STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, HOSPITAL & SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, Complainant, vs. APPLETON MEMORIAL HOSPITAL, Respondent.	Case XII No. 16489 Ce-1472 Decision No. 12082

Appearances:

Mr. Gary Robinson, Representative, appearing on behalf of the Complainant.

Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. Laurence E. Gooding, Jr., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Commission on March 28, 1973, at Appleton, Wisconsin, before John T. Coughlin, Hearing Officer; and the Commission having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, Hospital & Service Employees' International Union, AFL-CIO, referred to herein as the Complainant, is a labor organization with offices at 135 West Wells Street, Milwaukee, Wisconsin.

2. That Appleton Memorial Hospital, referred to herein as the Respondent, is a private nonproprietary hospital having its facilities at 1818 North Meade Street, Appleton, Wisconsin.

3. That at all times material herein the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent and the Complainant have been at all times material herein signators to a collective bargaining agreement covering wages, hours and conditions of employment of such employes; that said agreement provides that grievances may be presented to the Wisconsin Employment Relations Commission as alleged violation of said agreement in a complaint of unfair labor practices, and does not provide for final and binding arbitration of grievances.

4. That the aforesaid collective bargaining agreement in part provides as follows:

"ARTICLE V
Seniority

. . .

Section 3. Promotions and transfers will be determined upon the basis of the Hospital's record of the appraisal of the individual employee's skill and ability but where these are relatively equal, the employee with the greatest seniority will be given preference over those with less seniority."

5. That on October 13, 1972, the Respondent posted a notice of transfer opportunity for an Aide-X-ray Department pursuant to the general practice of the hospital which reads as follows:

"Aide - X-ray Department

Part-time, 7:30 AM to 11:30 AM

Job Description:

Transports patients to treatment units, assists x-ray technologists in positioning the draping patients; runs errands; does minor housekeeping chores in the X-ray Department; performs other duties as assigned.

Job Qualifications:

Individual should be able to work under strenuous conditions; should be able to effectively communicate with the public, doctors and staff; must present a professional appearance.

How to Apply:

Apply to the Personnel Office by October 19, 1972. Applications after 5:00 pm on that date will not be accepted."

6. That four employes of the Respondent applied for transfer to the Aide-X-ray Department pursuant to the posting, the employes applying were Donna Gross, Sally Kieffer, Beverly Stingle and Audrey Peterson; that on October 24, 1972, Lester R. Stauske, Director of Personnel, for the Respondent, and Eugene Plachinski, Director of the Department for the Respondent, conducted interviews of the four applicants for a transfer; that during the course of the interview Mr. Plachinski prepared interviewer's comments regarding his appraisal of the applicants.

7. That the appraisal of Donna Gross as noted by Mr. Plachinski was: "Donna was very interested in the position, has no health problems and had the best attitude. Asked pertinent questions--appears intelligent and sincere--good possibility--has only been employed since 2/15/72 but did work here previously", and that the appropriate line was checked recommending Donna Gross for hire; that the appraisal of Beverly Stingle as noted by Mr. Plachinski reads as follows: "Deteriorating discs--back problem likely from lifting without any help--also ulcer--under control now--raised question on what part seniority would play in getting the job--she asked few questions about the job responsibilities", and that the appropriate line was checked as not recommended; that the seniority of Beverly Stingle is May 20, 1965.

8. That Donna Gross was transferred to the position of Aide-X-ray Department on October 26, 1972, and that Beverly Stingle filed a grievance on November 8, 1972, asserting that she felt she had more seniority, skill and ability than Donna Gross; that said grievance was presented to John R. Shepard, Administrator for the Respondent, on November 20, 1972; that in support of the grievant's position relative to being physically fit for the job, Beverly Stingle provided to the Respondent a statement signed by her doctor, J. J. Young; that said doctor's slip dated December 1, 1972, reads as follows:

"Name Beverly Stingle Age 38

The above patient is in good health. She is physically fit to perform the work required as a nurses aid, including the x-ray department.

Physician J. J. Young";

that on January 9, 1973, John R. Shepard, Administrator for the Respondent, answered the grievance as follows:

"This will acknowledge receipt of your grievance. Reference is made to Article V, Section 3, of our current contract. The hospital denies a violation of the contract in the selection of an x-ray aide resulting from the posting of this transfer opportunity."

9. That by its action in transferring Donna Gross to the position of Aide-X-ray Department and refusing the transfer to Aide-X-ray Department of Beverly Stingle the Respondent has not and is not violating the provision of Article V, Section 3 of the collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSION OF LAW

That since the transfer of Donna Gross to the position of Aide-X-ray Department and the denial of transfer of Beverly Stingle to said position was not violative of Article V, Section 3 of the collective bargaining agreement existing between the Complainant, Local 150, Hospital & Service Employees' International Union, AFL-CIO, and the Respondent, Appleton Memorial Hospital, the Respondent, Appleton Memorial Hospital, committed no unfair labor practice within the meaning of any provisions of the Wisconsin Employment Peace Act with regard to said transfer.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes the following

ORDER

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of August, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Zel S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 1, 1972, the Union filed a complaint with the Commission alleging that the Employer committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act by denying a transfer of Beverly Stingle in violation of Article V, Section 3 of the collective bargaining agreement existing between the parties. Hearing in the matter was conducted on March 28, 1973, and the parties requested the opportunity to file briefs in the matter upon receipt of the transcript. Briefs were received on July 16, 1973.

COMPLAINANT'S POSITION:

Complainant contends that the Employer violated Article V, Section 3 of the agreement because the employes in question (Gross and Stingle) are relatively equal in skill and ability, and since skill and ability are relatively equal, seniority must govern.

Complainant further argues that the record supports the fact that Stingle is a good employe and the sole legitimate reason for the Employer's refusing to transfer Stingle pursuant to the posting was because of a deteriorating disc in her back. The Union further contends that at the time the decision was made there was no medical evidence to support the fact that Stingle was unable to perform the work and subsequent to the decision by the Employer, Stingle's personal physician certified her ability to do the job in question.

RESPONDENT'S POSITION:

Respondent contends that there is no violation of the agreement, that the sole responsibility placed on the Respondent by the collective bargaining agreement was to provide the opportunity of transfer based on seniority when skill and ability are relatively equal as assessed by the hospital.

DISCUSSION:

The Commission is satisfied that the Employer's interpretation of Article V, Section 3 is proper. We can find no other interpretation of the words "determined upon the basis of the Hospital's record of the appraisal of the individual employee's skill and ability" than that it means Employer has the latitude to make the decision as to the equality of skill and ability. It is entirely reasonable in the opinion of the Commission that an Employer will consider the state of health of the employe when considering the ability of that employe to perform a job. We further feel that the record satisfactorily indicates that at the time the decision was made the Employer had only the assertion of the employe that she had a back problem which he could consider. When the transfer decision was made, no medical evidence was produced by the employe which would have given the Employer reason to believe that she was fully capable of performing the duties of

Aide-X-ray Department. Furthermore, the very existence of the deteriorating disc, with or without certification from a doctor as to the employe's capability of performing the work in question, creates a reasonable distinction between the two applicants in question as far as their prospective ability to perform the work is concerned.

For the reasons set forth above the Commission concludes that the Employer has not violated the pertinent provisions of the collective bargaining agreement and has therefore dismissed the complaint.

Dated at Madison, Wisconsin, this 10th day of August, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Zel S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner