



practice was not contrary to the terms of the parties' agreement and is consistent with past practice. 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

1. Is this grievance arbitrable?
2. Did the Employer violate the parties' collective bargaining agreement by compensating new employees above the specified starting wage schedule?
3. If so, what is the remedy?

### RELEVANT CONTRACT LANGUAGE

#### ARTICLE 4 - EMPLOYER AUTHORITY

- 4.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities and equipment; to establish function 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 or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate.

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#### ARTICLE 6 - EMPLOYEE RIGHTS - GRIEVANCE PROCEDURE

- 6.3 PROCEDURE: Grievances, as defined in section 6.1, shall be resolved in conformance with the following procedure:

Step 1. An Employee claiming a violation concerning the interpretation or application of this AGREEMENT shall, within ten (10) calendar days after such alleged violation has occurred, present such grievance to their supervisor. The

supervisor will discuss and give an answer to such Step 1 grievance within ten (10) calendar days after receipt. A grievance not resolved in Step 1 and appealed to Step 2 shall be placed in writing, setting forth a nature of the grievance, the facts on which it is based, the provision or provisions of the AGREEMENT allegedly violated, the remedy requested and shall be appealed to Step 2 within ten (10) calendar days after the supervisor's final answer in Step 1. Any grievance not appealed in writing to Step 2 by the Union within ten (10) calendar days shall be considered waived.

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#### 6.4 ARBITRATOR'S AUTHORITY

- A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this 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. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the Union and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

\* \* \*

- 6.5 WAIVER: if a grievance is not presented within the time limits set forth above, it shall be considered "waived". If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the EMPLOYER'S last answer. If the EMPLOYER does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual agreement of the EMPLOYER and the Union in each step.

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## **ARTICLE 21 - WAIVER**

- 21.1 Any and all prior agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment to the extent inconsistent with the provisions of this AGREEMENT are hereby superseded.
- 21.2 The parties mutually acknowledge that during the negotiations which resulted in this AGREEMENT, each had the unlimited right and opportunity to make demands and proposals with respect to any term or condition of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in this AGREEMENT for the stipulated duration of this AGREEMENT. The EMPLOYER and the UNION waive the right to meet and negotiate regarding any and all terms and conditions of employment referred to or covered in this AGREEMENT or with respect to any term of condition of employment not specifically referred to or covered by this AGREEMENT.

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## **APPENDIX A - WAGES**

### **Douglas County Hospital Support Group – Local #70 – Wage Schedule**

[Chart listing “start” wage and steps for each job classification.]

\* \* \*

For employees hired after August 1, 1986, movement from any year level to the next year level shall be based on the completion of 2,080 hours of pay time.

## **FACTUAL BACKGROUND**

The Employer, Douglas County Hospital, is a general medical and surgical hospital located in Alexandria, Minnesota. The Union represents a bargaining unit consisting of approximately 80 employees in eight job classifications, including personal care assistants (PCAs). The Union has represented this unit since 1998, and the parties’ relationship currently is governed by a 2015-16 collective bargaining agreement.

This grievance arose out of a discussion between Alison Hoihjelle, a newly hired PCA, and fellow employee Tina Cantrell, the Union's PCA steward, during November 2015. Ms. Hoihjelle indicated during that discussion that she was earning a higher rate of pay than the starting wage rate specified in the parties' collective bargaining agreement. Ms. Cantrell shared this information with Union Business Representative David Eiyneck. Mr. Eiyneck requested information from the Employer which confirmed that the Employer was paying Ms. Hoihjelle above the contract's specified starting wage rate. The Employer's documentation also indicated that nine of the thirteen PCAs hired during the 2014-16 period were paid above the contract's specified "start" wage.

Both parties submitted evidence at the arbitration hearing concerning this premium pay practice. The Employer submitted evidence to the effect that it has routinely paid new hires since 1999 at above the contract's specified "start" pay amount to reward relevant experience. Nicole Schell, Chief Human Resources Officer, testified that her review of records revealed that the Employer has followed a practice of providing experience credit pay since 1999, with at least thirteen unit employees receiving an experience-based pay bump. This practice provides above-starting pay for new hires who have experience working full-time in an acute healthcare facility. The Employer also submitted evidence showing that the Employer routinely provides the Union with dues authorization forms signed by new hires. These forms specify the starting wage rate for each new hire. Finally, the record establishes that Union Steward Cantrell herself received four years of experience credit when she was hired in 2001.

The Union countered with two competing pieces of evidence. First, the Union elicited testimony from David Monsour who currently is Business Manager for Local 70 and previously

served as Business Representative for the Douglas County Hospital service unit. He testified that during negotiations for a first contract in 1999, the Employer's representative proposed language that would give new employees credit for previous work experience in a given classification. Mr. Monsour testified that the Union rejected this proposal since it was not accompanied by an increase in pay for current employees.

The Union also elicited testimony from Mr. Monsour and Business Representative David Eiyneck to the effect that the Union was not aware of the Employer's practice of augmenting starting pay to reflect relevant experience. These two witnesses further testified that the Union administrative employee who processes the dues deduction forms does not cross reference – and could not reasonably be expected to cross reference – the specified starting wages with the provisions of the applicable collective bargaining agreements.

The Union filed a grievance challenging the above-starting pay practice on February 3, 2016. The Employer denied the grievance both on the merits and on the grounds that the grievance was untimely.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union initially asserts that this grievance is timely in that it challenges a practice that constitutes a continuing violation and does not seek monetary damages for past violations. As to the merits, the Union contends that the parties' collective bargaining agreement establishes a specific "start" wage for PCAs and does not provide authority for the Employer to modify that amount on a unilateral basis. The Union also argues that the Employer's claimed past practice of adjusting pay for experience fails for lack of mutuality. Finally, the Union's maintains that its

position is bolstered by the fact that the Employer had previously sought language authorizing experience-based pay adjustments in 1999, but that the Union rejected that proposal.

### **Employer**

The Employer maintains that the grievance is not arbitrable since the Union had constructive knowledge that the Employer has long hired experienced employees at a higher wage rate, but did not file its grievance within the contract's ten-day limitations period. The Employer contends that the parties' agreement does not contain any language prohibiting it from providing an experience-based adjustment and, as such, that it has the inherent managerial authority to do so. Most significantly, the Employer argues that the Union either knew or should have known of its practice since 1999 of paying new hires with relevant experience at higher than the contract's stated start rate.

## **DISCUSSION AND OPINION**

### **Arbitrability**

The Employer contends that this dispute is not procedurally arbitrable. Pursuant to Article 6.3 of the parties' agreement, a grievance must be asserted within ten calendar days of an alleged contract violation. The Employer argues that this grievance is untimely since the experience-based premium pay practice has been ongoing since 1999, but the Union did not file a grievance until February 3, 2016.

The Union responds that its grievance should be viewed as challenging a continuing violation that recurs each time that the Employer provides pay above the start wage rate. Under that theory, an ongoing pay practice may be challenged at any time, but back pay or damages would not be awardable prior to the date of the grievance.

I find the Union's position on this issue to be persuasive. Since the Employer's pay practice is ongoing, a grievance filed within ten days of any pay date is timely as a prospective policy challenge. Retrospective monetary relief, on the other hand, would not be timely.

### **The Contract Language**

As with any contract interpretation case, the appropriate starting point is with the language of the parties' collective bargaining agreement. Here, Appendix A sets out a chart listing the specific "start" wage rate for each unit job classification. Appendix A provides that employees may progress through the listed wage steps upon the completion of 2,080 hours of pay time. The Union points out that the contract contains no exception to the expressed "start" wage that would authorize the Employer unilaterally to provide a higher start wage based upon prior work experience.

The language of Appendix A effectively dispels the Employer's management rights argument. The Employer argues that it has the right to provide an experience-based pay bump as a matter of inherent managerial right since the parties' agreement does not contain any language expressly withholding that authority. That argument falters, however, on the fact that the specified "start" wage in Appendix A is itself a limitation on the Employer's managerial right to determine wage rates. As explained in *ELKOURIN & ELKOURI, HOW ARBITRATION WORKS*, 13.23 (7<sup>th</sup> ed. 2012), "absent a clause giving management such right, management cannot unilaterally give individual increases under any agreement that contains a wage schedule." The unilateral setting of wages inconsistent with that specified in the parties' agreement is "repugnant to the collective bargaining process." *Frito-Lay*, 42 LA 426, 428-29 (Lee, 1964).

## Past Practice

The Employer's final contention is that the payment of an experience-based pay premium is a longstanding past practice. The Employer argues that this past practice represents a binding gloss on the parties' collective bargaining agreement.

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past practice" arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 12.1 to 12.4 (7th ed. 2012).

The evidence clearly establishes that the premium pay practice is clear, well established, and longstanding. The Employer has provided a premium pay adjustment for relevant experience since 1999. Documentary evidence shows that at least thirteen unit employees were hired with experienced-based pay adjustments, as were nine of the thirteen PCAs hired over the past two years.

The Union disputes the mutuality prong of the past practice formula. The Union claims it did not acquiesce in the purported past practice because Union leadership, notably Mr. Monsour and Mr. Eiyneck, were unaware of the Employer's practice.

The Employer counters that the Union either knew or should have known of the longstanding practice. The Employer supports this contention with three pieces of evidence. First, the Union routinely receives dues authorization forms signed by new hires that specify the

starting wage rate for each new hire. Second, Union Steward Cantrell received four years of experience credit pay when she was hired in 2001, a fact which the Employer maintains should be imputed to the Union. Finally, the Employer points to the widespread and longstanding nature of the Employer's practice.

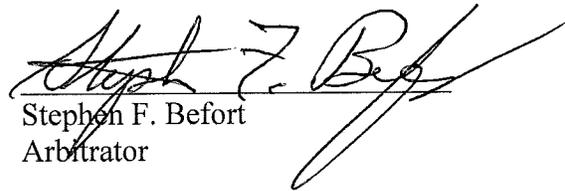
This evidence does not explicitly establish the Union's knowledge and acceptance of the Employer's pay practice. The dues authorization forms sent to an administrative employee, in particular, seem to be a weak reed on which to establish the mutuality element. But, taken together, the Employer's three contentions seem too significant to disregard. As the leading treatise on labor arbitration states, the mutual acceptance of a past practice may be implicitly inferred from the circumstances. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 12.3 (7<sup>th</sup> ed. 2012). In this instance, the Employer's practice has been so open and so widespread to establish that the Union either knew or should have known of the practice's existence.

In sum, the Employer has established the existence of a binding past practice of providing premium pay to unit employees with relevant prior work experience. As such, the Employer's practice does not constitute a violation of the parties' collective bargaining agreement. This conclusion, of course, does not preclude the parties from voluntarily negotiating the parameters of a premium pay policy going forward.

**AWARD**

The grievance is denied.

Dated: August 22, 2016

  
Stephen F. Befort  
Arbitrator