

IN THE MATTER OF THE ARBITRATION BETWEEN

THE MINNESOTA NURSES ASSOCIATION,	)	MINNESOTA BUREAU OF MEDIATION SERVICES
	)	CASE NO. 11-PA-0886
	)	
	)	
Union,	)	
	)	
and	)	
	)	
STATE OF MINNESOTA, DEPARTMENT OF HUMAN SERVICES,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

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For the Employer:

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On February 23, 2012, in St. Peter, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by failing to pay the grievant, Jane M. Breeggemann, the proper

wage rate after a change in her classification. The last of the parties' post-hearing written argument was received by the arbitrator on March 25, 2012.

#### FACTS

The State of Minnesota (the "Employer") employs about 750 employees who are licensed Registered Nurses. The Union is the collective bargaining representative of these employees.

Members of the Union's bargaining unit are employed in several classifications. During the fiscal year in which the present grievance arose (the year ending on June 30, 2010), the maximum hourly wage rates in these classifications ranged from \$26.01 to \$44.89. The maximum hourly wage rate for the classification, "Registered Nurse Principal," was \$38.85, and the maximum hourly wage rate for the classification, "Registered Nurse Senior," was \$37.36.

The grievant was first employed by the Employer in October of 1990 at the Minnesota State Security Hospital (the "Security Hospital") in St. Peter, Minnesota. She worked there as a psychiatric nurse until June of 1999, when she was promoted to Registered Nurse Evaluator II after transferring away from the DHS and the Security Hospital. During subsequent years, the grievant worked for other agencies of the Employer, including the Department of Health, the Department of Corrections and Minnesota State Colleges and Universities, teaching nursing in a Community College. In 2008, the grievant returned to the DHS, now traveling throughout Minnesota, educating other Registered Nurses employed by the Employer.

In July of 2002, the grievant was promoted to the "Registered Nurse Senior" classification, and in May of 2008, as she began traveling and teaching for the DHS, she was promoted to the "Registered Nurse Principal" classification.

The grievant's education credentials include a Bachelor's degree with a double major in Nursing and Psychology, a Master's degree in Health Science and a second Master's degree, Clinical Nurse Specialist, Nursing Education.

The following is a summary of the grievant's testimony about the circumstances that led to the present grievance. In January of 2010, while she was working for the DHS as a traveling nurse, she saw a job posting, dated January 19, 2010, for a position at the Security Hospital in the classification, Registered Nurse Senior. She had an interest in returning to the Security Hospital because she wanted to return to clinical work. She was aware, however, from the posting that the maximum hourly wage rate for the Registered Nurse Senior classification was \$37.36 -- \$1.49 less than the maximum hourly wage rate of \$38.85 that she was then receiving as a Registered Nurse Principal.

The grievant testified that she decided to apply for the position. Though its maximum hourly wage rate was less than she was currently earning, she thought that, if she was selected for the job, she could then consider finally whether to accept it. On February 1, 2010, the grievant was interviewed by two Registered Nurse Supervisors at the Security Hospital, Jane Clark and Jane Unzeitig. The grievant testified that during the

interview there was no discussion about the wage rate she would receive if she took the position.

On February 9, 2010, Unzeitig, who was the direct supervisor for the vacant position, telephoned the grievant and offered it to her. The grievant asked Unzeitig what the rate of pay would be. According to the grievant, Unzeitig said, "that's why it's taken so long; Colleen Ryan just heard from a Human Resources woman<sup>1</sup> that you will be at the same wage rate," i.e., \$38.85 per hour. Colleen Ryan was the Director of Nursing for State Operated Forensic Services, an agency that includes the Security Hospital in its jurisdiction. The Union presented evidence that Ryan held the status of "appointing authority" with respect to the vacant position.

Neither Ryan nor Unzeitig testified. The evidence includes documents and testimony of witnesses that attribute statements to them relevant to the Union's argument that the grievant's change of position was a "lateral transfer" rather than a "voluntary demotion." I discuss that evidence below.

The grievant testified that she understood from her conversation with Unzeitig that her hourly wage rate in the new position would be the same as her previous wage rate, \$38.85. She told Unzeitig that she accepted the job offer. The grievant

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1 The passage in quotation marks is, verbatim, what the grievant attributed to Unzeitig during the grievant's testimony. The relevant evidence, which is discussed at length below, does not identify the person referred to in this statement ascribed to Unzeitig. The evidence does not show that the grievant spoke directly to Ryan.

testified that, in the absence of Unzeitig's statement that she would be paid at her previous hourly wage rate of \$38.85, she would not have indicated her acceptance during that telephone call, but would have delayed any acceptance of the offer until she had an opportunity to discuss it with her husband.

On February 10, 2010, after the grievant tested "negative" for tuberculosis -- a prerequisite qualification for the vacant position -- Unzeitig told her that she would start in the new position on Wednesday, March 10, 2010.

The grievant began working in the new position on March 10, 2010, and she continued to do so on March 11 and 12. She testified that after work on March 12, she looked at her email and found the following letter attachment from Debbie Miller, a DHS Personnel Aide:

March 12, 2010

Re: Contingent Job Offer

On behalf of Jo Blaschko, RN Admin Supervisor, I am pleased to confirm our offer of a full time, anticipated full employer contribution for insurance, RN Sr position with the Department of Human Services, Minnesota Security Hospital/St. Peter.

Your move into this position is considered a voluntary demotion and your hourly salary will be \$37.36 on step 11 on the RN Sr salary range. You will be required to serve a six (6) month probationary period. In accordance with the Fair Labor Standards Act (FLSA), this position is designated as Exempt Professional.

Below are the terms and conditions of this offer of employment.

Your date of hire is 3/10/2010 working at Bartlett/Shantz St. Peter, contact your supervisor as identified below.

Jo Blaschko, Supervisor [telephone number]

The grievant testified that she thought Miller's letter of March 12, 2010 (the "Appointment Letter") stated that her hourly wage rate would be the maximum on the Registered Nurse Senior scale because of a misunderstanding. She sent Miller a responsive email on March 12, 2010, at 11:53 a.m.:

Debbie, I would like an opportunity to discuss this letter with my immediate supervisor as the rate of pay is different than what I had been informed of at the time that the position was offered to me.

At 1:23 p.m. on March 12, 2010, Miller sent the grievant an email, in which she noted that she forgot to include in the Appointment Letter the requirements for tuberculosis testing. Miller's email stated those requirements and noted that she would send the grievant a revised Appointment Letter including them, on the following Monday. The grievant sent copies of these emails and the Appointment Letter of March 12 to Ryan, Unzeitig and Blaschko.

The Step 1 Grievance. On March 19, 2010, the grievant initiated the present grievance at Step 1 by email, sent to Miller, Ryan, Unzeitig and Blaschko. The Step 1 grievance is set out below:

This letter is being sent as formal notice of my intent to file a grievance at step 1 of the MNA [Minnesota Nurses Association] grievance procedure in regard to my salary on voluntary demotion. As indicated in the current MNA contract,

"Article 17, Section 8. Salary on Voluntary Demotion. A nurse who takes a voluntary demotion shall retain his/her present salary unless that salary exceeds the maximum rate of pay for the position in which case the nurse's salary shall be adjusted to the new maximum. However, a nurse may continue to receive a rate of pay in excess of the salary range maximum

upon the recommendation of the Appointing Authority and approval of the Commissioner of Minnesota Management and Budget." [The last sentence, which I have underlined, is printed in bold-face in the original.]

On 2/10/10, I was offered a full-time nursing position in the Registered Nurse Senior class. At the time, I was employed in the RN Principal class of MNA. At that time, I specifically asked my immediate supervisor, Jane Unzeitig, what my salary would be and she informed me that the change in classification would not result in salary decrease and that I would maintain my current rate of pay. It was my understanding that the salary quote had been recommended by the appointing authority and approved by the Commissioner of MMB. A month later and two days after starting my new position, I received the following letter dated 3/12/10 from Debbie Miller indicating that my salary would be less than the rate of pay communicated to me at the time that I accepted the position. Please refer to the enclosed document. . . .

On March 24, 2010, Ryan sent the following memorandum to Chad N. Thuet, Compensation Manager for Minnesota Management and Budget ("MMB"), formerly designated as the Minnesota Department of Employee Relations ("DOER"):

Subject: Request to Maintain Salary above Maximum upon Voluntary Demotion Jane M. Breeggemann, Registered Nurse Senior

Jane Breeggemann recently accepted a Registered Nurse Senior position with the Minnesota Security Hospital at St. Peter. She transferred to our facility from another DHS facility where she worked as a Registered Nurse Principal. At the time of transfer, [her] salary was \$38.85/hour, the maximum rate of the Registered Nurse Principal salary range.

Prior to accepting the RN Senior position, Ms. Breeggemann was told by a DHS human resources staff member that her salary would remain at \$38.85 and this move would be considered a transfer. However, after she began employment on March 10, 2010 she received her appointment letter indicating that her salary would drop to the maximum of the Registered Nurse Senior salary range of \$37.36 per hour.

Therefore, I am requesting to maintain [her] salary at \$38.85 based upon her extensive nursing career and education and the expertise that she brings to our facility.

. . . .  
Attached is a copy of Ms. Breeggemann's resume for your review. Your consideration in granting this request of maintaining [her] salary one step over the maximum of the Registered Nurse Senior salary range is appreciated. . . .

On May 4, 2010, Thuet sent the following memorandum to Ryan, responding to her request to set the grievant's hourly wage rate at \$38.85:

Following is a response to your request to compensate Jane Breeggemann in excess of the range to which she voluntarily demoted. Ms. Breeggemann is currently assigned to the Registered Nurse Senior class with a salary range maximum of \$78,008, which matches her current salary. Prior to March 10, 2010, she served as a Registered Nurse Principal and was paid at the maximum of the range or \$81,119.

Pursuant to Administrative Procedure 15.6, advancement in a class series where the class title is the same with the exception of a higher level indicator is considered a promotion, and the reverse is considered a demotion regardless of the compensation code, and so Ms. Breeggemann's decision to accept the Registered Nurse Senior position with the Minnesota Security Hospital in St. Peter qualifies as a demotion.

Article 17, Section 8 - Salary on Voluntary Demotion of the 2009-2011 MNA Agreement states that "A nurse who takes a voluntary demotion shall retain his/her present salary unless that salary exceeds the maximum rate of pay for the position in which case the nurse's salary shall be adjusted to the new maximum. However, a nurse may continue to receive a rate of pay in excess of the salary range maximum upon the recommendation of the Appointing Authority and approval of the Commissioner of Minnesota Management and Budget."

While I regret the misinformation that Ms. Breeggemann may have received, regarding her salary, I cannot support your request to compensate her above the maximum of the Registered Nurse Senior salary range. There are currently 228 incumbents in the Registered Nurse Senior class which includes 158 at the salary range maximum.

Because there are so many in the class and that [sic] are paid at the top of the range, approving an exception for one individual is extremely difficult, especially when you consider the State's current budget situation and the inequity it would create with other RN Seniors. By all

indications, her decision to accept the lower level position was voluntary, the contract is clear about what happens when a nurse takes a voluntary demotion, her appointment letter indicated the appropriate rate, and the appointing authority -- through its central office -- has not submitted a recommendation to MMB to support retaining a salary above the maximum for this situation.

Ms. Breeggemann should be placed at the top of the range [for the Registered Nurse Senior classification] and be eligible for wage adjustments to that salary range consistent with the MNA Agreement.

The Step 3 Grievance. On June 23, 2010, the parties met to discuss the Union's Step 3 grievance, which the grievant wrote in the first person; parts of it are set out below:

NATURE OF GRIEVANCE (facts upon which it is based):

. . . At the time of my job offer for RN Sr, I was specifically informed by the Director of Nursing at St. Peter, Colleen Ryan, that this job would be considered a lateral transfer [see Footnote 1 above and related text] with no change in my hourly salary even though the RN Sr top step was over a dollar less an hour than the RN Principal step I was on.

I accepted the new position based upon my reliance that the offer was not a change in my hourly wage. I entered into a binding contract. I started the position on 3-10-10.

After starting in my new position, I was sent a letter dated 3-12-10 from St. Paul DHS Personnel Aide Debbie Miller indicating that the RN Sr position was a voluntary demotion with a pay cut to \$37.36, which is the [top step for the Registered Nurse Senior classification].

In a memo dated 3-24-10, Colleen Ryan wrote State Compensation Manager, Chad Thuet, documenting my reliance upon the offer of \$38.85 per hour in accepting the RN Sr position. This 3-24-10 memo records that DHS HR staff itself said that my hourly rate of pay would remain \$38.85 per hour in my new job. [Again, see Footnote 1 above and related text.] . . .

In a memo dated 5-4-10 [MMB] Compensation Manager, Chad Thuet wrongly denied me my hourly salary of \$38.85 because:

1. A misreading of Administrative Procedure 15.6 ("AP 15.6") that the class titles are the same. RN Principal is not the same as RN Senior.

2. An assumption that this is a demotion. [AP 15.6] defines a demotion. This is not a demotion under any bullet.
3. Approving an exception is difficult given the budget. The exception was already approved by HR and the [Department of Nursing.] It may be a savings to the State to give me a pay cut with this new job, if my old job is not filled. If my old job is not filled then, keeping my old salary is budget neutral.
4. Approving an exception would create an inequity. No proof was given that other nurses were denied a higher step. My contract allows off step compensation above the pay range.
5. The MNA contract Article 17, Section 8, dictates pay upon demotion. If this is a demotion, Article 17, Section 8 specifically allows the remedy I am seeking.
6. The Appointing Authority has not submitted a recommendation to MMB to support a salary above the maximum. Colleen Ryan wrote such a memo dated 3-24-10. Colleen Ryan is the Appointing Authority. She hired me.
7. My decision was voluntary. My decision was contingent upon my pay remaining the same.

WHAT CONTRACT PROVISIONS, POLICIES, PROCEDURES, PAST PRACTICES, ORAL CONTRACTS HAVE BEEN VIOLATED IN THIS GRIEVANCE?

All applicable articles including:

- Recognition, Article 2
- Duration, Article 31
- Wages, Article 17, not limited to Sections 6,8, and 9
- Administrative Procedure 15.6
- Every nurse who has ever been paid the maximum step
- The oral contract that I relied upon
- The assurances of Colleen Ryan and HR. . . .

The Employer presented the testimony of James M. Yates, which I summarize as follows. He is the Human Resources Director for the Operated Services Division of State government, which includes the DHS. He works frequently with issues concerning the parties' labor agreement.

Yates described a program, entitled the Corrections Employees Retirement Plan ("CERP"), which is made available

under the labor agreement to some members of the Union. It permits nurses to retire at the age of 55, if they have sufficient experience in clinical positions treating inmates of corrections facilities. The Registered Nurse Senior position the grievant took at the Security Hospital in March of 2010 was a clinical position that made her eligible to complete qualification for CERP and its early retirement benefits, which, according to Yates, were worth about \$150,000 to an employee receiving them. In her former position as a traveling nurse for the DHS, the grievant was not eligible for CERP.

Yates testified that appointment letters may often be issued several days after an employee begins employment in a new position -- primarily because of the volume of such work, which sometimes must accommodate 200 to 300 open jobs on a single day.

In addition, Yates testified when the grievant received the Appointment Letter of March 12, 2010, she did not request that she be returned to her previous job as a traveling nurse in the classification, Registered Nurse Principal, at its hourly maximum wage rate of \$38.85. Yates testified, however, that eventually in October of 2010, she did make that request, but that the previous position was no longer available. Yates also testified that, from September 23, 2010, till October 3, 2010, a vacant position at the Security Hospital was posted in the Registered Nurse Principal classification. That job opening went unfilled until January 18, 2012, when Blaschko filled it by voluntary demotion, accepting a reduction in her hourly wage rate from \$44.93 to \$38.85. Yates testified that the grievant

did not apply for that position, remaining in her Registered Nurse Senior classification. He conceded that, because the vacant Registered Nurse Principal position was not a clinical position, it did not qualify for the early retirement benefits available under CERP.

The Union presented the testimony of Linda Lange, who represented the Union at the hearing and during most of the steps of grievance processing. I describe her testimony below, during my discussion of the several issues to which it pertains.

#### DECISION

##### Article 17, Section 8.

The parties raise three primary issues and a substantial number of related lesser issues. The first primary issue was raised in the Step 1 grievance -- whether the Employer violated Article 17, Section 8, of the labor agreement. The Union argues, first, that the grievant's change of position should have been processed as a "transfer," as described in Article 17, Section 6, rather than as a "voluntary demotion" as described in Article 17, Section 8.

The Union cites Article 17, Sections 6, 8 and 9, as relevant:

Article 17, Section 6. Salary on Transfer. A nurse who is transferred to a nurse position under another Appointing Authority shall receive the salary being paid before such transfer. . . .

Article 17, Section 8. Salary on Voluntary Demotion. A nurse who takes a voluntary demotion shall retain his/her present salary unless that salary exceeds the maximum rate of pay for the position in which case the nurse's salary shall be adjusted to the new maximum. However, a

nurse may continue to receive a rate of pay in excess of the salary range maximum upon the recommendation of the Appointing Authority and approval of the Commissioner of Minnesota Management and Budget.

Article 17, Section 9. Reallocation Downward. If a position is reallocated to a class in a lower salary range, and the salary of the nurse exceeds the maximum of the new range, the nurse shall be placed in the new class and shall retain his/her current salary. . . .<sup>2</sup>

Before deciding whether the grievant's change of position was a transfer, governed by Article 17, Section 6, or a voluntary demotion, governed by Article 17, Section 8, I make the following additional findings of fact. The Union argues that the change of position should be considered a transfer, noting that an unnamed person from DHS Human Resources told Ryan 1) that the change would be considered a transfer and 2) that the grievant's hourly wage rate would continue at \$38.85. The record includes the following relevant evidence.

First. The grievant testified that on February 9, 2010, during a telephone call, Unzeitig offered her the position, that she accepted it, and that Unzeitig said, "that's why it's taken so long; Colleen Ryan just heard from a Human Resources woman that you will be at the same wage rate."

Second. In Ryan's memorandum to Thuet of March 24, 2010, she made the following statement: "Prior to accepting the RN Senior position, Ms. Breeggemann was told by a DHS human

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2 It appears that the Union cites this section of the labor agreement as relevant to evidence it presented about the Employer's payment of wage rates above the maximum to employees whose position has been reallocated. Nothing in the evidence indicates that the grievant's change to the Registered Nurse Senior classification resulted from a reallocation.

resources staff member that her salary would remain at \$38.85 and this move would be considered a transfer." The grievant's testimony does not support this statement. She did not testify that she had spoken to any Human Resources representative. Rather, as noted above, she testified that Unzeitig told her on February 9, that Ryan had "just heard from a Human Resources woman" that her wage rate would not change.

Third. Linda Lange, the Union's representative during the processing of the present grievance, testified at the hearing that she attended the parties' Step 3 meeting on June 23, 2010, and that she took handwritten notes. The Union presented those notes in evidence. They include the following:

Colleen [Ryan] told a lateral transfer someone in Central  
HR  
Colleen I in good faith assumed accuracy no reason to  
question.

I consider this evidence as follows. Though much of it is hearsay, I accept it, relaxing the exclusionary rules of evidence, as is typically done in arbitration. I accept the grievant's testimony that Unzeitig told her that Ryan told Unzeitig that Ryan had spoken to an unnamed "Human Resources woman" who told Ryan that the change of position would be a transfer and that its hourly wage rate would be \$38.85. I accept Lange's testimony that her notes taken at the Step 3 meeting are accurate. I accept the accuracy of Unzeitig's representation to the grievant and of Lange's notes, that it was Ryan who had heard from "Central HR," notwithstanding Ryan's failure to state in her memorandum to Thuet of March 24 that it

was she, herself, who had heard from Human Resources and notwithstanding her statement in that memorandum (unsupported by other evidence) that it was the grievant who "was told by a DHS human resources staff member that her salary would remain at \$38.85 and this move would be considered a transfer."

I reach the following conclusions about this evidence. Even with my acceptance of the evidence as true -- including the out-of-hearing statements by Ryan that are most favorable to the Union's position -- that evidence does not establish that the anonymous Human Resources person Ryan spoke to had sufficient knowledge or authority to decide whether the grievant's change of position 1) should be considered a transfer or a demotion, or 2) should be paid at the grievant's previous hourly wage rate or at the hourly rate for the Registered Nurse Senior classification.

Therefore, I rule that the conversation Ryan had with a Human Resources representative does not establish either that the grievant's change of position should be considered a transfer or that she was entitled to be paid the Registered Nurse Principal maximum rate. My decision whether the change of position was a transfer or a voluntary demotion rests on interpretation of the labor agreement, of a relevant statute and of relevant administrative rules.

Thuet testified that he is the Compensation Manager for MMB and that, as the delegate of the Commissioner of MMB, he is responsible for monitoring the compensation relationships of state employees. He testified that the language of Article 17, Section 8, has been in the parties' labor agreement for at least six years and that its language is similar to language in all of

the labor agreements between the Employer and unions representing state employees.

In carrying out his responsibility, Thuet follows Minn. Stat., Section 43A.17, Subdivision 5, titled, "Salary on Demotion; Special Cases," part of which is set out below:

The commissioner [of MMB] may, upon request of an appointing authority, approve payment of an employee with permanent status at a salary rate above the maximum of the class to which the employee is demoted. . . . If the action is justified by the employee's long or outstanding service, exceptional or technical qualifications, age, health or substantial changes in work assignment beyond the control of the employee, the commissioner may approve a rate up to and including the employee's salary immediately prior to demotion.

Thuet testified that, in his administration of this statute, he follows AP 15.6, which, by its terms, "applies to transfers, demotions and promotions within the classified service," and which, Thuet testified, has the force and effect of law. Relevant excerpts from AP 15.6 are set out below:

Responsibilities -

A. Appointing Authorities:

- Make selection decisions based upon merit, ability to perform the duties of the position, the needs of the agency and provisions of laws, rules, administrative procedures and collective bargaining agreements or plans.
- Apply the compensation provisions of this policy to determine if the transaction is a transfer, demotion, or promotion.
- Check collective bargaining agreements or plans for provisions regarding transfer/demotion/promotion and the appropriate salary treatment.
- Contact DOER [now MMB] Staffing Division to arrange qualification assessment and obtain advance approval of proposed transfers/demotions from {MMB}.
- Inform employee and prior appointing authority of type of appointment, salary treatment, duration

of probation, and the employee's rights to return to the former class/position.

- B. Department of Employee Relations [MMB]:
- Determine the type of transaction and the appropriate salary treatment.
  - Determine if an employee meets the qualifications for the new class.
  - Review and make determinations on requests for exceptions to the general requirements (see Provisions A.2) and communicate these decisions to appointing authority.

Provisions -

A. Compensation

1. General Requirements

- "Transfer" is the lateral movement of an employee between positions:
  - in the same class in different agencies or organizational units; OR
  - in different classes which are assigned to the same salary range; OR
  - in different classes assigned to salary ranges which differ by less than two steps at the minimum and maximum; OR
  - in different classes assigned to salary ranges which differ by less than two steps at the maximum but differ by more than two steps at the minimum if less than a two-step increase is required to pay the employee at the minimum of the new range.
- "Promotion" is the movement of an employee to a class assigned to a salary range which is two or more steps higher at the maximum or which requires an increase of two or more steps to pay the employee at the minimum of the new range.
- "Demotion" is the movement of an employee to a class assigned to a salary range which is two or more steps lower at the maximum.

When movement is between salary grids, step differences are calculated using the grid with the smallest percent difference between steps.

2. Exceptions to General Requirements

Advancement in a class series where the class title is the same with the exception of a higher level indicator is considered a promotion, and the reverse is considered a demotion regardless of the compensation code.

The Commissioner may approve exceptions to the general requirements based upon the classes' relative job content and complexity and the effect on the State's classification and compensation plan. . . .

Thuet testified that since July of 1990, the Employer has had in place a policy ("PERSL 1305"), which states that its purpose is "to clarify the statute under which an employee may be paid at a salary rate above the maximum rate for the classification to which the employee is demoting." Below, I set out excerpts from a part of PERSL 1305 entitled, "Analysis," which appears after the full text of Minn. Stat., Section 43A.17, Subdivision 5:

The following points are clear:

1. The decision to apply this provision is a joint decision of the Appointing Authority and the Commissioner of [MMB]. Appointing Authority may make a request, but cannot commit the Commissioner to the application of the statute. Likewise, the Commissioner of [MMB] cannot act without the request of the Appointing Authority. . .
6. There are five factors which the legislature has said may be used to justify application of the statute. Those factors are:
  - A. the employee's long or outstanding service;
  - B. the employee's exceptional or technical qualifications;
  - C. the employee's age;
  - D. the employee's health, and;
  - E. substantial changes in the employee's work assignment beyond the control of the employee.

I make the following rulings. I find that Ryan was the appointing authority for the vacant position. Thuet's responsive memorandum to Ryan of May 4, 2010, seems to raise an issue whether Ryan had that status, by its statement that "the appointing authority -- through its central office -- has not submitted a recommendation to MMB to support retaining a salary above the maximum for this situation." The Employer did not present other evidence denying Ryan's status as the appointing authority for the vacant position, nor did the Employer propose

that some other person was its appointing authority. Therefore, I accept the evidence presented by the Union that Ryan was the appointing authority for the vacant position.

As I interpret AP 15.6, the grievant's change of position was a demotion and not a transfer. AP 15.6 includes provisions that define whether a change of position (a "transaction") is a transfer, a demotion or a promotion. The appointing authority and MMB can make preliminary determinations of the type of transaction at issue, but the Compensation Provisions of AP 15.6 define the three types of transaction and control the final determination.

Paragraph 1 of the Compensation Provisions, which is entitled, "General Requirements," defines the three types of transaction. Paragraph 2, which is entitled, "Exceptions to General Requirements," then states a controlling exception to definitions given in the General Requirements, thus:

Advancement in a class series where the class title is the same with the exception of a higher level indicator is considered a promotion, and the reverse is considered a demotion regardless of the compensation code.

I rule 1) that Registered Nurse Principal and Registered Nurse Senior are in the same class series, 2) that "Principal" is the level indicator for the former and "Senior" is the level indicator for the latter, 3) that a change from Registered Nurse Senior to Registered Nurse Principal would be an "advancement," 4) that the change here at issue, from Registered Nurse Principal to Registered Nurse Senior is the "reverse" of such an advancement, and 5) that, therefore, the grievant's change of

position was a demotion, as provided in the Exception text set out just above.

I also rule that, because the change of position was a change that the grievant sought, rather than one that was imposed upon her (as might occur through reallocation) the demotion was a "voluntary demotion." Because the change of position was a voluntary demotion, the provision of the labor agreement that applies is Article 17, Section 8, and not Article 17, Section 6.

Article 17, Section 8, provides that a nurse who takes a voluntary demotion "may continue to receive a rate of pay in excess of the salary range maximum [for the new position] upon the recommendation of the Appointing Authority and approval of the Commissioner of Minnesota Management and Budget."

The evidence clearly shows that Ryan, the appointing authority, in her memorandum to Thuet of March 24, 2010, recommended that the grievant retain her previous hourly wage rate of \$38.85, and that Thuet in his response of May 4, 2010, did not approve that recommendation.<sup>3</sup>

The relevant provisions 1) of the labor agreement (Article 17, Section 8), 2) of the applicable statute (Minn. Stat., Section 43A.17, Subdivision 5), and 3) of the two

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3 As I have described above, other evidence, hearsay though it is, indicates that Ryan spoke to an unknown Human Resources person on or before February 9, 2010, and was told that the change of position would be a transfer with the hourly wage rate set at \$38.85, but the evidence does not show that the person to whom Ryan spoke had authority to make those decisions.

administrative rules that apply (AP 15.6 and PERSL 1305) all clearly provide that the decision whether to approve such a recommendation is within the discretion of MMB.

The Union makes a substantial number of arguments that Thuet should have approved Ryan's recommendation. Thus, Lange testified from records obtained from the Employer that MMB and its predecessor, DOER, have approved payment above the maximum at least twenty-eight times since 2002. The parties disagree about the number of such approvals, and the Employer presented evidence that only two such approvals have been given after a voluntary demotion. Even if I accept the Union's view of that evidence, I do not find that the number of such approvals has been large -- certainly not sufficient to show either discrimination against the grievant or an abuse of the discretion exercised by Thuet in his refusal to approve Ryan's recommendation that the grievant be paid above the maximum wage rate for the new position.

The Union makes other arguments, urging that Thuet should have exercised his discretion by approving Ryan's recommendation -- that the grievant had a record of long and outstanding service, that she had exceptional qualifications and that that approval would not violate the labor agreement, the relevant statute or the relevant administrative rules.

I agree that the grievant's qualifications and service record are excellent, and I agree that Thuet could have exercised his discretion by approving Ryan's recommendation. Nevertheless, the labor agreement, the statute and the

administrative rules all provide such approval is discretionary. Thuet's memorandum of May 4, 2010, set forth reasonable bases for his refusal to approve the recommendation -- budget constraints and the status of personnel within the Registered Nurse Senior classification. I conclude that, though Thuet could have decided to approve Ryan's recommendation, he had discretion not to do so, and that his failure to approve it did not violate the labor agreement.

Oral Contract.

The Union also makes the following primary argument. On February 9, 2010, Unzeitig, by telephone, offered the Registered Nurse Senior position to the grievant, representing that her hourly wage would continue at \$38.85. The grievant accepted that offer during the telephone call. On February 10, 2010, the grievant fulfilled any condition to the offer by passing the test for tuberculosis. The offer by Unzeitig and acceptance by the grievant created an oral contract, which the grievant began to perform on March 10, 2010. The Union argues that that contract should be enforced in this proceeding.

In his testimony, Yates made two responses to this argument. First, he testified that, if any representation was made to the grievant by Unzeitig or by Ryan, promising an hourly rate above the maximum for the Registered Nurse Senior classification, that promise was made without authority and had no force even if the grievant accepted it, believing that they were authorized to make it. He testified that only MMB and its delegates have authority to permit such a departure from the

maximum range for a classification and that neither Unzeitig nor Ryan have that authority and that, for DHS, only he and a few people in his office have been so delegated. Second. Yates testified that the Union's argument seeks enforcement of an oral contract alleged to have been made by discussion between a Union member and an employee of the Employer. Yates testified that, because the Union and the Employer have agreed in their labor agreement that the Union is the exclusive representative of Union members, "direct dealing," i.e., contracts made between the Employer and individual members of the Union are not enforceable. The Employer argues that Article 1, Section 1, of the labor agreement recognizes this principle in its last paragraph:

Any agreement which is to be included as a part of this Agreement must so indicate, must be reduced to writing, and must be signed by the parties to this Agreement.

I rule 1) that the evidence does not show that the grievant entered into a binding contract with an authorized agent of the Employer and 2) that the last paragraph of Article 1, Section 1, of the labor agreement, set out just above, does not permit enforcement of contracts, whether oral or written, between the Employer and individual members of the Union.

Violation of Article 11, Section 6.

The Union argues that the Employer violated the second paragraph of Article 11, Section 6, of the labor agreement by failing to give the grievant the Appointment Letter for her new position until March 12, 2010, two days after she began working

in the position. The second paragraph of Article 11, Section 6, is set out below:

The Appointing Authority agrees that nurses hired be given a letter of appointment stating the classification and (class option, if any), working title (if applicable), employment condition, a general description of duties, the work location, the pay range and specific rate of pay, shift or shifts (if applicable), the normal hours of work and the starting date prior to commencing employment.

At the hearing and again in its post-hearing written argument, the Employer objected to consideration of this argument, urging that it should not be considered because it was not expressly made until the day of the hearing -- thus depriving the Employer of the opportunity to present a full response to it. In answer to this objection, the Union argues that the Step 3 grievance notified the Employer that the Union alleged the violation, not only of particular provisions of the labor agreement, but "all applicable articles" of it. The Union urges that the Employer had notice from the Step 1 grievance and the Step 3 grievance that the Union alleged the factual basis for this argument -- that the Appointment Letter was issued two days after the grievant began working in the new position.

At the hearing, I ruled, as most arbitrators do, that usually a party who raises a new argument at the hearing should not be foreclosed from doing so, but that, instead, the opposing party should be allowed time to prepare a response to the newly raised argument, thus to fulfill a primary, salutary goal of grievance arbitration -- to satisfy both parties that the grievance has been fully considered. Accordingly, I allowed the

Employer additional time to respond to the Union's argument, and I overruled the objection to its consideration. In its post-hearing written argument, the Employer renews its objection to the timeliness of the Union's argument that the Employer violated Article 11, Section 6; in response, I repeat here the rulings I made at the hearing.

If the language of the second paragraph of Article 11, Section 6 (hereafter, for simplicity, merely the "Paragraph"), is read out of context, it is not clear whether it requires an appointment letter to be issued "prior to commencing employment" only for newly hired nurses or whether the words, "nurses hired," were used in a broader sense to refer to all nurses who begin work in a new position -- those who are newly hired as well as incumbent nurses who change to a new position through the various vacancy filling procedures described in Article 11.

In isolation, the language of the Paragraph can be read to refer only to newly hired nurses, but the evidence indicates that the parties apply its language in the broader sense. Thus, the context in which the Paragraph appears in the labor agreement implies that it was intended to apply to changes of position by incumbent nurses (as well as to newly hired nurses). Almost all of the twelve sections of Article 11 are used to describe how incumbent nurses fill vacancies or fill positions from seniority lists after reallocation or after recall from layoff. The Paragraph itself is the second of two paragraphs in Article 11, Section 6, the first of which has nothing to do with newly hired nurses, but, instead, describes how positions are to be filled

from seniority lists if the posting and bidding process (described in Sections 4 and 5) is not used. Near the end of Article 11, in the second-to-last subparagraph of Section 12, another provision appears that applies to newly hired nurses -- describing their initial probation period.

In his memorandum to Ryan of May 4, 2010, Thuet referred to Miller's email to the grievant of March 12, 2010, as her "appointment letter," indicating that that term is used by the Employer to refer to a letter that states the terms of employment even for nurses who are not newly hired. Yates' testimony also indicates that incumbent nurses who are changing positions receive an appointment letter. The Employer's opposition to the Union's argument that Article 11, Section 6, was violated is based upon its objection that the argument was not timely made, as described above, and upon its urging, described below, that such a violation, if it occurred, has no effective remedy. Indeed, the Employer has not argued that the Paragraph does not apply to incumbent nurses who change position. Accordingly, I interpret the Paragraph as applying to incumbent nurses changing position as well as to newly hired nurses, and I rule that the failure to issue an appointment letter before the grievant commenced her employment in the new position violated Article 11, Section 6, of the labor agreement.

The Union seeks an award that, for hours worked after March 10, 2010, provides the grievant with the difference between her former hourly wage rate of \$38.85 and her new hourly wage rate of \$37.36, plus a corresponding adjustment of benefits and premiums that are determined by earnings.

The Employer makes several arguments opposing the remedy sought by the Union. First, it argues, as expressed in its post-hearing written argument:

. . . there is no apparent remedy for an appointment letter that arrived two days after an employee began a job. A two-day lag between an employee starting a job and being notified that it will pay slightly less than she had expected is inconsequential and is certainly not an injustice that needs correction.

Second. The Employer argues that the grievant failed to mitigate any damages she might have suffered from her receipt of the Appointment Letter two days after she began employment in the new position. The Employer argues that when the grievant received the Appointment Letter on March 12, 2010, she did not request that she be returned to her previous job in the Registered Nurse Principal classification for which the hourly wage rate was \$38.85. The Employer notes that, as Yates testified, the grievant did not make such a request until October of 2010, when the position was no longer available.

In addition, the Employer argues that the grievant could have, but did not, bid for the Registered Nurse Principal vacancy at the Security Hospital that was posted from September 23, 2010, until October 3, 2010, which went unfilled until January 18, 2011. The Employer urges that, by bidding for that position, the grievant could have resumed her hourly wage rate of \$38.85, thus mitigating her damages.

The grievant testified that in February of 2010 she was informed by the supervisor for her former position that, when she left for her new position at the Security Hospital, her

former position would be discontinued and would no longer be available. The record does not include other evidence whether the grievant's former position would have been available to her on March 12, 2010, if, after receiving the Appointment Letter on that day, she had requested to return to that position. Yates' testimony that the position was not open in October of 2010, shows that it was not open then. The record does not explain why the grievant applied for her former position in October of 2010 if it had been discontinued the previous March.

I make the following rulings relating to remedy for violation of Article 11, Section 6. I note that these rulings seek to determine damages and any duty to mitigate them that flow from the late receipt of the Appointment Letter. These rulings are not grounded on the other bases the Union has alleged for recovery. I accept the grievant's testimony that, on March 12, 2010, her former position had been discontinued, but, as I note below, she continued to work in the former position until she began work in the new position on March 10. Further, it is not clear whether the grievant had a right to return to it on March 12, even if it had been still available. In Article 11, Section 12(B), the labor agreement does establish a right of return in limited circumstances, thus:

Nurses who have permanent status in a nurse classification in the bargaining unit shall be given written reasons for non-certification in a subsequent probationary period in another classification. Any nurse who is not certified shall have the right to return to the position or another position in the same classification and option in the Seniority unit from which the nurse was transferred or promoted. . . .

This provision allows return after non-certification (failure to pass probation), and it allows such return to a position from which the nurse was "transferred or promoted." Thus, by its terms, it would not apply to the grievant's circumstance -- first, because she did not fail to pass probation and second, because her change of position resulted from a voluntary demotion and not from a transfer or a promotion.

The award below is based upon this evidence and upon the following conclusions derived from it. The grievant continued to work in her former position until March 10, 2010. If she had received the Appointment Letter informing her that her hourly wage rate in the new position would not be \$38.85, she could have decided not to take it, and she could have stayed in her former position.<sup>4</sup> Because of the late issuance of the Appointment Letter, she was not made aware that the wage rate she expected from her discussion with Unzeitig was incorrect. Thus, the lateness of the Appointment Letter defeated the apparent purpose of requiring that it be issued before commencement of employment, i.e., to provide nurses with a formal statement of the terms of their new employment, thereby eliminating the possibility of error in expectations before they change positions.

I conclude that the late issuance of the Appointment Letter, in violation of Article 11, Section 6, prevented the

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4 I do not assume that the Employer would have discontinued her former position if she had remained in it rather than moving to the new position, and I do not assume that, after leaving the former position on March 10, she could have returned to it on March 12.

grievant from choosing to keep her hourly wage rate of \$38.85 by staying in her former position, and that she is entitled to damages equal to \$1.49 per hour worked plus a corresponding adjustment of benefits and premiums determined by earnings.

The evidence shows that the grievant could have eliminated the wage rate differential by bidding for the vacancy at the Security Hospital in the Registered Nurse Principal classification that was posted on September 23, 2010, and went unfilled until January of 2011. In the absence of other bidders for the position, the evidence indicates that, with her experience and her credentials, she would have been selected for that position if she had bid for it.

For that reason, the period of recovery should be limited -- to end one month after September 23, 2010, a reasonable time after the vacancy was posted.

#### AWARD

The grievance is sustained in part. The Employer shall pay the grievant \$1.49 for each hour that she worked from March 10, 2010, till October 23, 2010, plus a corresponding adjustment of benefits and wage premiums determined by those additional earnings.

June 25, 2012

  
Thomas P. Gallagher, Arbitrator