

**THE MATTER OF ARBITRATION BETWEEN**

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**MINNESOTA STATE COLLEGE** )  
**FACULTY,** )  
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 ) **Union,** )  
 ) **M STATE COORDINATORS**  
**and** ) **GRIEVANCE**  
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**MINNESOTA STATE COLLEGES** )  
**AND UNIVERSITIES,** )  
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 ) **Employer.** )  
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Arbitrator: Stephen F. Befort

Hearing Date: June 27-28, 2011

Post-hearing briefs received: August 1, 2011

Date of Decision: August 29, 2011

**APPEARANCES**

For the Union: Jess Anna Glover

For the Employer: Jeffrey Wade  
William Brady

**INTRODUCTION**

Minnesota State College Faculty Association (Union), as exclusive representative, brings this grievance claiming that Minnesota State Colleges and Universities (MnSCU or Employer) violated the parties' collective bargaining agreement by reducing teaching equivalent credits for employees occupying coordinator positions in the Radiological Technology and Nursing programs at Minnesota State Community and Technical College (M State). The Union contends

that the Employer implicitly required the employees to continue to perform coordinator duties on an overload basis. The Employer maintains that it validly reduced or eliminated the coordinator assignments and that the employees had no obligation to perform those duties and no right to obtain compensation for their performance. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

## **ISSUES**

Did the Employer violate the parties' collective bargaining agreement when it eliminated or reduced credits for coordinator work in the Radiologic Technology and Nursing programs but those employees continued to perform coordinator tasks? If so, what is the appropriate remedy?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE 6**

#### **MANAGEMENT RIGHTS**

**Section 1. Inherent Managerial Rights.** The MSCF recognizes that the Employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policies as the functions and programs of the Employer; its overall budget; utilization of technology; the organizational structure; and the selection, direction and number of personnel.

### **ARTICLE 11**

#### **WORK ASSIGNMENTS**

**Section 7. Reasonable Credit Equivalences.** A faculty member may be assigned duties that are not described in this agreement by written mutual agreement among the faculty member, and the college president or designee. Copies of such agreements will be provided to the MSCF chapter grievance representative and the state MSCF in a timely manner. Credit and/or student contact hour equivalencies for the assignment will be determined before the assignment is made. The instructor's regular workload will be reduced by an equal number of credits/student contact hours. The college administration will schedule the assignment within the parameters described in this Article except by

mutual agreement among the faculty member, the state MSCF, and the college president or designee. If an overload condition is created, compensation shall be according to the overload calculation in Article 13, Section 15. . . .

## **FACTUAL BACKGROUND**

Minnesota State Community and Technical College (M State) is a component of the MnSCU system and is comprised of four campuses located in Fergus Falls, Detroit Lakes, Moorhead, and Wadena, Minnesota. The Union represents faculty employed by M State with terms and conditions of employment governed by a 2009-2011 master agreement.

Full-time faculty members generally teach 30-32 credits of instruction during the academic year. In some instances, the Employer assigns non-instructional duties to faculty members and reduces their teaching load by the reasonable credit equivalence (RCE) value of the non-instructional assignment. For a number of years, the Employer assigned faculty in the Radiological Technology and Nursing programs to perform administrative tasks as “coordinators” for their respective programs. In 2009, due primarily to budgetary concerns, the Employer significantly reduced the RCEs allocated to those coordinator positions.

In the Radiological Technology program, the Employer assigned coordinator duties to Program Director Colleen Brady and Clinical Coordinator Amy Coley. These duties included such tasks as obtaining new clinical sites, making the clinical schedule, overseeing student performance, maintaining student records, and obtaining and maintaining certification status with the national accrediting body (the Joint Review Committee on Education in Radiologic Technology or “JRCERT”). In 2009, the Employer reduced the RCE allocation for these two employees and correspondingly increased their respective teaching loads. The resulting RCE allocations for the years in question are as follows:

	2008-09 RCEs	2009-10 RCEs	2010-11 RCEs
Colleen Brady	9	6	4
Amy Coley	6	3	3

Dean Helene Hedlund testified that she calculated the amount of credits based upon JRCERT requirements. She testified that a reduction in RCEs was appropriate in that the initial certification process was completed in 2009 and some of the duties of the program director were assigned to other employees while other duties were made the responsibility of faculty generally. Hedlund testified that she communicated to Brady and Coley that they were expected to limit administrative responsibilities within the reduced RCE framework, and she invited them to inform her if there were tasks that could not be accomplished within the RCE time allocated.

Brady and Coley testified that they continued to perform administrative tasks at only a slightly reduced level following the reduction in the RCE allocations, with the number of hours worked being somewhat higher during the 2009-10 school year than in the 2010-11 school year. Both employees testified that while they were not expressly assigned to perform these duties, the college expected them to maintain certification status which required them to continue to perform the administrative tasks as a practical matter.

Through the 2008-09 school year, the Employer assigned five instructors as coordinators in the Nursing program. Coordinator duties included such administrative tasks as overseeing the effectiveness of teaching, handling administrative faculty and student issues, assisting the clinical faculty, and coordinating student progress through the curriculum. In 2009, the Employer eliminated the coordinator roles altogether in the Nursing program, and the former coordinators were reassigned to full-time instructional responsibilities. The five coordinators and their respective RCE allocations for the years in question are depicted in the following table:

	2008-09 RCEs	2009-10 & 2010-11 RCEs
Tracy Morstad	10	0
Cindy Moore	20	0
Pat Ahlschlager	16	0
Cheryl Thorpe	13	0
Jennifer Jacobson	22	0

Kathy Burlingame, Academic Dean and Director of Nursing, testified that some of the duties previously performed by the five coordinators were reassigned to a newly hired Clinical Coordinator. Burlingame testified that she also assumed responsibility for a number of coordinator duties, while other duties either were assigned to the faculty generally or were no longer necessary. Burlingame also testified that she communicated to the faculty that the coordinator positions were being abolished and that the former coordinators were no longer expected to perform the previously assigned administrative tasks.

Three of the five former coordinators testified that while they were not explicitly assigned to continue to perform administrative tasks, they did so because such tasks were important and somebody needed to take care of them. Some faculty testified that they sought direction from Burlingame about their responsibilities, but did not receive clear responses. As with the coordinators in the Radiological Technology program, the Nursing coordinators tended to perform less administrative tasks in the 2010-11 school year than they had in the prior year.

The Union filed a grievance challenging the reduction or elimination of coordinator RCEs claiming that the continued performance of such duties was nonetheless expected. The Employer denied the grievance which then proceeded to arbitration.

## **POSITIONS OF THE PARTIES**

### **Union:**

The Union argues that the Employer, even though reducing the number of RCEs provided to coordinators for performing administrative duties, essentially required the coordinators to continue to perform most of those administrative duties on an overload basis. The Union contends that the Employer implicitly assigned the performance of these administrative duties because the Employer expected that the duties would continue to be performed but did not make adequate arrangements for ensuring that this work otherwise was accomplished. The Union further asserts that the individual coordinators provided credible testimony as to the time they spent working on these tasks above and beyond their formal workload assignments. As such, the Union claims that the coordinators should be compensated for the extent of the time spent on these overload assignments.

### **Employer:**

The Employer contends that it has the managerial right to control the assignment of work and that it did not assign the coordinators to perform the administrative work in question. The Employer maintains that program administrators clearly communicated the reduction in release time in 2009 and that the coordinators were expected to confine their work activities within the modified RCE framework. The fact that coordinators undertook to continue to perform some of these administrative tasks is not attributable to the Employer, and the Employer should not be held responsible for providing compensation for such activities.

## DISCUSSION AND OPINION

### The Assignment of Work

The Union seeks in this grievance to obtain compensation for seven employees who allegedly performed work on an overload basis. Even though the coordinator duties of these employees were either officially reduced or eliminated, the Union claims that these employees are due compensation because the Employer caused them to continue performing many of the duties in the two following years.

As a general proposition, an employer is responsible for providing compensation to an employee only for work that the employer has assigned that employee to perform. According to both statute, Minn. Stat. § 179A.07, subd. 1, and contract, Article 6, § 1, the Employer possesses the inherent managerial authority to make work assignments. In this instance, it is undisputed that the Employer did not expressly assign the employees in question to continue to perform the former coordinator tasks.

The Union nonetheless contends that the Employer *implicitly* assigned the former coordinators to continue to perform these duties. In this regard, the Union primarily relies on two arguments. First, the Union claims that the Employer expected that the duties in question would continue to be performed. Second, the Union maintains that the Employer did not make adequate alternative arrangements for the performance of these tasks. Taken together, the Union argues that the Employer essentially required the former coordinator employees to continue to perform these tasks as a practical matter.

Pursuant to the Fair Labor Standards Act (FLSA), courts have recognized that an implicit assignment of duties undertaken with the knowledge of the employer can constitute a sufficient

basis for wage and hour liability. *See, e.g., Chao v. Gotham Registry, Inc.*, 514 F.3d 280 (2nd Cir. 2008). As the leading treatise on the FLSA summarizes:

Time spent by an employee performing work not requested but suffered or permitted is generally seen as work time. Thus, an employer must compensate its employees for unauthorized work that, even though prohibited, is performed with the knowledge and acquiescence of management. The key factual inquiry is whether the employer knew or through use of reasonable diligence should have known that a person was performing work on the employer's behalf. . . .

ELLEN C. KEARNS, *THE FAIR LABOR STANDARDS ACT* 473 (BNA 1999).

With respect to the Union's first argument, the Union points out that the Employer did not eliminate most of the tasks previously performed by the coordinators. Indeed, many of these tasks continued to be priorities for the Employer, such as maintaining the administrative controls necessary to continue certification for the Radiological Technology program. As many of the coordinators testified, the tasks at issue were important and somebody needed to do them.

The Union additionally contends that the Employer did not make adequate arrangements for others to perform the tasks that the Employer still wanted performed but which were no longer assigned to the coordinators. Many of the tasks were vaguely reassigned as general faculty responsibilities. Other tasks, particularly in the Nursing program, were purportedly assumed by the Dean of Nursing. And, in some instances, clear directions were not given about task responsibility.

In further support of its position, the Union introduced evidence concerning the number of hours that the former coordinators worked on these administrative tasks. This evidence shows that the coordinators continued to perform a majority of tasks following the Employer's formal reassignment of those duties in 2009. The evidence generally establishes that the number of hours worked on these tasks in the 2010-11 school year were less than in the 2009-10 school year.

The Employer's counter-argument is that the coordinators could not reasonably have believed that they were expected to continue to perform the reassigned tasks in light of the very clear directives informing them to keep their workload within the revised RCE framework. Both Hedlund and Burlingame testified that they asked the coordinators to tell them if they were unable to work within the new guidelines, but they received little feedback except for the instant grievance. Based on these circumstances, the Employer argues that the coordinators "self-assigned" the continued duties because of their unhappiness with the new arrangement. In addition, the fact that the coordinator's work on their former duties declined in the second year following the 2009 reassignment indicates that at least some of the work performed during the 2009-10 school year may not have been necessary.

In the end, I find that both parties have asserted plausible positions, at least in part. Given the Employer's directive that the coordinators were not expected to perform the reassigned duties, the coordinators should have refrained from performing most of those tasks. If the coordinators felt that were being pressured to perform some work without pay, they should have been diligent in seeking clarification about their responsibilities. On the other hand, the Employer's 2009 reorganization placed the coordinators in a position in which other faculty and students still expected them to perform some necessary administrative duties because no one else was stepping into the void. The Employer either knew or should have known that the coordinators were performing work beyond their explicitly assigned duties. Under these circumstances, I believe that the Union has established a basis for some, but not all, of their compensation claims.

## **The Appropriate Remedy**

During her testimony at the arbitration hearing, Dean Burlingame acknowledged that additional faculty mentoring may have been appropriate to ensure that the faculty did not burden former coordinators with tasks for which they are no longer receiving release time. Tr. at 295. This testimony hits upon a key problem underlying this grievance and also provides a starting point for determining the appropriate remedy. Given the Employer's directives to the coordinators not to continue to perform the reassigned duties, the fact that the coordinators continued to perform some of these duties does not mean that they are entitled to pay for all of that extra work. On the other hand, however, the coordinators should receive something in the way of compensation for the extra work that was both foreseeable and preventable by the Employer. The appropriate "something" is compensation for administrative work that the Employer knew or should have known the coordinators were performing during the 2009-10 transition year.

Based on this principle, I conclude that the two coordinators in the Radiological Technology program are entitled to two additional RCEs each for the 2009-10 year and that the five former coordinators in the Nursing program are entitled to three additional RCEs each for the 2009-10 year. The Employer should provide compensation in the form of the monetary equivalent of these RCEs to the individual coordinators unless the Employer and the individual coordinators agree to the substitute of a reduced teaching load during either the 2011-12 or 2012-13 school years. No additional award for compensation is made for the 2010-11 school year or going forward.

## **AWARD**

The grievance is granted in part and denied in part. The Employer is directed to provide Colleen Brady and Amy Coley with the equivalent of two additional RCEs for their work during the 2009-10 school year. The Employer is directed to provide Tracy Morstad, Cindy Moore, Pat Ahlschlager, Cheryl Thorpe, and Jennifer Jacobson with the equivalent of three additional RCEs for their work during the 2009-10 school year. The Employer shall provide this compensation in the form of the monetary equivalent of the specified RCEs unless the Employer and the individual coordinators agree to the substitute of a reduced teaching load during either the 2011-12 or 2012-13 school years. The arbitrator will retain jurisdiction for 90 days to resolve any remedial issues as may be necessary.

Dated: August 29, 2011

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Stephen F. Befort  
Arbitrator