacation, and injuries of bargaining unit personnel or overloads of work to be performed based on unanticipated increases in either patient census or acuity levels.

Other Bargaining Units and Labor Organizations: Registered Nurses (MNA), Licensed Practical Nurses (AFSCME) and Engineers Teamsters 320. Registered Nurses bargaining unit personnel have been supplemented by casual personnel when conditions required and supervisory personnel are frequently utilized to assist bargaining unit personnel without complaint or grievance from the Nurses Association. Licensed Practical Nurses unit personnel has been represented by three different labor organizations in the past forty (40) years and have been supplemented by casual and supervisory personnel when needed without incident or grievance. Engineers' bargaining unit routinely relies on supervisory personnel for the performance of normal duties when needs for such assistance arise without incident or grievance from the Minnesota Teamster Union.

Observed Practices Among Minnesota Public Sector Employers. Based on routine observations among Minnesota public employers, the use of non-bargaining unit personnel (casual, seasonal, and supervisory) is and has been common. The use was deliberately provided for by definitions of public employees in PELRA 179A.03, Subd. 14 and Supervisory employee in 179.03, Subd. 17 when the PELRA was enacted in 1971 – and continued as of the date of this grievance arbitration. The use occurs at this time in Minnesota under PELRA generally without grievance or incident except in those jurisdictions where employers and union have negotiated

agreements that non-bargaining unit personnel will not be used to perform work assigned to bargaining unit personnel. The Hospital has made no such agreements.

Douglas County Hospital, like other general hospitals, has little control over the number of its patients at a given time, the demographics of its patient population, the acuity levels with which it must contend, or the range of medical needs involved. It cannot predict either the range or incidence of medical activities required for any time period. However, it must be prepared at all times to provide medical care to those who are admitted for care or who appear for emergency service. The Hospital staffs the facility at levels it believes appropriate. However, it frequently finds itself either over or understaffed based on a variety of unforeseen circumstances. In such cases, it may cancel some personnel from scheduled shifts; bring to work non-scheduled personnel, or do the best it can with existing personnel.

The Union questioned Sandra Majerus-Lieser, Dietary Director, with regard to the identity of a named supervisor in the Department, the supervisors and dietary employees “work day routines” and employees’ work schedule. On direct and cross-examination Director Majerus-Lieser indicated that the number of employees scheduled in the dietary group is sixteen (16) – fourteen are unit members, two (2) are casual employees. Additionally, she indicated there are six (6) supervisory employees and one (1) dietitian.

She stated that both the volume and type of work performed by all employees under her supervision varies significantly based on wide swings in both the number of patients in the Hospital and the range of medical conditions among the patients. The number of supervisory employees has increased by one in the last five years to meet the increased activities of the Department with regard to both cafeteria services and complexities of medical dietary needs.

Director Majerus-Lieser has been the Dietary Director for five plus (5+) years. During that time she has regularly scheduled Casual employees to work at assigned tasks to supplement full-time staff. Also from time to time, based on patient load and medical complexities, she has utilized supervisory employees, including herself, to meet medical needs of the Hospital’s patients which the non-supervisory staff could not meet. During her years as Director she so scheduled and assigned without complaint or grievance.

Union Witness Dave Elynck stated that he was alerted to the fact that Supervisors were performing Union work and filed a grievance. On cross-examination, Elynck agreed that no provision of the labor agreement prohibited non-bargaining unit personnel from performing work she also assigned to unit personnel.

Arbitrability. The Hospital indicated the issue and remedy presented by the Union was not arbitrable based on:

Definition of an employee in M.S. 179A.03, Subd. 14 which is used by the Minnesota Bureau of Mediation Services to define eligibility for bargaining unit membership for the State’s public employers and Charitable hospitals. The Section specifically provides that some employees of a public employer cannot be included in a bargaining unit organized by a labor organization based on hours worked. These ineligible employees; however, are not prohibited

by PELRA from working for the employer at the tasks assigned by the employer prior to organization by a labor organization of a bargaining unit. The two casual employees scheduled to work by the dietary Director fall in this category and have the right to continue to be assigned work under the PELRA. Thus, the Union demand that the arbitrator order that these employees be prohibited from being continued to be scheduled to work by the Hospital is contrary to both the obvious language and intent of the PELRA and the Hospitals' authority under the Labor Agreement.

The definition of a supervisory employee in M.S. 179A.03, Subd. 17 is also used by the Minnesota Bureau of Mediation Services to determine eligibility for membership in a non-supervisory bargaining unit. Subd. 17 was written to exclude supervisory employees from inclusion in a non-supervisory bargaining unit. It defines a supervisory position solely on the basis of the degree of authority possessed by a person in a supervisory job classification rather than on the basis of work or duties performed. No section or part of the PELRA prohibits supervisory employees from performing work also performed by employees supervised. Furthermore, M.S. 179A.03, Subd. 1 provides a comprehensive management rights provision for both public employers and Charitable hospitals in the event of a labor dispute. This legal provision gives employers the unrestricted authority to refuse to meet and negotiate with a labor organization or be subject to interest arbitration with regard to the selection, direction and number of personnel. These management rights are also specifically reserved for the Hospital and outlined as the Hospital's "full and unrestricted right" with regard to assignment of work in Article IV, Employer Authority of the Labor Agreement – Joint Exhibit 1.

Based on the provisions of the PELRA and CHA, the Union complaint concerning the Hospital's assignment and utilization of casual employees exempted from bargaining unit membership by the Minnesota Bureau of Mediation Services under the authority of PELRA and CHA cannot be considered arbitrable. The continued use by an employer of employees whose regular work schedule disqualifies them from bargaining unit membership cannot be usurped by a labor organization merely because the PELRA denies the union the right to represent them. Additionally, those employees provided with sufficient authority over other employees to be classified under PELRA as supervisory by the Minnesota Bureau of Mediation Services, without objection from a labor organization, cannot be denied the ability to perform work assigned by an employer. A simple review of the PELRA, deliberately written to define a supervisory employee solely on the basis of authority possessed regardless of duties performed, should be sufficient to determine that persons defined a supervisory employees cannot be denied the ability to work as assigned by the Employer unless the Employer and Union have agreed to so deny.

## SUMMARY

Union Grievance Statement: Union statement submitted in written grievance: Step 1 on July 26, 2010 and repeated in Step 2 on August 9, 2010 (see Union Exhibit No. 2): "Nature of Grievance: Non-Union employees routinely scheduled/assigned to Union Positions."

Hospital Reply to Grievance on July 28, 2010: "Our Step 1 Grievance Report dated July 26, 2010 is denied."; Step 2 Grievance reply: "The issue raised by the Union in its grievance

regarding the assignment and scheduling of work of Douglas County Hospital employees is not 'grievable' by law and by labor agreement between the Hospital and the Union."

Remedy of Grievance Desired by Union: As stated in Steps 1 and 2 of the Grievance: "Union employees to be scheduled/assigned to Union positions only." As stated at the Hearing on December 14, 2010: "Local 70 seeks an order sustaining its grievance, restoring all bargaining unit work to the bargaining unit, and including all Cook duties, and directing the Employer to cease and desist from assigning unit work to supervisors or other non-unit employees."

Position of Hospital Relative to Union Remedy: "Contract Violations(s): Article II Recognition and any and all other Articles that may apply not only lacks sufficient specificity to be a viable 'grievance' as a 'grievance' is defined by Article VI, Section 6.1 of the Labor Agreement, the grievance is not arbitrable under both the law and the Labor Agreement."

## DISCUSSION AND OPINION

### Procedural Issue

The threshold issue was raised by the Employer who challenged arbitrability of the grievance in the following argument:

#### Position of the Hospital

Definition of Grievance in Labor Agreement – Article VI – Employee Rights – Grievance Procedure, Section 6.1: Definition of a Grievance: A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the Agreement.

Grievance Arbitrator's Authority: Article VI, Section 6.4 states:

- A. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of the Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.
- B. The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law.

Stated positions of the parties in writing in Step 2 of the Grievance Procedure:

Union Position: Nature of Grievance: "Non-Union employees routinely scheduled/assigned to union positions."

Remedy Desired: “Union employees to be scheduled/assigned to Union positions only.”

Argument: “The issue raised by the Union in its grievance regarding the assignment and scheduling of work Douglas County Hospital employees is not ‘grievable’ by law and/or by the labor agreement between the Hospital and the Union.”

Past practices of the parties under the Labor Agreement:

The long-standing and consistent past practices of the Hospital and this Union, as well as the four other unions previously representing the same bargaining unit employees, has been the routine utilization of union and non-union employees (casual and supervisory employees) to perform a variety of duties solely determined and assigned by the Hospital with full knowledge of the Unions and the Hospital.

Relevant Provisions of Laws: Supervisors are defined by the Minnesota Bureau of Mediation under both the Minnesota Charitable Hospital and Public Employment Labor Relations Acts (see M.S. 179A.03 Subd. 17 Supervisory employee) solely on the basis of authority without relevance to or mention of work/duties performed. Additionally, neither Acts or the Labor Agreement between the parties contain any limitations on the assignment of work to employees. Rather Article IV of the labor agreement contains an Employer Authority provision which states:

Relevant provisions of the Labor Agreement:

ARTICLE IV  
Employer Authority

4.1 The Employer retains the full and unrestricted right to operate and manage manpower, facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules and to perform any inherent managerial function not specifically limited by this agreement.

4.2 Any term and condition of employment not specifically established by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE XVIII  
Work Schedules

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18.8 Nothing contained in this or any other Article shall be interpreted to be a guarantee of a minimum of maximum number of hours the Employer may assign employees.

Summary: The attempt by the Union to limit the Hospital's utilization of non-bargaining unit personnel to perform duties identified and stipulated by the Hospital to be performed by Hospital employees lacks both legal and labor agreement foundation and further lacks merit based on the Hospital's obligation to provide quality, timely patient care.

### Position of the Union

Pursuant to the CBA, "[a] grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of the Agreement." Jt. Ex. 1k, Art. 6.1. Here, the Union timely filed a grievance in this arbitration (Un. Ex. 2) relying on several provisions of the CBA. Jt. Ex. 1, Art. II, 4.1, and 5.1. The Union seeks redress for the violation of express provisions of the CBA, and including the Recognition and Union Security provisions as they relate to the transfer of Unit work. It has been long established, as discussed in Part I, A and B, that the Union may pursue grievances to enforce its contract when an Employer transfers Unit work to non-Unit employees. Yeshiva Univ., 125 LA 885, 888-89 (Gregory, 2008); ISD 112, Chaska, BMS Case No. 07-PA-0893 (O'Toole, Sept. 9, 2007); Doctors Hosp. of Pinole, 106 LA 1200 (Riker, 1996); Hughes Aircraft Co., 101 La 226 (Richman, 1993); New Britain Machine Co., 8 LA 720, 722 (Wallen, 1947). Consequently, the Employer's arguments that the dispute does not arise under the contract are without merit.

### Ruling

The CBA clearly and unambiguously requires that "...grievance...defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT." The sole determination to be made by the Arbitrator is whether this grievance constitutes "specific terms and conditions" of this CBA or is, otherwise, barred from arbitration by applicable law.

The legal standing of the grievance is resolved in PELRA 179.03, Subd. 17 which provides that:

The removal of employees by the employer from a nonsupervisory appropriate unit for the purpose of designating the employees as "supervisory employees" shall require either the prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective. (Numbers in parentheses added.)

This language precisely covers the facts of this case, i.e., the Employer removed an employee from the Cook's classification and designated him a "supervisory employee" without securing the PELRA required "prior written agreement of the exclusive representative and the written approval of the commissioner or a separate determination by the commissioner before the redesignation is effective."

The Employer presumably could satisfy the PELRA designation requirement by prevailing in this present case. The Union could be thus bound to apply its agreement to the subject designation or appeal the adverse arbitration to the courts.

It follows that the instant arbitration provides an appropriate forum for resolving the core issue, providing only that the grievance can cite specific terms and conditions of the CBA which are addressed therein.

The Union fully meets the obligation of showing that the parties have bargained over, agreed to, and committed to governing terms of the CBA the terms and conditions of contract raised in the grievance. Specifically, the Union seeks herein to protect its contractual claim to represent “Dietary employees” as covered in Article II of the CBA and as referenced in Article IV, i.e., “All full-time and part-time employees...shall be covered by this AGREEMENT and shall become members of this Union...”

### On the Merits

The Employer argues that “a supervising employee” is identified as exempt from CBA coverage not by work performed but, rather, by authority delegated to such position. This line of argument misses the central complaint of the grievance which never challenges the right of the Hospital to create a new supervisory position and staff that position with a non-supervisory employee.

Instead, the consequential point of the grievance is that the Hospital failed to follow the process mandated by PELRA to accomplish such purpose, i.e., get prior written agreement of the exclusive bargaining representative and the commissioner’s approval of the redesignation, or a separate unit determination by the commissioner. The Employer has met neither qualifying standards.

Even more to the point, the primary concern of the grievance goes to the claim that the newly designated “supervisor” has been assigned and has been performing work routinely done by members of the bargaining unit.

These facts combine to create a most peculiar anomaly, i.e., the Union claims that the Hospital has violated the CBA by removing bargaining unit work from its members and assigning it to a supervisor (who is not legally a supervisor). It necessarily follows that the true status of the “supervisor” is non-supervisory employee and member of the bargaining unit. Accordingly, this work has never left the ambit of the unit – it has been assigned, performed and, as of this time, continues to be performed by a unit member who has never been a supervisor despite being improperly given that designation by the Employer.

This unusual situation is inconsistent with the terms of the exclusive bargaining unit of BMS certification and Article II, the Recognition clause which states that “The EMPLOYER recognizes the UNION as the exclusive representative for all employees in a unit composed of...Dietary employees...”

Further, and to the point, Article V UNION SECURITY specifies that “All full-time and part-time employees covered by Article II...shall become members of this UNION upon completion of their Probationary Period. This clear and unambiguous language means that

Derrick Menk's removal from the bargaining unit constituted a violation of the above-cited provisions of the CBA.

A brief review of the remaining Employer arguments show them to be similarly without merit. Referring now to the Hospital's past practice argument, even if it were established that supervisors frequently perform bargaining unit work, there was no evidence that employees who were non-supervisory and not members of the Union, as was the case with Derrick Menk, had ever performed such unit work with approval of the exclusive bargaining unit.

In regard to supervisors, the Union specified that Beth Ward, Kae Eblem, Tammy Roth, Karen Pollard, and Melissa Roers had also appeared on scheduling records assigning them at various times to perform unit work. I recognize that it is common for supervisory personnel to "pitch in" during emergencies when unanticipated bulges in patient census outrun the availability of bargaining unit employees in any classification. These temporary situations are markedly different from the practice of routinely assigning supervisors to do bargaining unit work – which is clearly contrary to the spirit and the language of the CBA.

I take arbitral notice on the basis of better than 50 years of arbitration experience that the ebb and flow of patient census or by treatment type is often handled by "floats" (individual or teams of part-time employees) who fill in as needed on short term call ins. Reliance on supervisors in emergencies is usually acceptable to the exclusive bargaining representatives pending arrival of the float employees who are union members.

Placement of supervisors on scheduled shifts, as has sometimes happened at the Hospital per the examples on pages 7, 8 of the Union's brief clearly violate the jurisdiction of the exclusive bargaining representative and must be discontinued. The Employer's contention that its use of supervisors to perform work normally and routinely assigned to non-supervisory employees is an established past practice cannot be credited.

Arbitral lore advises that where an alleged past practice conflicts with clear contract language, the written provision must prevail. In the instant matter, the language of at least Articles II and V stating recognition and union security unambiguously control the issue in favor of reserving such work to the certified bargaining unit.

The fact that prior unions have not challenged the use of supervisors herein grieved does not constitute waiver or acquiescence by the current Union leadership. The frequent violation of the CBA does not confer on the Hospital the right to continue to violate the contract in the absence of a clear and unmistakable waiver by the exclusive bargaining representative.

Neither does any alleged waivers by other jurisdictions in this Hospital of the use of supervisors to do bargaining unit work bind this Union to such supposed practice. Indeed, the Employer has not presented objective proof that the use of floats in these named bargaining groups does not limit use of Supervisors to define emergency situations.

The final argument presented by the Hospital contends that, in order to limit or contain the use of supervisors in performance of unit work, the CBA needs to contain language expressly

prohibiting such assignment. This position fails to sustain the test of elemental logic to wit: if a public sector employer could transfer work out of a bargaining unit at will in the absence of an explicit prohibition against such action, employer would have the unfettered means to decimate the bargaining unit. Certainly such a harsh and unanticipated result could not have reasonably been the intent of the law.

Instead, the Recognition Article, the Union Security Provision, and even the Management Rights clause provide a firm guarantee that work regularly and commonly performed by members of the bargaining unit will not be transferred to employees not members of that certified unit. Extra provisions stating an absolute prohibition against such transfer would be just that – extra and redundant to guarantee the exclusive representative’s claim on the work.

A final word on the Employer’s position that the sole definition of a supervisor under PELRA and CHA lists only level of authority and not work assigned. Under the facts of the case, this point is moot because the Hospital, as mentioned above, never complied with the PELRA enumerated steps for transferring Derrick Menk from non-supervisory to supervisory status.

#### DECISION

1. The Hospital violated at least Article II and V of the CBA by transferring work out of the bargaining unit to Derrick Menk, who at time of the transfer was neither a Supervisor or a member of the bargaining unit.
2. By way of remedy, the Hospital shall immediately restore Menk to bargaining unit status and union membership.
3. The Hospital shall, further, reimburse the Union for any loss of union dues and/or any other union membership costs for the period of his employment as non-union employee. Menk will not be required to serve a probationary period before restoration of all rights, including seniority rights.
4. The Union further presents claims of assignment of other supervisors from separate bargaining units to work in those jurisdictions. None of those separate bargaining units are parties to the instant proceedings. Therefore, nor are findings are made in regard to such claims, nor any remedies therefore appropriate.
5. In the future, no supervisory employee will be assigned bargaining unit work covered by the CBA except in emergencies.

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 January 26, 2011  
 Date

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 John J. Flagler, Arbitrator