

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**AL PENNING,
Petitioner,**

HF No. 11 G, 2005/06

v.

DECISION

**MINNEHAHA COUNTY,
Respondent.**

This matter comes before the Department of Labor based on Al Penning's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Eric C. Schulte appeared on behalf of Penning. Gordon Swanson represented Respondent Minnehaha County. The Department of Labor conducted a hearing on June 28, 2006, in Sioux Falls, South Dakota. Upon consideration of the live testimony given at hearing and the evidence presented at hearing, Petitioner's Petition for Hearing and request for relief is hereby denied.

Issue:

The Department conducted a telephonic prehearing conference on March 6, 2006, and thereafter entered a Prehearing Order. The Prehearing Order listed the sole issue to be presented at hearing as:

Whether Respondent was authorized to reduce [Petitioner]'s salary in accordance with the provisions of the County Handbook.

Stipulation of Facts:

1. Comes now the Petitioner and Respondent, through undersigned counsel, who hereby stipulates and agree to the following factual matters, which are not in dispute. Petitioner will be referred to as "Penning," and Respondent will be referred to as "County."
2. Penning began working for County in 1986 as a reserve deputy in the Minnehaha County Jail. Penning was placed in this new position. At that time, he was an Emergency Medical Technician (EMT), and also a Licensed Practical Nurse (LPN).
3. In 1987, Penning became a full-time Medical Corrections Technician.
4. In 1991, Penning became Medical Corrections Officer, at a higher pay grade, when the position was reclassified to include supervisory duties.
5. Penning continued his employment while taking nursing classes over the years, and was licensed by the South Dakota Board of Nursing as a Registered Nurse (RN) in 1995. He was promoted in November 1995 to a higher pay grade, to reflect his status as a RN. Penning provided nursing services for the jail on his own, as a county employee, up until the year 2000.
6. In 2000, County entered into a contract with Avera McKennan, a hospital and health care provider, to provide nursing services at the jail. Penning's title became "Health Services Coordinator," and he was again moved into a higher pay grade. To establish this pay grade, the County submitted a Comprehensive Position

- Questionnaire to its compensation analyst, the Archer Company, also known as DMG-Maximus (copy included as Exhibit 1).
7. A copy of the contract between Avera and County for jail nursing services, dated October 23, 2000, is included as Exhibit 2.
 8. Avera and the jail administration required Penning to sign a document entitled "Roles/Responsibilities/Accountabilities for Al Penning, RN" on March 8, 2005. This document (marked as Exhibit 2A), was drafted by Avera personnel, with input from jail administration and Mr. Penning. One paragraph of this document provides as follows:

Avera McKennan will not tolerate three infractions annually of the above listed roles and responsibilities. The manager for correctional health services and the warden/associate warden will evaluate issues of concern to determine qualification of an actual infraction. With the third occurrence, Avera McKennan will exercise the right to withdraw supervision of Al Penning as indicated in the original health services contract.
 9. As a result of the County's contract with Avera, Petitioner remained on County's payroll, but was under the direct supervision of Avera, which had assumed complete responsibility for jail nursing services.
 10. The contract between County and Avera provided that Avera could choose to decline the continuing services of the Corrections Registered Nurse (referred to as Health Services Coordinator in the county personnel system) at any time. Further, paragraph 3.4 of the agreement provided that Penning would "revert to that of a regular full time employee of County..." upon Avera's exercise of the purported option. Avera exercised this option by giving notice to County on June 1, 2005, that it would decline the position effective June 17, 2005. In the notice, Avera informed County that the position of Corrections Registered Nurse (aka Health Services Coordinator) was no longer necessary. A copy of this notice is included as Exhibit 3.
 11. It is undisputed that the actions pertaining to Penning and his position in this matter were not: 1) the result of poor work performance by Penning, 2) due to a lack of funds, 3) for cause, or 4) a disciplinary action.
 12. County immediately notified Penning of this action by Avera, and informed him that because his services as a RN were no longer needed, his pay would be adjusted to that of an advanced corrections officer (Correctional Officer II, or CO-II), at pay grade 10, step 13, effective July 4, 2005. A copy of the County's notice to Penning is included as Exhibit 4. County placed him in step 13, the highest step on the County's pay scale, because of his longevity as a County employee. This action by Avera and the County caused Penning's annual pay to be reduced by approximately \$7000.
 13. After Avera's termination of the Corrections Registered Nurse position, the jail still needed to cover some of the non-nursing responsibilities that Penning had formerly performed, so the Sheriff decided to create a new position in the County system, entitled Medical Corrections Technician, rather than the alternative of assigning these duties to other jail staff.
 14. This newly-created position, into which Penning was placed, involves coordinating health care appointments for inmates, assisting with inmate medical records,

- maintaining stock medical supplies, and other duties as outlined in a Job Duties Description (Exhibit 5). Penning contends that his placement in this position constitutes nothing more than a “reclassification” of his prior position within the meaning of the County’s employee handbook, which governs the dispute in this case. County disagrees, and contends that under the handbook “reclassification” is a term of art which refers to the movement of a position to a higher or lower pay grade.
15. Penning contends that this new position is substantially similar to his prior position. County disagrees, and contends that the elimination of nursing services and other duties from the position justified the reduced pay grade.
 16. The parties agree that the newly-created position’s job description does not involve the provision of nursing care to inmates. County submitted the new position description to its compensation specialist, The Archer Company, on a Comprehensive Position Questionnaire (Exhibit 6), which Penning helped to complete. Archer concluded that the position should be placed at pay grade 9, by letter dated June 1, 2005 (Exhibit 7). Rather than reducing his pay again, the Sheriff’s Office (which oversees the jail) chose to leave Petitioner at pay grade 10 in a correctional officer’s slot, while performing the duties of the newly-created Medical Corrections Technician position.
 17. Pursuant to the County’s employee handbook, Petitioner appealed this decision to the Minnehaha County Human Relations Committee, which held a hearing that Petitioner attended with his counsel. A copy of the Employee Handbook is included as Exhibit 8.
 18. The Committee issued a written decision upholding the Sheriff’s action (Exhibit 9). Penning appealed to the full County Commission pursuant to the County Handbook, which also upheld the decision (Exhibit 10).
 19. [Penning] has now taken this appeal to the Department pursuant to SDCL 3-18-15.2.

ANALYSIS

SDCL 3-18-1.1 defines a grievance:

The term “grievance” as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a “grievance” and is not subject to this section.

The Department’s role in resolving a grievance is defined by SDCL 3-18-15.2.

SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . .

The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on Penning, the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991). Penning alleges County violated and/or misinterpreted the County Handbook when it changed his pay. County alleges that no violation and/or misinterpretation took place.

Avera and County entered into a Health Care Services Agreement (the Contract) on October 23, 2000. The Contract called for Avera to provide healthcare services to County inmates. The Contract called for County to maintain and staff the position of Corrections Registered Nurse, but allowed Avera to elect "for any reason to decline to accept and be responsible for the services of the person holding the Corrections Registered Nurse at any time during the term of this agreement." Penning agreed that he did not hold the position of Corrections Registered Nurse (or Health Services Coordinator) before County entered into the Contract. To establish the pay grade for the Corrections Registered Nurse, the County submitted a Comprehensive Position Questionnaire to its compensation analyst, the Archer Company, also known as DMG-Maximus. Penning's position as Corrections Registered Nurse (or Health Services Coordinator) included nursing duties.

In a letter to Warden Tim Devlin, dated June 1, 2005, Avera's President and CEO Fredrick W. Slunicka provided County with notification that the services of Penning as Corrections Registered Nurse were declined by Avera. Avera also notified County that "no additional addendum is necessary as the manner and method of replacing the [s]ervices of the Corrections Registered Nurse is not necessary operationally."

Penning received notice of Avera's decision on June 16, 2005. Warden Devlin notified Penning that Avera had "exercised their contractual option to decline your services as a registered nurse." The June 16, 2005 notice also provided that County could no longer pay Penning at his current level "due to the fact that you are no longer performing the functions of a registered nurse." The notice went on in detail regarding the change in Penning's pay grade. County thereafter demoted Penning into a newly created position called Medical Corrections Technician, placing him at the top of County's pay schedule for that position.

Penning argues that County violated its Handbook by changing his pay when Avera elected to stop using his services except to freeze or "redline" his pay under the reclassification policy. In support of his argument that County could not stop paying him his nurse's salary, Penning argues that a document entitled "Roles/Responsibilities/Accountabilities for Al Penning, RN", which was signed by Al Penning on March 8, 2005, created conditions and terms of employment that precluded the actions taken by both County and Avera. Paragraph 7 of this document provided:

Avera McKennan will tolerate three infractions annually of the above listed roles and responsibilities. The manager for correctional health services and the warden/associate warden will evaluate issues of concern to determine qualification of an actual infraction. With the third occurrence, Avera McKennan will exercise the

right to withdraw supervision of Al Penning as indicated in the original health services contract.

This document was prepared sometime in February or early March of 2005 because County staff and Avera staff felt it necessary to define Penning's roles and responsibilities to address concerns "between Avera McKennan and Penning".

Penning argues that this document, not signed by County or Avera, amended paragraph 3.4 of the Avera/County Contract. Penning asserts that Avera could not elect to withdraw supervision of Penning until Penning had committed three infractions of the roles listed in the document.

Penning's argument must fail for three reasons. First, the Roles/Responsibilities document signed by Penning was not a contract. It was not an addendum to the Health Care Services Agreement between Avera McKennan and Minnehaha County. Penning was the sole signer of the Roles/Responsibilities document. He was not in a position to bind either Avera or County to a certain course of action regarding his status as a county employee or Avera's obligations under the Contract. Second, the Healthcare Services Agreement between Avera McKennan and Minnehaha County lists only those two parties in the introduction and the signature page. Al Penning is not mentioned. It is signed by the Chairman of the County Commission and the CEO of Avera. Nothing in the Roles/Responsibilities document served to alter the parties' rights and it cannot serve to alter a contract signed by the Chairman of the County Commissioners and the CEO of Avera. Third, the Role/Responsibilities document is directed specifically at Penning and not at the Corrections Registered Nurse position itself. Testimony from Assistant Sheriff Boyd at hearing demonstrated that it was drafted to address specific concerns with Penning's performance, not concerns about the nature of the Healthcare Services Agreement between Avera and County. Therefore, Avera was within its contractual rights when CEO Slunicka provided its June 1, 2005, notification to County.

After Avera's notification, the Minnehaha County Sheriff decided to create a new position in the County system, entitled Medical Corrections Technician. The Sheriff's Department recognized that Penning had performed some non-nursing duties while serving as Corrections Registered Nurse and that those non-nursing duties would not be performed by Avera personnel. The County followed its Handbook procedures when it created the Medical Corrections Technician. Penning argues that County reclassified the Corrections Registered Nurse position into the Medical Corrections Technician position. County disagrees and argues that the notification by Avera created a "reduction in force" and the creation of the Medical Corrections Technician was done to avoid a protracted procedure of terminating Penning, creating a new position, and then rehiring Penning.

The relevant portions of the County Handbook or Guidelines for County Employees under part **C) Conditions & Circumstances of Employment** include:

C-2) PAY CHANGES: Promotion, Transfer, Demotion, Step Increase, Reclassification.

C. Demotion

An employee may be demoted for cause, disciplinary action, or in the event of a reduction in force. In the case of a demotion, the employee's pay rate will remain unchanged for ten (10) working days, at which time it will be reduced within the range established for the position to which demoted.

A full time permanent employee will have the right to be presented in writing [with] the reason(s) for the demotion, and will be allowed a period of five (5) working days, with which a grievance procedure may be initiated. (See Section C-21)

E. Reclassification

A reclassification is the movement of a position to a higher or lower pay grade. All persons filling the position are consequently also moved to the new pay grade, retaining their current steps.

If a position is reclassified to a lower pay grade, employees holding the position will be red-circled, or frozen, at their current rates of pay until the new grade and step reaches that level.

Position reclassification may be requested and justified when changes in the labor market affect the level at which competitive wages are being paid.

Requests to create new positions or to reclassify current positions will be initiated by department heads or the Commission. New job descriptions will be developed in cooperation with Human Resources. The County Commission will approve the new position or change and make the assignment of pay grade using relevant salary survey data. Reclassification and new position requests will be considered as part of the annual budget process.

C-14) – Reduction in Force, Layoffs, Termination

Any department head may terminate or demote any employee without prejudice because of lack of funds or curtailment of work. In such event, the department head or immediate supervisor will give at least two weeks notice of the intended action to the employee. The employee's rate and receipt of pay will not be altered until at least two weeks after the date notice is given. In the event of demotion or job termination, the monies received by the employee during the two weeks will be considered the total sum of any "severance pay" which may be claimed by the employee.

When Avera made its election to stop using Penning's services as Corrections Registered Nurse, County no longer had the need to employ a registered nurse. This is a "curtailment" of work County was obligated to provide. County had no need for a registered nurse because it had contracted with Avera for healthcare services for inmates

at its County jail. After Avera's election, Penning no longer acted as a registered nurse and he no longer supervised any personnel at the County jail. The nursing and supervisory duties performed by County's Corrections Registered Nurse were completely curtailed and County properly used its reduction in force policy. County properly invoked its reduction in force policy and demoted Penning.

Penning's argument that the Medical Corrections Nurse position was reclassified is rejected. Penning's position as a registered nurse was no longer needed by County and was not moved to a different pay scale to reflect changes in the competitive market. Reclassification was explained by witness Michelle Boyd, who explained from her personal experience that when her position as assistant sheriff was reclassified (at the same time as the warden's position), the duties remained the same, but the pay was adjusted to reflect market wages. While Penning argues that he performs approximately 75 to 80% of the same duties he performed as Corrections Registered Nurse, this does not support a finding that his nursing position was reclassified. The duties that Penning no longer performs are significant because those duties required RN status and involved supervising other personnel. Penning agreed that he no longer performs any nursing duties, that he no longer needs RN status to perform his duties, and that he is now overqualified for his current position as Medical Corrections Technician. While the paper trail of Penning's transition reveals that at one time the term reclassification was used in regard to Penning, it was a typographical error that was later corrected. Penning's argument's the Corrections Registered Nurse position was reclassified and not reduced due to curtailment of work must fail.

Penning also argues that he was demoted without just cause. While County has given its employees "just-cause" protection, Penning fails to support with authority his claim that County must make a case for just cause in order to demote him under the reduction in force policy. The County Handbook expressly deals with the possibility of elimination of positions, and County properly followed those procedures.

In a similar context, the South Dakota Supreme Court has held that a city did not need to create a new position for an employee who found himself displaced. Anderson v. City of Sioux Falls, 384 N.W.2d 666 (S.D. 1986). County's need for a nurse on staff ended when Avera exercised its rights under the Contract. County is not obligated by the Contract or the County Handbook to spend taxpayer dollars paying competitive registered nurse wages to a registered nurse who does not perform the duties of a registered nurse, even when County has no need for a registered nurse.

Penning further argues that equity requires that the Department find in his favor. The South Dakota Supreme Court has stated regarding an administrative agency's jurisdiction:

This Court has consistently ruled that an agency has only the authority granted to it by statute.

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. Furthermore, '[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void.' An agency has

only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction.

O'Toole v. SD Retirement System, 2002 SD 77, ¶15, 648 N.W.2d 342, 346 (citations omitted). The Department has no jurisdiction to decide matters of equity. The Department is limited by SDCL 3-18-1.1. The County followed its procedures as set forth in the Handbook in properly demoting Penning.

CONCLUSION

Avera's election to discontinue using Penning's services as Corrections Registered Nurse eliminated County's need to retain Penning as a registered nurse or to retain a registered nurse on the County staff. County properly used the reduction in force policy due to this "curtailment of work". County followed procedure when it created the Medical Corrections Technician and properly demoted Penning under the County Handbook. County did not violate or misinterpret the Handbook when it demoted Penning to a Medical Corrections Technician and thereby reduced his pay.

County shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Penning shall have ten (10) days from the date of receipt of County's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, County shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 12th day of March, 2007.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge