C: Kolapo
Julie
J. Goliber

New England Labor Center

American Arbitration Association
Dispute Resolution Services Worldwide

June 21, 2006

133 Federal Street, 11th Floor, Boston, MA 02110-1703
telephone: 617-451-6600 facsimile: 617-451-0763
internet: http://www.adr.org/

Alan J. McDonald
McDonald Lamond & Canzoneri
Cordaville Office Center
153 Cordaville Road, Suite 210
Southborough, MA 01772-1834

Thomas Royall Smith, Esq.
Jackson Lewis, LLP
75 Park Plaza
4th Floor
Boston, MA 02116

Re: 11 300 02635 05
M.N.A.
and
Merrimack Valley Hospital

Grievances: M. Ciulla - Denial of Spouse Insurance

Dear Parties:

By direction of the Arbitrator, we herewith transmit to you the duly executed Award and Opinion in this matter.

We also enclose the Arbitrator's bill for services rendered in the above-captioned matter. When paying the Arbitrator, checks should be prepared and mailed directly to the Arbitrator, not to the American Arbitration Association. Your cooperation in this matter is greatly appreciated.

The American Arbitration Association, in its publications ***Summary of Labor Arbitration Awards***, ***Arbitration in the Schools*** and ***Labor Arbitration in Government***, reports arbitration decisions in labor arbitration cases. These monthly publications have a wide distribution and are used by practitioners in the field as well as for educational and research purposes. We would like to consider the enclosed case of yours for reporting in a forthcoming issue.

Unless we hear from you to the contrary within one (1) month from the date of this letter of transmittal, we will assume your have no objection to our doing so. Objections to the use of this decision should be sent directly to the Publications Department, AAA, 335 Madison Avenue, 10th Floor, New York, NY 10017.

Thank you for choosing the services of the American Arbitration Association.

Very truly yours,

Jessica R. Coco
Case Manager
617 695 6056
Cocoj@adr.org

Enclosures

cc: Arnold Martin Marrow, Esq.
Roland N. Goff
Gina M. Lagana

AMERICAN ARBITRATION ASSOCIATION

In the matter of the Arbitration between:

M.N.A.	*	
and	*	AAA Case No. 11 300 02635 05
Merrimack Valley Hospital	*	

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ARBITRATION DECISION

Arbitrator: Arnold M. Marrow, Esq.
Hearing: April 20, 2006
Haverhill, Massachusetts
Appearances: Mark Hickernell, Esq. for the Association
Thomas Royall Smith, Esq. for the Employer

ISSUES

Did the Employer violate the 2005-2007 collective bargaining agreement between the parties by not providing medical insurance coverage to the Grievant's spouse? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE II – NON-DISCRIMINATION

Section 1 Neither the Hospital nor the Association will discriminate on the basis of race, color, religion, sex, national origin, disability, veteran's status or sexual orientation.

ARTICLE XXV
MEDICAL INSURANCE

Section 1 All eligible RNs have the option to be covered by the medical insurance plan(s) provided by the Hospital, subject to the enrollment requirements of the plan as set forth below in this Article.

Section 2 Medical insurance coverage is effective of the sixty-first (61) day of employment with the Hospital, subject to the enrollment requirements of the plan and as set froth in this Article. Notwithstanding this, if a per diem RN, or another RN, either of whom have been continuously working at the Hospital for six (6) months or more but have not been benefit eligible, transfers to a benefit eligible position, the waiting period referred to herein shall be waived.

Section 3 If an RN with medical insurance membership resigns, is laid off or otherwise becomes ineligible, takes an approved personal leave in excess of thirty (3) days, or is terminated for any reason for any reason other than gross misconduct, the RN may continue medical coverage in accordance with the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), except as provided in Article XXXVIII, Worker's Compensation.

Section 4 The Hospital may substitute insurance carriers, plans and/or administrators as long as the Association is notified thirty (30) days in advance. Notwithstanding this, the Hospital may only substitute a plan(s) for the plan(s) in effect on the date of ratification if such plans are substantially similar considering all relevant factors to the plan(s) they replace, unless the parties mutually agree otherwise.

Section 5 Issues concerning medical insurance which are not specifically addressed in this Agreement shall be governed by the terms of the plan(s).

Section 6 During the annual open enrollment period, eligible RNs shall select from the type and level of medical coverage and plans made available by the Hospital. Such elections shall continue for the plan year, absent a qualifying event.

Section 7 RNs who are eligible for medical insurance may pay their share of the premium on a pre-tax basis in accordance with Section 125 of the Internal Revenue Code.

Section 8 RNs who are eligible for medical insurance and who elect no health insurance in writing during open enrollment are entitled to a five hundred dollar ($500.00) annual payment in four (4) quarterly installments. (This will be pro-rated during the initial year of employment.)

Section 9 RN contribution rates for individual coverage shall be as set forth below. These same percentages shall apply to premium increases. Except as otherwise agreed, only RNs regularly scheduled for twenty-four (24) or more hours per week are eligible.

Section 10 There is a one (1) million dollar ($1,000,000) lifetime cap per member on medical insurance plan expenses including claims.

* * *

ARTICLE LIII – COMPLETE AGREEMENT

Section 1 – The Hospital and the Association 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 subject or matter not removed by law from the area of collective bargaining, and that he understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set froth in this Agreement.

Section 2 – The Hospital shall not be deemed to have agreed to any term or condition of employment not specifically set forth in this Agreement, including, but not limited to any past practice.

BACKGROUND

At the outset of the hearing the Employer raised an issue of procedural arbitrability. Evidence was taken and testimony of witnesses with respect to the matter of

the processing of the grievance. Thereafter, the Arbitrator considered the testimony and the evidence and orally made a ruling on the record finding the grievance to be arbitrable.

The Grievant, Maria Ciulla, a woman, employed as a nurse by the Employer, was married to another woman in Massachusetts under the laws of Massachusetts on October 1, 2005. A few days later she attempted to enroll her new spouse in the Employer's medical insurance plan but the enrollment was denied. The Grievant has been employed as a registered nurse in the bargaining unit since August 2004.

Martee J. Harris was called as a witness for the Employer. Ms. Harris is corporate vice-president for human resources for Essent Healthcare, the parent corporation that owns and operates the Employer at the Haverhill, Massachusetts location. Ms. Harris testified that she contacted Blue Cross/Blue Shield brokers to discuss the health plan covering the employees at the Haverhill location. Blue Cross/Blue Shield was a provider of health insurance at the facility.

She stated that she requested that the brokers change the plan back so as to encompass the definition of "spouse" to be only an individual married to another individual of the opposite sex. This was to apply to all of the health insurance plans of Essent, and not just the Haverhill operation. When asked on cross examination why the change was requested Ms. Harris testified that Essent felt the need to further define what "spouse" would mean.

There followed a series of e-mails with Blue Cross/Blue Shield and Ms. Harris that finally effectuated the change of the definition of "spouse" in the health insurance plan. (Em. Exs 12-20) As a result, when the Grievant sought to enroll her spouse into the plan in October, 2005 the plan had been changed to define "spouse" to cover only marital situations where the couple were man and woman. Consequently coverage was denied to the Grievant's spouse.

It appears that earlier, before Ms. Harris contacted Blue Cross/Blue Shield, it had changed the language of the plan to cover same sex marriages in accordance with the decision of *Goodridge v. Department of Public Health et al* 440 Mass. 309 ("Goodridge") In that decision the Supreme Judicial Court of Massachusetts held that under the state constitution, the Commonwealth may not bar same sex couples from entering into a civil marriage. *Goodridge* at 313.

POSITION OF THE PARTIES

THE ASSOCIATION

The Association asserts that the action of the Employer is on its face a violation of the non-discrimination clause of the contract. The Association maintains that Article III expressly forbids discrimination on the basis of sexual orientation. By failing and refusing to enroll the Grievant's spouse in the health and insurance plan a violation took place. Under the decision in *Goodridge* the Grievant entered into a lawful marriage in Massachusetts and her *spouse* was clearly entitled to the benefits of the medical plan.

The Association rejects the Employer's contention that Section 5 of Article XXV of the contract trumps the non-discrimination clause. It argues that access to health insurance is not an "issue concerning medical insurance" and further, even if access is an "issue concerning medical insurance" the non-discrimination clause specifically prohibits discrimination on the basis of sexual orientation.

The Association argues that there was no reason other than animus that the Employer chose to change its health insurance plan to exclude employees like the Grievant. It points out that the Employer was at first in compliance with Article III of the contract even after *Goodridge,* but through the actions of Ms. Harris, the corporate Employer changed the plan after Blue Cross/Blue Shield had, on its own, brought the plan into compliance with *Goodridge.*

With respect to defenses raised by the Employer, the Association rejects any suggestion that it had a chance to address the issue of the definition of "spouse" in bargaining and failed to do so. The Association argues that it was never put on notice that the Employer had changed the rider defining "spouse" nor was the matter ever raised before the instant grievance. The Association maintains that it cannot be held to have waived the opportunity to bargain over an issue that it was unaware of.

The Association further avers that the arbitrator should not attempt to reconcile the contract with the Defense of Marriage Act ("DOMA") a federal law that defines a "spouse" as "a person of the opposite sex who is a husband or a wife" for the purpose of federal law. The Association suggests that the Employer intends to argue that because of the kind of health insurance plan that it offers its employees it is entitled to rely on the "DOMA" definition.

For a remedy, the Association asks that the Arbitrator order the Employer to cease and desist from violating the non-discrimination clause of the contract and, further, to order the Employer to revise its health insurance plans to grant access to same-sex spouses on the same terms as different-sex spouses. Additionally, the Association asks that the Employer be ordered to make the Grievant whole for any other expenses that she and her spouse may have incurred as a result of the Employer's refusal to grant access to the health insurance plan.

THE EMPLOYER

At the outset the Employer contends that it did not violate the non-discrimination clause by denying the Grievant medical insurance, because it simply applied the terms of the plan, to which the parties were bound, in determining that the Grievant was ineligible. Inasmuch as the terms of the plan were specifically incorporated into the collective bargaining agreement all parties are therefore bound by those terms. The Employer relies on arbitral law that maintains that the terms of an insurance contract are binding on both the employer and the union where the contract was incorporated into the collective bargaining agreement, or where the parties were found otherwise to have agreed on the benefits or other terms of the insurance contract. Boise Cascade, 119 LA 35, 41 (Kilroy, 2003) Cited in Elkouri and Elkouri, *How Arbitration Works,* 6th ed/editor-in-chief, Alan Reuben (2003), p.466-67.

The Employer also relies on the language in Palm Tran Inc., 117 LA 1577 (Murphy 2002) wherein the Arbitrator held that language in a collective bargaining agreement that provided that "benefits…are subject to the terms and conditions of the policies of each plan contract" incorporated a plan contract into the agreement by reference and bound the parties to its terms.

In the present situation the Employer argues that the language of Section 5 of Article XXV of the collective bargaining agreement provides that "[i]ssues concerning medical insurance which are not specifically addressed in this Agreement shall be governed by the terms of the plan(s)." Since the issue of whether same sex spouses are eligible for medical insurance benefits is not specifically addressed in the collective bargaining agreement the Employer contends that, as in Palm Tran Inc., the parties are

bound by the terms of the plan. Under the plan only married spouses of the opposite sex are eligible for coverage.

The Employer asserts that Section 5 of Article XXV and Article III must be considered together as it is not possible to give meaning to the prohibition against discrimination on the basis of sexual orientation in Article III without consideration of the rest the contract, which includes Section 5 of Article XXV. Inasmuch as that latter incorporates the terms of the plan into the contract and the plan, by its terms does not cover same sex marriage partners.

The Employer relies on the decision of Arbitrator Strasshofer in Kent State University, 103 LA 338, 343 (Strasshofer, 1994) where the employer was held not to have violated the non-discrimination clause by refusing to provide medical and dental insurance coverage for an employee's same-sex domestic partner pursuant to the terms of the applicable plan. The arbitrator held that the definition of spouses under the plan was limited to "a husband or wife in a marriage" and did not include domestic partnerships.

In the present matter, the Employer avers that the medical insurance plan provides coverage only for spouses of the opposite sex. Since the Grievant's spouse is not of the opposite sex but is of the same sex, coverage should not have been provided. By applying the terms of the plan the Employer did not violate the non-discrimination clause.

The Employer maintains that the issue before the arbitrator is not the sometimes controversial issue of same-sex marriage but rather whether the Employer violated the collective bargaining agreement. It points out that the Association made no proposal in the summer of 2005 to change the language in the contract to cover same-sex spouse marriage. The Employer avers that the Association was aware of the change the Employer made after *Goodridge* to further define spouse so that the status quo that existed before *Goodrige* could be maintained. It argues that the Association has not met its burden of showing a violation of the contract therefore the grievance should be denied.

OPINION

The Arbitrator has been asked to decide if the Employer violated the 2005-2007 Collective Bargaining Agreement between the parties by not providing medical insurance coverage to the Grievant's spouse.

In essence the Association claims that the Employer did so by not recognizing the validity of the marriage under Massachusetts law whereby same-sex marriages were made lawful in *Goodridge*. Thus, according to the Association, the definition of "spouse" under the medical insurance plan would have included the Grievant's spouse and the Employer violated the discrimination clause when it denied her coverage.

In contrast, the Employer rejects any discrimination asserting that the medical insurance plan definition of "spouse" very specifically defined the term as to limit coverage only to husband and wife of opposite sex. In conforming to the plan the Employer did not engage in any discriminatory act.

In order to properly decide the issue I found it necessary to go outside the language of the collective bargaining agreement to consider the impact and effect of the *Goodridge* decision on the totality of conduct involved in the instant matter. Although raised at the hearing, the Employer did not address the matter of Federal law, and the Defense of Marriage Act (DOMA) in its brief. However, I find that it is necessary to construe that Act, as well as the potential impact of other aspects of federal law in order to properly decide the issue before me.

I find that a fundamental matter to be determined is whether or not federal law and the "DOMA" definition of *spouse* preclude resort to the spousal definition given by the Supreme Judicial Court in *Goodridge.* In that decision the Court majority held, in essence, that marriage licenses should not be denied in the Commonwealth to a same-sex couple.

While the Association suggests that it is not necessary to tread in this area, I disagree. Fundamental to a resolution is an answer to the question of how "spouse" is to be defined in the health insurance plan. If federal law is applicable, then the spousal definition sought by the Association pursuant to *Goodridge* fails. Conversely, if there is no need to resort to federal law then the definition under Massachusetts law stands and

the denial of coverage to the Grievant's spouse would be a violation of the collective bargaining agreement.

My examination of the law applicable turns on the question of whether or not the health insurance plan is restricted by the Defense of Marriage Act ("DOMA'). That Act was adopted by Congress to protect the institution of marriage by using the traditional heterosexual concept and to protect the rights of states to determine what recognition, if any, they give to same-sex marriages from other states. Prior to *Goodridge,* same-sex couples in Massachusetts were treated differently and denied many of the legal rights and privileges to which heterosexual couples were entitled. A number of the rights and privileges are directly related to employment including health insurance

In Massachusetts, after *Goodridge,* an employer cannot utilize the federal definition of "spouse" as set forth in DOMA to treat same-sex marriages differently from traditional marriage situations. Massachusetts non-discrimination law makes it unlawful not only to refuse to hire or dismiss an individual from employment on the basis of sexual orientation, but also to not discriminate against such individual in compensation, or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.[1]

In combination with *Goodridge* it would now appear that Massachusetts employers are required to offer all of the same benefits, which would include health insurance, to married same-sex spouses as it would offer to married opposite sex spouses.

However, where benefits are federally governed or regulated a Massachusetts employer may not be required to give the same benefits to same-sex marriage partners. Since many work place benefits are regulated or governed by the Employee Retirement Income Security Act (ERISA), the DOMA definition of "spouse" would apply. Federal law does not recognize same-sex civil marriages.

Although DOMA clearly sets forth a federal policy, the act also states that its definitions of "marriage" and "spouse" apply to the meaning of any Act of Congres, or any ruling, regulation, or interpretation of the various administrative bureaus and

[1] Mass, Gen Laws ch. 151b, §§ 1-10 (2002)

agencies of the United States. [2] Conversely, if a benefit is not governed by federal law, such as ERISA, than the law under *Goodridge* governs and the Massachusetts non-discrimination law must apply Accordingly, the issue before me turns on what law applies to the health insurance plan herein, federal law and thus ERISA controls or state law and thus the *Goodridge* spouse definition applies. The determination of whether an employer is obligated to provide a benefit that comes under ERISA turns on whether or not the benefit is insured.

ERISA sets "minimum standards for most *voluntarily* established pension and health plans in private industry to *provide protection* for individuals in those plans" [3] Insured ERISA programs that extend benefits or coverage to spouses, such as health insurance plans fall outside the scope of DOMA and are subject to state regulation. Uninsured ERISA programs, in contrast, are under the DOMA umbrella and its definition of "marriage" and "spouse". As a general rule, employers whose health plans are governed by federal law and not subject to state insurance law have discretion to decide whether or not to provide same-sex spousal benefits.

In the present case, the facts indicate that the plan is a self-insured one administered under the aegis of Blue Cross/Blue Shield of Massachusetts. (Em. Ex. 17). Therefore, the plan might not be subject to Massachusetts law and insurance regulation, but rather would fall under ERISA and the federal definition of marriage. Under *Goodridge* employers must cover same-sex spouses on the same terms and conditions as they cover traditional marriage spouses. In the present case Blue Cross/Blue Shield initially changed the plan to comply with the *Goodridge* decision shortly after the issuance of that decision. Coverage was amended to include same-sex spouses.

Thereafter, as Ms Harris testified, she caused the Blue Cross/Blue Shield to alter the definition of the term "spouse" so as to make coverage available only to traditional married couples, that is to a heterosexual union. The result was denial of coverage to the Grievant's spouse.

Having determined that the health insurance plan is not subject to Massachusetts law, the denial of coverage in the circumstances was not discriminatory. I find that

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[2] See 28 U.S.C.A § 1783C (2004).

[3] U.S. Dept of Labor, *Health Plans & Benefits: Employee Retirement Income Security Act,* http:// www.dol.gov/dol/topic/health-plans/erisa.htm

DOMA restricts and supersedes the ability in Massachusetts to provide benefits for same sex spouses on the same terms as *Goodridge.* I base this conclusion on the distinction made under ERISA between self-insured and insured plans.

Federal law applies and that law does not recognize same-sex civil marriages. Insured plans are subject to Massachusetts insurance regulations and must cover same-sex spouses on the same terms as they cover different sex spouses. That is based on the holding in *Goodridge* clarifies the term "spouse" under Massachusetts law to include all legal spouses regardless of gender.

The plan herein was at first amended after *Goodridge* to include same-sex spouses. However, the Employer, through Ms. Harris caused Blue-Cross/Blue Shield to return the plan to the status quo ante and eliminate the unilateral adoption of the change that Blue Cross/Blue Shield had made.

The Employer contends that the terms of the Plan are specifically incorporated in the collective bargaining agreement and are thus binding on both the Employer and the Association. The Association claims that it was never given notice or opportunity to discuss the change implemented by Ms. Harris after Blue Cross/Blue Shield had made the change to comply with *Goodridge.*

Although the Association argues that the plan was amended or changed to exclude same-sex spouses without its input or knowledge, I do not find that saves the day for the Association. Inasmuch as the health insurance plan is self-insured I find myself bound by federal law and the impact of ERISA, and the definition of "spouse" as set forth and defined in DOMA. Accordingly, I find that the Employer did not violate the agreement by failing to permit the Grievant to enroll her spouse in its health and welfare plan. The Grievance is denied.

AWARD

The Employer did not violate the Agreement by failing to permit the Grievant to enroll her spouse in its health insurance plan. The grievance is denied.

Arnold M. Marrow

Arnold M. Marrow
June 21, 2006