

Arbitration

**In The Matter of Arbitration
Between:
Minnesota Nurses Association, Union
And
North Memorial Medical Center,
Employer**

**FMCS Case No. 100907-59694-3
(S. Racine Work Agreement)**

**Carol Berg O'Toole
Arbitrator**

Representatives:

For the Employer:

**Jessica M. Marsh, Esq.
Felhaber Larson Fenlon & Vogt
220 South Sixth Street, Suite 2200
Minneapolis, Minnesota 55402-4504**

For the Union:

**Beverly Hall, Labor Relations Specialist
Minnesota Nurses Association
345 Randolph Avenue, Suite 200
Saint Paul, Minnesota 55102**

Witnesses

For the Employer:

**Maribeth Woitas, Director, Emergency and Trauma Services, Fairview Southdale
Mike Fasbender, Manager, Emergency Department, Fairview Southdale
Lisa Job, RN, Director, Emergency and Psychiatric Services, North Memorial
Medical Center**

For the Union:

Trent Burns, RN and North Memorial Medical Center, Co-Chair, MNA
Sara Racine, RN, North Memorial Medical Center, Grievant

Preliminary Statement

The hearing in the above matter commenced shortly after 9:00 AM at the Federal Mediation and Conciliation Services, Suite 3950, Broadway Place West, 1300 Godward Street NE, Minneapolis, Minnesota , 55413. The parties involved are North Memorial Medical Center (North Memorial or Employer) and the Minnesota Nurses Association (Union), representing all registered professional staff nurses, unit shift coordinators, and assistant head nurses. The parties presented opening statements, oral testimony, oral argument and exhibits. Post hearing briefs were filed by both parties. The arbitrator closed the hearing upon receipt of both briefs on October 10, 2011.

Issue Presented

The parties could not agree on an issue so the arbitrator crafted the issue as the following: Was the contract violated by the Employer when the Employee Change Form signed on November 13, 2009, was rescinded? If a violation occurred, what is the remedy?

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for all registered professional staff nurses, unit shift coordinators, and assistant head nurses. The Employer and the Union are signatories to a collective bargaining agreement (Agreement), Joint Exhibit 1, covering the period from 2007 to 2009, which provides in Article 40 that if the grievance is not resolved in Step 2 of the grievance procedure, either party may refer the matter to arbitration. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator. The parties waived the requirement of a three-party panel and agreed to have the grievance decided by a

single, neutral arbitrator. There were no timeliness issues raised by the parties, nor were there any procedural issues in dispute.

Union's Position

The Union maintains that the issue in dispute is in the Agreement between the parties, Article 6, page 7, entitled "Confirmation of Work Agreement" which provides that,

The Employer shall provide the nurse with written confirmation of the nurse's work agreement. This confirmation shall include her or his salary and increment level, including the credit assigned for such prior work experience, the number of hours per payroll period for which the nurse is being employed, shift rotation and shift length to which the assigned, the unit assigned to, the weekend rotation (rotation of the unit, if the weekend rotation is not every other weekend), and the on-call requirements for those units that have mandatory call. This confirmed work agreement shall not be changed without consent of the nurse. Joint Exhibit 1.

The Union argued in the opening statement that Article 24, B, on page 34, Joint Exhibit 1, has the same language, prohibiting changing a confirmed work agreement without consent of the nurse. This article applies to nurses with ten or more years of seniority, and, although the Grievant didn't have the requisite seniority at the time of the dispute, the Union maintains that the concept is the same.

The Union maintained that the manager had the authority to sign the Employee Change Form on November 13, 2009, and that the Grievant detrimentally relied on the change when she turned down an offer from Maple Grove the next day.

The first witness for the Union was Trent Burns, a Unit Shift Coordinator and Registered Nurse who has worked for North Memorial for more than fourteen years. He testified that the work agreement can be changed under two situations: 1) when the nurse consents to the change; 2) when there is a layoff. He stated that layoffs are related to a decrease in the number of patients. He added that in a layoff, the individual has some

choice. Burns stated that the policy for North Memorial doesn't permit rescission of a work agreement and that he had never heard the argument that the work agreement could be rescinded if it wasn't yet in effect. In fact, he stated on redirect, that it was not unusual to have a work agreement signed to be effective in the future. He testified that he had never heard that Human Resources had to sign the document before it was effective. Burns stated that, in his long employment with North Memorial, he was not aware of any other work agreement that had been signed and then rescinded.

The second witness for the Union was the Grievant, Sara Racine. She testified that she has worked in the Emergency Department at North Memorial for over ten years. She described her job as a Unit Shift Coordinator as "very difficult" and a "leadership role" that was considered the "go-to person". She said that she coordinated the flow of staffing. She testified that she was a "babysitter, waitress, and shoulder to cry on."

Racine explained that she keep contemporaneous notes indicating the dates of important events that happened to her, but had not dated or signed the page. Union Exhibit 2. Racine described the time as very stressful. Amy Kaiser, her co-worker, left North Memorial to take a supervisor position at Maple Grove Hospital and approached her to offer her a job at Maple Grove Hospital as a Patient Care Coordinator working a twelve hour day/night shift. She testified that the position was the same as a Unit Shift Coordinator. Kaiser told her she was also "working on" Miller to come to Maple Grove Hospital.

Racine testified that she had a three year old daughter (and since had another baby) and was looking to do something else. Racine testified that she had lunch with Kaiser at Maple Grove Hospital. Following that, her manager, Jeff Nordlinder asked her if she was interested in taking a day/night position at North Memorial. She told him she was

interviewing at Maple Grove Hospital, but she was interested in the day/night position at North Memorial. Racine said she took the Maple Grove Hospital offer seriously as it involved a more favorable shift than her present job at North Memorial, allowed her to stay in a leadership role and permitted her to more easily care for her young children. Racine testified that she “prayed about it a lot” and that she found it difficult “to go to something new”. Racine stated that one of the considerations was that North Memorial was a Level 1 Trauma Center and that Maple Grove was a small hospital. Racine stated that she was interested in the Maple Grove Hospital position not for the money, but because it was closer to home and would get her out of “straight nights”. She learned that the North Memorial day/night job was not available until January, 2010. Racine stated that Nordlinder spoke to her about it and she talked with Mike Fasbender about the move.

Racine testified that when she decided to take the position at North Memorial, she understood the job would start on January 18, 2010. She had submitted the Employee Change Form for Miller’s job on October 31, 2009, at the request of management. Her manager, Nordlinder, signed the Employee Change Form in front of her on November 13, 2009. Joint Exhibit 5. Racine testified that “everyone was happy I was staying”. Racine said that she talked to Shelby Shepard, the day/night scheduler and Bruce Olson, the day/night Unit Staff Coordinator, about the job start date. Racine testified that, once the documentation was completed on the North Memorial day/night Unit Shift Coordinator job on November 13, 2009, she turned down the Maple Grove Hospital position. She believed that Nordlinder had the authority to sign the Employee Change Form on November 13, 2009, and that the process was complete. Racine testified that she “relied on “ it. Neither Nordlinder nor Fasbender, who were her managers, said they had to get it authorized by “Mary P”, the Human Resources person.

Racine testified that a week after she accepted the North Memorial day/night job and turned down the Maple Grove Hospital offer, she was told by Fasbender that he had to “take the work agreement away from you.” Racine testified that “it was over in a blink.” Racine testified that Fasbender said “[I] can give you a day/night position, but no coordinator”. Racine stated she turned down this offer for the job because it did not include the supervisory part. She told Fasbender that she would stay on straight nights. She indicated that she “enjoyed being part of the leadership team”. She testified that there were two major perks: 1) “you get to self schedule—very huge”; 2) “professionally...didn’t want to step down [or] step backwards.” She added that the financial repercussions were “huge...per year, \$18,000” “Mike and I consider ourselves to be friends [but this] put a wedge between us”.

.Employer’s Position

In the opening argument the Employer stated that they considered Racine an excellent nurse. The Employer described North Memorial Center as a level one trauma center that has had “significant financial losses”. The Agreement between the parties, Joint Exhibit 1, was acknowledged as having no express management rights clause. The Employer argued, that despite that fact, the Employer has inherent management rights, one of which is to operate efficiently and effectively. The Employer’s only curtailed if a clear violation of the Agreement occurs. The Employer stated that it is the Union’s burden to show the violation occurred. The Employer described the position of Unit Shift Coordinator and how it had been staffed over the period of time from October 2009 to the present. Employer Exhibit 1, 3, 5, and 7. The Employer characterized the grievance as asking the arbitrator to create a position that doesn’t exist.

The first witness for the Employer was Maribeth Woitas, Registered Nurse, Director of Emergency Services, Fairview Southdale. Until April, 2010, Woitas was Director of Emergency Services at North Memorial. Woitas described the role of the Unit Shift Coordinator and stated that it was the clinical leader on a given shift who took care of managing any patient issues that come up. Woitas said that the position is essentially the same as the 2009 description Employer Exhibit 5. She described it as the “go-to person” for staff working that particular shift. Woitas suggested that it was critical for the night shift as the more senior nurses have an opportunity to move into the day shift.

Woitas testified that Norlinder left about a week after the incident in question and that Fasbender then assumed responsibility for staffing.

Woitas stated that they hadn’t budgeted for seven Unit Staff Coordinators and the “intent was not to fill it [Miller’s position].” She stated that management “wanted time to think through” the future staffing with the Unit Staff Coordinator. She stated it was an “effective clinical leadership model”. She testified on redirect that in January, 2010, North Memorial had budgeted for six Unit Staff Coordinators, but had five. Employer Exhibit 5.

Fasbender was the second witness for the Employer. He is a Registered Nurse and currently a manager at Fairview Southdale. Prior to his move in July, 2010, he was a manager of the Emergency Room at North Memorial. He was the numbers person and Nordlinder, the other manager, was the staff scheduler. When Nordlinder left, he was the only manager. He testified that he wrote “VOID” across the Employee Change Form on November 24, 2009, the same day he told Racine that the position was no longer available. Employer Exhibit 6. He testified that Racine had not actually ever

worked the position at issue and that when he left North Memorial in July, 2010, he had no “plans to add” the Unit Staff Coordinator position.

The next witness was Lisa Job. She is a Registered Nurse currently enrolled in a Masters program at Walden University. She is the Director of Emergency and Psychiatric Services and replaced Woitas at North Memorial in November, 2009 . Job testified that she was not aware of or involved in the incident in dispute.

Discussion

The Employer has certain inherent management rights, even absent a specific provision in the Agreement. Those rights include inherent rightst to manage personnel except as specifically limited by language in the Agreement.

At issue in this dispute is the interpretation of the Agreement’s language in Article 6 A, page 7. The article is entitled, Confirmation of Work Agreement and reads :

The Employer shall provide the nurse with written confirmation of the nurse’s work agreement. This confirmation shall include her or his salary and increment level, including the credit assigned for such prior work experience, the number of hours per payroll period for which the nurse is being employed, shift rotation and shift length to which the assigned, the unit assigned to, the weekend rotation (rotation of the unit, if the weekend rotation is not every other weekend), and the on-call requirements for those units that have mandatory call. This confirmed work agreement shall not be changed without consent of the nurse. Joint Exhibit 1.

The work agreement is the “Employee Change Form”, Union Exhibit 5. It is written confirmation including hourly rate (as “per contract”) number of hours, shift rotation and length, weekend rotation and on-call requirements.

Arbitrators are expected to recognize the fundamental principles of contract law. *Trubitz Hardware & Elec. Co.*, 32 LA 930, 934-5 (Scheiber, 1959) as cited by Elkouri & Elkouri, *How Arbitration Works* (6th ed. BNA 2003) at 553. This includes the concept of offer and acceptance. *Westwood Prods.*, 77 LA 396, 399 (Peterschmidt, 1981) as cited by Elkouri at 553. “Estoppel”, particularly promissory estoppel, is a concept that is instructive in the instant case. It is defined as a promise made without consideration that may nevertheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and the promisee did actually rely on the promise to her detriment. *Black’s Law Dictionary* 571 (7th ed. 1999) as cited in Elkouri at 558.

It is clear from the testimony that Racine thought she had a deal and acted on it. She turned down the job offered by Maple Grove Hospital after she had the North Memorial Employee Change Form signed by Nordlinder, the boss in charge of staffing in the Emergency Department. Her turn- down of the Maple Grove job or even her consideration of it may not now make sense to Fasbender or Jeff Cahoon, Manager, Labor/Employee Relations. Joint Exhibit 3. It is probably not the decision they would make. It is probably not the way they would make a decision. However, it made sense to Racine.

It is clear from Racine’s testimony that the shift and the supervisory duties were more important than the money earned. Two children under three adequately explains the import of a shift change. Professionalism and the obvious relish Racine has for being the “go-to person” explain the interest in retaining a supervisory position.

The Employer attempts to characterize the day/night Unit Shift Coordinator job as one the arbitrator creates if the grievance is sustained. The position was one created by the Employer when the Employer, through Nordlinder, offered it to the Grievant, when she accepted and when the Employer confirmed it by signing it. Racine testified, without refutation from the Employer, that the Employer approached her regarding the day/night Unit Staff Coordinator position.

The Employer attempts to portray Racine's decision on the Maple Grove job as insincere and lacking detriment. Not to Racine. She relied on the North Memorial signed Employee Change Form, Joint Exhibit 5, and acted on it when she turned down the Maple Grove position. She lost what she thought to be a job with a better shift than her straight nights.

The Employer attempts to negate the "offer and acceptance" as not complete because the job had not started yet. The Employer argues that Racine never actually did the new job so no real change occurred. The testimony of Burns is uncontroverted. He stated that it was typical for a Confirmation of Work Agreement to be in the future. Effective management dictates that. Nurses are not "just in time" inventory.

The Employer also argues that an employee can't hold two jobs at once. The position the Employer rescinded was a day/night job effective January 18 as opposed to a straight night job Racine had. That night job would have ended for Racine when the new one started. To say no "change" occurred is correct, but to rely on it to defeat the prohibition in the contract, is improper.

I find that the deal was done after Racine accepted the North Memorial position, Nordlinder, the Employer's agent, signed the Confirmation of Work Agreement and

Racine turned down the Maple Grove offer. The Confirmation of Work Agreement is just what it says. It is confirmation of a deal both parties thought they had.

The prohibition in the Agreement, that the Confirmed Work Agreement shall not be changed without consent of the nurse, is clear. The Employer cannot renege on this deal. Employer's counsel argued in her opening remarks, that the Employer had "significant financial losses". Woitas and Fasbender echoed that concern, although no details were given. The Employer has the tool, layoff, to counter patient decline and the attendant financial distress. In addition, the Employer can use attrition to reduce staff. Woitas testified she didn't intend to fill the Unit Shift Coordinator position that Miller had. That intent was clearly not relayed to Nordlinder. Nor was that intent manifested in the budget. Why were six Unit Shift Coordinator positions budgeted? A budget is a plan.

The testimony was clear and Employer Exhibit 1 and 7 show four Unit Shift Coordinators. Woitas or her successor Job can "think through" the number of Unit Shift Coordinators they want and on what shift they want them. They have the right to layoff if they determine it necessary. However, rescinding a work agreement in the face of clear language in the Agreement, is not the way to do it. A deal is a deal.

Award

The grievance is sustained. Racine is entitled to the job described in the Confirmed Work Agreement. No back pay or reimbursement to either the Employer or Grievant, if applicable, is awarded as part of this decision. The full time day/night Unit Staff Coordinator position, described in Joint Exhibit 5 shall be given to the Grievant, with a start date as soon as practical for both parties.

Dated this 17th day of October, 2011

Carol Berg O'Toole