

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**MERCY HOSPITAL**

**Cases 18-CA-155443**

**and**

**SEIU HEALTHCARE MINNESOTA**

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**MERCY HOSPITAL**

**Cases 18-CA-163045**

**and**

**ANGEL ROBINSON, INDIVIDUAL**

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**RESPONDENT MERCY HOSPITAL'S  
REPLY BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS**

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As is plain from the General Counsel's Answering Brief, there is little to no evidence supporting the General Counsel's case. Accordingly, the Board should grant Respondent's Cross Exceptions in their entirety.

**I. RESPONDENT WAS DENIED DUE PROCESS.<sup>1</sup>**

In his November 2015 order, Deputy Chief ALJ Amchan concluded that Paragraphs 5 and 11 of the Complaint were insufficiently clear and ordered that the General Counsel specify: (1) "what new *positions* were allegedly unilaterally created in the mother-baby birthing center" and (2) "which vacant *positions* Respondent unilaterally failed to post." (GC Ex. 1(o) (emphasis added).) The General Counsel failed to comply. Tacitly admitting that it could not identify "*positions*" as defined by the parties' CBA and as required in Judge Amchan's decision, the

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<sup>1</sup> Citations in this Brief will be as follows: "Tr. \_\_\_" to indicate the hearing transcript page; "J. Ex. \_\_\_" to indicate a Joint Exhibit; "R Ex. \_\_\_" to indicate Respondent's Exhibits; "GC Ex. \_\_\_" to indicate an Exhibit of the General Counsel; "ALJ-JD \_\_\_" to indicate the pages of the Decision of the Administrative Law Judge; and "GC Br. \_\_\_" to indicate the pages from the General Counsel's Answering Brief.

General Counsel instead resorted to sleight of hand identifying “*work assignments*” (i.e., areas where EVS employees clean) and repeating without any evidentiary support that work assignments are the same thing as positions. (R. Exs. 24-25.) The great weight of the evidence – including, most importantly, the contract language itself – shows the General Counsel’s argument to be entirely specious.

## **II. JUDGE AMCHAN COMMITTED AN ERROR OF LAW IN DENYING RESPONDENT’S MOTION TO DEFER.**

The General Counsel does not dispute that Judge Amchan applied the wrong legal standard in denying Respondent’s motion to defer.<sup>2</sup> Because utilizing the wrong legal standard is, by definition, an abuse of discretion, Judge Amchan abused his discretion, and the NLRB erred previously by failing to grant Respondent’s Request for Special Permission to Appeal.

## **III. PORTIONS OF THE COMPLAINT ARE TIME-BARRED.**

### **A. PARAGRAPHS 11(a)-(g) AND 14 OF THE COMPLAINT.**

The General Counsel concedes that Respondent made changes to EVS employee work assignments since at least 2013 – well before the six-month limitations period set forth in Section 10(b). (GC Br. 3.) Notwithstanding that concession, the General Counsel claims that the allegations in Paragraphs 11(a)-(g) and 14 of the Complaint are not time-barred because “the Union had no notice of the changes that Respondent made in work assignments . . . prior to the commencement of the 10(b) period.” (*Id.*) This is demonstrably false.

Contrary to the General Counsel’s claim that employee work assignments were changed “just four times in 2013 and 2014,” the record evidence shows Respondent made *numerous* “work assignment” changes without posting them on the AKN or otherwise assigning them on

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<sup>2</sup> The proper standard for determining whether pre-arbitral deferral is appropriate is set forth in Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies Corp., 268 NLRB 557, 558-59 (1984).

the basis of seniority. (Tr. 89, 124-25, 227, 274, 282-83, 429, 442-45, 471; 760; see also GC Ex. 1(u) (Giboney Aff. ¶¶ 4-6).) In fact, a comparison of the position Control Summaries from September 2014 (R. Ex. 46) and December 2014 (R. Ex. 47) shows that several work assignments were significantly modified and nine *new* work assignments were created.

Importantly, the General Counsel also *admits* the Union received notice of work assignment changes on at least two occasions: (1) on or before September 23, 2013 when it filed a grievance, (GC Exs. 3, 4); and (2) in December 2014. (R. Ex. 2; Tr. 71-74, 778-79.) Although the Union clearly was aware of the work assignment changes, *it is undisputed that no unfair labor practice charge was filed until July 2015.*<sup>3</sup> If Respondent's actions in late May 2015 or early June 2015 violated the Act, then substantially identical actions by Respondent in September 2013 and December 2014 must also have violated the Act. Because this conduct has continued for more than *three years* without challenge, any claim that Respondent's actions in May or June of 2015 violated the Act (regardless of theory) is barred by the statute of limitations.

**B. PARAGRAPHS 11(h)-(j) AND 14 OF THE COMPLAINT.**

The General Counsel's 8(a)(5) claim is premised entirely on its (unsupported) assertion that "employees knew the assignments that went with the vacancy." (GC Br. 13 n.10.) And, because the General Counsel admits that work assignments were not included on the "job posting," these assignments could only be ascertained by speaking with a supervisor. (Tr. 166, 260-61, 215, 415, 520, 759-60.) In fact, the undisputed record evidence shows that EVS managers (both before and after Crothall) openly discussed work assignments and the "switching" of work assignments with bargaining unit employees. (Tr. 759-760.) Because the

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<sup>3</sup> Filing a grievance does not toll the statute of limitations.

alleged direct dealing alleged in Paragraphs 11(h)-(j) and 14 of the Complaint is nothing more than the continuation of practices that were in place prior to 2013, Section 10(b) bars this claim.

**IV. RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) BY TELLING ROBINSON THAT SHE WAS NOT ALLOWED TO ASK QUESTIONS.**

**A. THE ALJ APPLIED THE WRONG LEGAL STANDARD.**

Ignoring its Complaint, which alleges that Stillings “threatened” Robinson with unspecified reprisals, the General Counsel claims that it does not need to prove that Robinson faced a “threat of reprisal.” (GC Br. 5-6.) However, contrary to the General Counsel’s claim, in the absence of a threat of reprisal, Section 8(c) precludes the Board from concluding that Stillings’ statement constituted an unfair labor practice. See 29 U.S.C. § 158(c).<sup>4</sup>

**B. THE ALJ IGNORED PERTINENT RECORD EVIDENCE.**

Context is important. See In Re Tradesmen Int’l., 338 NLRB 460, 461 (2002). Yet, remarkably, the General Counsel claims that evidence placing Stillings’ statement in context is “totally irrelevant.” This is contrary to settled Board law. When viewed in the proper context, Stillings’ alleged statements to Robinson were not coercive or threatening. It is undisputed that, at the time of the alleged statement, construction on the Mother-Baby Center had not yet been completed and Stillings was unable to develop Mother-Baby Center work assignments.<sup>5</sup> (Tr. 380-81.) Several Union witnesses – including Cullen, Robinson, and Wagner – testified to those facts. (Tr. 181-82, 294, 435-36.) There is also no dispute that the supervisor who ran the huddle

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<sup>4</sup> The General Counsel attempts to distinguish Baker Concrete Construction, 341 NLRB 598 (2004) by claiming that case turned not on whether there was a threat of reprisal but rather on the vagueness of the alleged unlawful statement. (GC Gr. 6.) That was not the sole basis for the Board’s decision. The Board specifically noted that it was not clear from the alleged statement that “the [employer] would be the source of that trouble.” Id. at 598. Here too, the General Counsel has not alleged that Robinson was “ordered” by Stillings not to engage in concerted activities; nor is there any record evidence to that effect.

<sup>5</sup> While it is true that unit employees were cleaning the Mother-Baby Center before it opened, it is undisputed that they were performing construction-related cleaning and their tasks bore no relation to their work assignments in the Mother-Baby Center. (Tr. 294 (Robinson describing cleaning of sheetrock dust).)

in question – Rudy Hanuman – was a new employee and was not, at that time, able to competently respond to questions about work assignments. Several Union witnesses – including Cullen, Robinson, and Wagner – acknowledged that Hanuman was new to the department at that time and still learning hospital operations. (Tr. 295, 373, 445, 803.) In addition, the record is replete with examples of Stillings (as well as his predecessors) discussing work assignments with bargaining unit employees. (Tr. 759-760, 793, 815-16.)<sup>6</sup> A reasonable employee who understands that she is able to ask questions during team huddle meetings would not feel “threatened” or “coerced” by her supervisor’s request that she bring questions about a single topic (*i.e.*, work assignments in the Mother-Baby Center) to the supervisor directly. Here, context is important and weighs heavily against the ALJ’s finding that Stillings threatened Robinson.

**V. RESPONDENT DID NOT CONSTRUCTIVELY DENY ROBINSON A TRANSFER TO THE ICU.**

**A. THE “HOBSON’S CHOICE” THEORY IS UNTENABLE.**

The General Counsel’s attempt to distinguish Central Casket Co., 225 NLRB 362 (1976) and Easter Seals Connecticut, Inc., 345 NLRB 836 (2005) is unavailing. (GC Br. 10.) Regardless of the General Counsel’s attempt to manufacture a meaningful distinction, the Board made clear in Central Casket that *threats* are not sufficient to create a Hobson’s Choice:

*A threat is not the equivalent of the actual imposition of unlawful conditions of employment;[] it does not in any meaningful sense render the conditions of employment so intolerable as to compel an employee to leave his job.*

Id. 363 (emphasis added; footnote omitted). Yet, the General Counsel concedes that the alleged Hobson’s Choice is premised on nothing more than “the adverse working conditions that Schulz *threatened* to impose.” (GC Br. 10 (emphasis added).) Because the possibility of close scrutiny

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<sup>6</sup> The General Counsel claims the ALJ’s finding that employees were generally allowed to “ask questions in team huddle meetings” made Stillings’ alleged statement “*all the more coercive.*” (GC Br. 8 (emphasis in original).) That is absurd.

that allegedly dissuaded Robinson from taking the ICU position was only anticipated and not realized, Robinson was not subject to a Hobson's Choice under settled Board law.

The Board also cannot ignore record evidence demonstrating that Robinson rejected the ICU position for reasons other than any alleged statements by Schulz. It is undisputed that Robinson was looking for a full-time, evening position. (Tr. 359.) While both the OR position and the ICU position were evening positions, the ICU position was only a .5 FTE position – which was .1 FTE *less* than her then-current position in the FCU – and the OR position was a 1.0 FTE. (See R. Ex. 22; Tr. 676.) Stated differently, while the ICU position represented a 16% reduction in pay from her position in the FCU, the OR position represented **40% pay increase**. Accepting a better-paying position with less-burdensome job duties that was “better for her family” is hardly a Hobson's Choice.<sup>7</sup> Because the General Counsel has not shown that the alleged threats by ICU Manager Schulz caused Robinson to decline the ICU position, Robinson was not subject to a Hobson's Choice pursuant to Easter Seals.<sup>8</sup>

**B. THERE IS NO EVIDENCE THAT SCHULZ HAD KNOWLEDGE OF ANY PROTECTED ACTIVITY BY ROBINSON.**

Contrary to the General Counsel's claim, remoteness *does* diminish the potential connection between the alleged protected activity and the adverse employment action. Rockland Bamberg Print Works, Inc., 231 NLRB at 306 (1977) (employee's discharge five months after

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<sup>7</sup> Moreover, the undisputed evidence demonstrates that Robinson applied for and turned down lots of positions. Indeed, in 2015 alone, Robinson applied for more than 50 positions; was the most-senior applicant for 15 positions; and *declined or withdrew* from 13 of the 15 positions. (R. Ex. 22.) Thus, Robinson declining the ICU position was nothing more than a continuation of her prior, established practice and not the product of a constructive refusal to hire.

<sup>8</sup> The General Counsel completely fails to address Respondent's arguments relating to the traditional constructive discharge theory. (GC Br. 9 n.9.) The Board's decision in Comfort Inn, 314 NLRB 714 (1991) makes plain that threats of “unbearable working conditions” are insufficient to establish a constructive discharge. Indeed, the record reflects that Schulz told Robinson nothing more than that her performance would be monitored closely and that the job was difficult. (R. Exs. 39, 41; Tr. 358, 723.) Both of which were *true* statements. There is no evidence that any of these alleged statements (which are protected by 8(c)) bore any relation to any protected activity by Robinson. Lasell Junior College, 230 NLRB 1076, 1076 (1977) (“Mere suspicion cannot substitute for proof of an unfair labor practice.”).

supporting union in election too remote); see also New York Hosp. Med. Ctr. of Queens, No. 29-CA-136515 (Dec. 31, 2015) (Fish, ALJ) (four month gap found to be too remote). In addition, while the ALJ did find that Robinson’s June 2015 conduct at the huddle meeting was protected, this “conduct” was not reported to Schulz by Stillings. The evidence shows only that Stillings may have referenced some conduct issues, including a 2013 disciplinary issue where Robinson was called into a meeting to discuss insubordinate behavior, which included crossing her arms, rolling her eyes, and loudly sighing while managers were speaking. (Tr. 289, 378.) That conduct was not protected by the Act and Section 8(c) protects Stillings’ truthful reporting of Robinson’s conduct to Schulz. Gruma Corp., 350 NLRB 336 (2007). Here, the ALJ’s decision is based entirely on inference and speculation and must be reversed.

**VI. THERE IS NO VIABLE PAST PRACTICE EVIDENCE REGARDING WORK ASSIGNMENTS.**

The General Counsel claims it has presented “more than viable” evidence that Respondent has an established past practice of posting “vacant work assignments . . . and fill[ing] [them] in seniority order.” This is a gross misinterpretation of the record evidence. (GC. Br. 12.) The General Counsel sole basis for its position came in the form of testimony from a few EVS employees who claimed they “just knew” the work assignment associated with a particular job posting, “even if it wasn’t posted on [the job posting].” (Tr. 282-83, 415-16.) This is not viable evidence of a past practice. To prove the existence of a past practice, General Counsel must establish that “an activity which has been satisfactorily established by practice or custom” or an “established condition of employment.” Exxon Shipping Co., 291 NLRB 489, 493 (1988). This testimony is *not* evidence of a practice – but rather vague generalities that cannot eclipse objective record evidence to the contrary. Indeed, none of the employees testified that they were “promised” a work assignment before they accepted a position. Moreover,

Stillings, Bauer, and current EVS employees Caskey and Johnson all testified that *prior to and after Crothall*, applicants were *not promised or assured of receiving a specific work assignment*. (Tr. 166, 260-61, 215, 415, 520, 759-60.)

**VII. THE ALJ ERRED BY CREDITING ROBINSON'S TESTIMONY OVER ALL CONTRARY TESTIMONY AND DOCUMENTARY EVIDENCE.**

**A. NO SPECIAL WEIGHT SHOULD BE GIVEN THE ALJ'S FINDINGS.**

The General Counsel does not dispute that the ALJ's credibility determinations are not entitled special weight because he based "his credibility findings on factors other than demeanor." See Mercy Hospital of Buffalo, 336 NLRB 1282, 1285 (2001); Kelco Roofing, 268 NLRB 456, 456 (1983). Yet, the General Counsel insists that the Board should ignore serious credibility problems with its key witness (Robinson) and leave unfounded attacks on Respondent's witnesses undisturbed. The General Counsel simply cannot explain away Robinson's untrue averment in her affidavit that work assignment information was contained in job postings.<sup>9</sup> (Tr. 371-72.) This was not a "difference in terminology"; Robinson testified unequivocally that she told Region 18 that Respondent's job postings identified "work area." (Tr. 371.) This is no minor misstatement; *the General Counsel's entire case revolves around conflating "work assignment" (or "work area") with "position."* In addition, Robinson's surreptitious recordings and subsequent loss of her cellphone are not "irrelevant" to her credibility. Having the recording from her conversation with OR Manager Dooher would demonstrate Robinson's tendency to construe otherwise truthful and innocuous statements as retaliatory. Robinson's shaky and inconsistent attempt to explain the loss of her cellphone revealed her lack of credibility.

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<sup>9</sup> Region 18 elicited similarly untruthful sworn testimony from Cullen. (Tr. 164-66.)

**B. OCTOBER 13 MEETING.**

Ignoring numerous problems with Robinson's credibility as well as contrary documentary evidence, the General Counsel insists that the ALJ did not err in crediting Robinson's testimony. (GC Br. 15.) Yet, the General Counsel fails to find any support for Robinson's version of events.<sup>10</sup> Even her Union, the leaders of which proposed pursuing even the "stupidest" grievance, thought so little of her claim that it refused to file a grievance. (R. Ex. 13.) Furthermore, like the ALJ, the General Counsel ignores the fact that Schulz's and Sandberg's meeting notes confirm that none of the alleged statements were made by Schulz. (R. Ex. 39, 41.) Contrary to the General Counsel's claim, the ALJ also ignored substantial evidence undermining Robinson's credibility with respect to the October 13 meeting and discounted or ignored evidence that confirmed Respondent's version of events. When the testimony and documentary evidence is properly weighed, neither the Section 8(a)(1) nor the 8(a)(3) claims can be sustained.

**VIII. THE ALJ ERRED BY MAKING FACTUAL FINDINGS THAT ARE CONTRARY TO THE RECORD EVIDENCE.**

Contrary to the General Counsel's claim, in the interest of truth and justice it is neither "irrelevant" nor "absurd" to bring focus to evidentiary detail. (GC Br. 17.) In fact, one must question why the General Counsel prefers fantastic speculation to findings based on record evidence. The Board should not follow suit, but rather should agree with Respondent that: (1) the ALJ wrongly identified two work assignments ("PM Turndown" and "Public Areas") as "positions;" (2) the record evidence does not show Stillings gave the 2Heart assignment to Wagner on a permanent basis in early June, but, instead, shows that Wagner was given the

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<sup>10</sup> Even Robinson's surreptitious recording gives fails to support the General Counsel. In her recording, Robinson characterized the *interview* as "disrespectful" and "inappropriate"; she did not state Schulz called her "disrespectful" and "inappropriate," or in any way referenced Robinson's right to engage in protected conduct. (R. Ex. 43c.)

assignment on an interim basis until Robinson took it over on a permanent basis on June 16, 2015; and (3) “position” and “work assignment” simply are not used interchangeably.<sup>11</sup>

**IX. THE PARTIES’ WORKING RELATIONSHIP HAS NOT BROKEN DOWN.**

The General Counsel has consistently argued the parties’ otherwise healthy and effective dispute resolution process broke down with regard to the parties’ dispute concerning Respondent’s right to make work assignment changes, and that on the basis of that breakdown, deferral of complaint allegations related to that dispute should not be deferred. The great weight of the record evidence demonstrates the General Counsel’s argument is meritless. Following the ALJ’s deferral of the Complaint allegations arising from the dispute, the parties resumed working to resolve the dispute through their contractual dispute resolution process, agreeing to arbitrate the underlying dispute on December 6, 2016.<sup>12</sup>

Dated: August 25, 2016.

FELHABER LARSON

/s/ John C. Hauge

John C. Hauge

Grant T. Collins

220 South Sixth Street, Suite 2200

Minneapolis, Minnesota 55402

(612) 339-6321

ATTORNEYS FOR RESPONDENT

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<sup>11</sup> The General Counsel makes much of Lizzie Johnson’s confused testimony but the record evidence demonstrates that she applied to a 1.0 FTE Day position, and two .5 FTE employees were awarded the positions instead of Johnson because Johnson was already a 1.0 FTE day shift employee, *i.e.*, she was in the same position.

<sup>12</sup> Pursuant to Federal Rule of Evidence 201, as recognized in Section 16-201 of the NLRB Bench Book, Respondent hereby requests that the Board take administrative notice of the following facts: (1) on July1, 2016, the Union requested that Respondent join it in selecting an arbitrator to hear the Union’s June 9, 2015 EVS Work Assignment grievance; (2) the parties selected Arbitrator Jay C. Fogelberg to arbitrate the grievance; and (3) the parties agreed that such arbitration hearing shall take place on December 6, 2016. These facts are memorialized in the attached email correspondence between counsel for the Union and Respondent. (See Supp. Exs. 1-2.). It is consistent with Board precedent to take administrative notice of these facts while reviewing exceptions to the ALJ’s decision. See Drummond Coal Co., 277 NLRB 1618, 1618 n. 1 (1986) (taking administrative notice of an arbitral award issued after close of the hearing and during its review of exceptions brought to the ALJ’s decision).

**STATEMENT OF SERVICE**

This is to certify that, on August 25, 2016, I caused the following documents to be filed electronically with the National Labor Relations Board E-Filing System:

**Respondent Mercy Hospital's  
Reply Brief In Support Of Its Cross-Exceptions**

I further certify that on the same date, I served these documents upon the following party representatives via e-mail:

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Dated: August 25, 2016.

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/s/ Grant T. Collins

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ATTORNEYS FOR RESPONDENT MERCY  
HOSPITAL

# **EXHIBIT 1**

**Lori J. Loken**

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**From:** Roger Moore <Roger.Moore@seiuhcmn.org>  
**Sent:** Friday, July 01, 2016 2:08 PM  
**To:** Thomas R. Trachsel  
**Subject:** 1655494 ARBOK:8 MCY  
**Attachments:** Mercy EVS Grievance.pdf

Tom:

We can agree to substitute Fogelberg for Lalor. The case you referenced in your previous email is not the case I am taking to arbitration. I have attached the grievance and Allina Step 1 and 2 denials for your review. I will call shortly to strike the arbitrators.

Roger Moore  
Lead Internal Organizer  
SEIU Healthcare Minnesota  
952-715-7247



GRIEVANCE FORM

Facility and Worksite: Mercy Date: 6.9.15 Department/Unit: EVS  
 Subject of Grievance: Jobs Assignment  Pay Issue  
 Name of Grievant(s): \_\_\_\_\_ Contact #: \_\_\_\_\_  
 Supervisor/Manager: Charles HR Contact: Paula  
 Steward/Union Representative: Rita  
 Grievance/Violation (specify Article or Section of CBA violated): Article 14 + Arbitration  
Decision

and any and all other articles and sections of the Collective Bargaining Agreement that may apply.

Basic Facts of Incident: (Who, What, When, Where): Multiple Employees applied for  
the and was offered different job assignment for same  
position to follow arbitration decision and let  
 Desired Remedy: Employee bid on job assignment  
 Make grievant(s) whole for any and all losses.

Rita Matthews  
 Sign and Date

Information Requested:

1. Personnel File
2. Any and all documentation and information relevant to the incident outlined above

The Union reserves the right to request additional information as needed in order to investigate this grievance.

Please fill in the dates and responses

Incident Date (date contract violated, discipline issued, pay roll): \_\_\_\_\_

Pre-Grievance (Allina) or 1<sup>st</sup> Step (Informal Discussion with Supervisor/Manager)

Meeting Date: 6.8.15 Response date: 6.8.15  
 In attendance: Paula, Charles, Rita + Karen  
 Response: Arbitration was one decision and we will  
post job and assignment as best fit

SEIU Healthcare Minnesota  
 345 Randolph Avenue, Suite 100 St. Paul, MN 55102  
 Phone: 651-294-8100 1-800-828-0206 Fax: 651-294-8200  
[www.seiuhealthcaremn.org](http://www.seiuhealthcaremn.org)

Original (White): Employer

Yellow: Union

Pink: Steward

BH:zm/Opeiu#12  
 By Phone: Nancy Watson Arbitration is one time only



Labor Relations  
Mail Route 10705  
P.O. Box 43  
Minneapolis, MN 55410-0043

September 1, 2015

**VIA U.S. MAIL AND EMAIL**

Sara Roeger  
SEIU Healthcare Minnesota  
345 Randolph Avenue  
Suite 100  
St. Paul, MN 55102-3610

RE: *Mercy Hospital / SEIU Healthcare Minnesota (EVS Job Assignments)*

Dear Ms. Roeger,

On August 20, 2015, we held the Step 2 meeting by phone regarding a grievance filed by SEIU Healthcare Minnesota at Mercy Hospital alleging that the Hospital violated Article 14 and the Arbitration by offering different job assignment for the same position to multiple employees (the "Grievance"). You attended the meeting on behalf of the union, while I attended the meeting on behalf of Allina Health.

The union filed the Grievance on or about June 9, 2015, and the Step 1 meeting took place on June 17. The Hospital denied the Grievance on June 30. The union advised the Director of Labor Relations by email on July 6 that it wished to move the Grievance to Step 2.

The items discussed at the Step 2 meeting, the union argued that the Hospital changed its practice of posting work location/floor on job postings when Crothall took over management. As a remedy, the union seeks that all postings include the floor. As to the specific allegation that multiple employees were offered different job assignments for the same posting, the union claimed that Angel Robertson applied for a position and was told that the assignment would be elevator and stairwells and that a less senior employee applied for the same position and was awarded the position and is now working 4 hours on surveys and 4 hours cleaning. The union contends that Robertson would have taken the position had she been given the correct information.

After careful consideration, we find no merit to the union's arguments. First, as to the claim that the Hospital changed its practice, the claim fails factually and procedurally. The Hospital has not changed its practice related to postings. The Hospital did not have a practice of postings floors or other indications of assignments on its job postings prior to Crothall taking over management of the department. Moreover, even if it had (which it did not), Crothall has managed the department since 2013, so any such claim would be untimely. (See Article 7(B)).

With regard to the union's contention that Robertson was offered a different assignment for the same posting, the union is again factually mistaken. Robinson applied for a day and evening 1.0 FTE opening. On about May 28, Robinson was offered and declined the day position without any

Sara Roeger  
September 1, 2015  
Page 2 of 2.

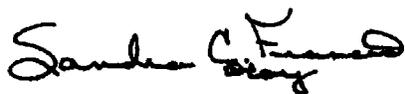
inquiry into the assignments (she did not want to move to day shift). Robinson then inquired about the evening posting. EVS Manager Stillings explained to her that she *already* was a 1.0 evening employee. Robinson expressed she was unhappy with the assignment she ended up with from the rebid (lower level/basement) and wanted a different assignment. Robinson asked what the assignment would be for the new evening position. Stillings explained that it was new and assignments had not yet been created. It was intended to cover the Mother-Baby Center and would likely include elevators, public areas, and would have some patient interaction. Robinson commented that she was not interested in that work, but would like a different assignment. Stillings suggested that she talk to him about her assignment interests and he would see what he could do.

The evening posting was awarded to Elona Decker (Decker did not apply for the day position). When she was offered the position, Stillings explained the fact that it was a new opening intended for help with the Mother Baby Center doing public areas, elevators, and some patient interaction and would be doing a relief assignment in the interim. With the opening of the Mother Baby Center, Decker's assignment is split between patient interaction (PM Turndown service of about 2 hours) and cleaning (about 6 hours).

As the foregoing demonstrates, the union's factual account is plainly inaccurate. Decker did not apply for the day position that Robinson turned down. Robinson was not offered the evening position as she was already in a 1.0 FTE evening position. As to the assignments for the evening position, both Robinson and Decker were provided with the information that was known at the time.

The union has failed to establish any contractual violation. For these reasons, , the Grievance is denied. If you have any questions, please feel free to contact me at (612) 262-5024 or at [sandra.francis@allina.com](mailto:sandra.francis@allina.com).

Sincerely,



Sandra C. Francis  
Labor Relations Counsel

cc: Nancy Watson, HR Director (via email)  
Paula Wahlberg, HR Generalist (via email)  
Timothy Kohls, Allina Health Director of Labor Relations (via email)  
SEIU Member Action Center (via email)

June 30, 2015

Roger Moore  
SEIU Healthcare MN  
345 Randolph Ave., Suite 100  
St. Paul, MN 55102

Re: Grievance – EVS Job Assignments

Dear Mr. Moore:

On June 17, 2015 we held a Step 1 grievance meeting regarding a grievance filed by SEIU at Mercy Hospital over the bidding of job assignments in EVS. The grievance alleges the Hospital violated Article 14 and the recent Arbitration decision. The desired remedy is “to follow arbitration decision and let employees bid on job assignments.” Rita Matthews, steward attended for the union. Charles Stillings, director EVS and I attended for the hospital.

The items discussed at the Step 1 meeting and set out in the relevant documentation include the following:

- The Hospital posts open positions by FTE and indicating shifts.
- The Hospital has not changed its practice related to posting of positions.

During the Step 1 meeting, the union argued that by posting the open positions without assignments, the Hospital violated section 14F (Seniority Preference) by not allowing the employees to choose assignments in order of seniority. The union further relies upon the recent Mercy EVS decision (award dated March 16, 2015) in support of its contention that positions must be posted with assignment to allow employees to exercise their seniority preference.

After carefully reviewing the evidence and arguments raised by the union, the Hospital believes that no violation of the collective bargaining agreement has occurred.

Article 14(F) is not relevant. The provision reads: “[i]n the *establishment of workweek schedules*, the Hospital shall give preference to employees in accordance with seniority as far as practicable and consistent with proper hospital management.” (Emphasis added). The grievance is not related to establishing workweek schedules, but rather to filling open positions in an established schedule.

Similarly, the arbitration award relied upon is not applicable. The arbitration award is specifically limited to the (May) EVS re-bid . It is not relevant to the posting of an open position. In fact, the award specifically addresses the union's contention in the section titled DOES THIS DECISION APPLY TO OTHER CASES? *"The language of Article 14F has been discussed and a decision made regarding its interpretation but on this record it is unknown how or even whether that would apply to any other fact scenario."* The union is clearly attempting to expand the grievance award to a situation that is in no way related to the award.

The employer has continued to post open positions, indicating shift and FTE. It has not been the practice to post an open position that would include the specific area to which the person would be assigned to work.

In light of the foregoing, the grievance must be denied.

Sincerely,

A handwritten signature in cursive script that reads "Paula Wahlberg".

Paula Wahlberg  
Human Resources

Cc: Charles Stillings, Director EVS  
Nancy Watson, Director HR  
Labor Relations  
file

# **EXHIBIT 2**

## John C. Hauge

---

**From:** Jay C. Fogelberg <jcfogelberg@aol.com>  
**Sent:** Monday, August 08, 2016 9:51 AM  
**To:** justin@cummins-law.com  
**Cc:** John C. Hauge  
**Subject:** Re: Grievance Arbitration between SEIU HealthCare Minnesota & Mercy Hospital; Work Assignment

This will confirm December 6th for the hearing in connection with this matter. Please advise re time and location as the date approaches. Thank you.

*Jay C. Fogelberg - Arbitrator*  
*Ph: 952.926.5505 Fax: 952.922.4404*

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-----Original Message-----

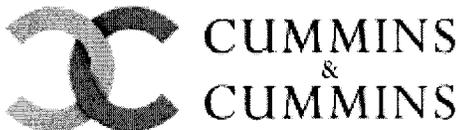
From: Justin Cummins <justin@cummins-law.com>  
To: Jay C. Fogelberg <jcfogelberg@aol.com>  
Cc: John C. Hauge <JHauge@Felhaber.com>  
Sent: Tue, Aug 2, 2016 12:27 pm  
Subject: RE: Grievance Arbitration between SEIU HealthCare Minnesota & Mercy Hospital; Work Assignment

Dear Arbitrator Fogelberg:

The parties have agreed on 12/6/16 for the hearing; does that still work for you?

Sincerely,

Justin Cummins  
MSBA Board Certified Labor & Employment Law Specialist



Cummins & Cummins, LLP  
1245 International Centre | 920 Second Avenue South  
Minneapolis, MN 55402 | 612.465.0108 (t) | 612.465.0109 (f)  
[www.cummins-law.com](http://www.cummins-law.com)

**From:** Jay C. Fogelberg [<mailto:jcfogelberg@aol.com>]  
**Sent:** Monday, July 25, 2016 12:30 PM  
**To:** Justin Cummins

Cc: [JHauge@Felhaber.com](mailto:JHauge@Felhaber.com)

Subject: Re: Grievance Arbitration between SEIU HealthCare Minnesota & Mercy Hospital; Work Assignment

Currently, I have the following dates available:

November 29, 30 & December 6, 2016

Again, they are being offered on a first come/first served basis. Thank you.

*Jay C. Fogelberg - Arbitrator*

*Ph: 952.926.5505 Fax: 952.922.4404*

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-----Original Message-----

From: Justin Cummins <[justin@cummins-law.com](mailto:justin@cummins-law.com)>

To: Jay C. Fogelberg <[jcfogelberg@aol.com](mailto:jcfogelberg@aol.com)>

Cc: John C. Hauge <[JHauge@Felhaber.com](mailto:JHauge@Felhaber.com)>

Sent: Mon, Jul 25, 2016 12:01 pm

Subject: Grievance Arbitration between SEIU HealthCare Minnesota & Mercy Hospital; Work Assignment

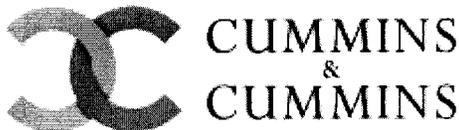
Arbitrator Fogelberg:

Please provide the parties additional dates in October, November, and December for the parties to consider to do the hearing. Thank you.

Sincerely,

Justin Cummins

MSBA Board Certified Labor & Employment Law Specialist



Cummins & Cummins, LLP

1245 International Centre | 920 Second Avenue South

Minneapolis, MN 55402 | 612.465.0108 (t) | 612.465.0109 (f)

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Thank you.