BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
VISITING NURSE SERVICE OF MADISON, INC.	Case 4 No. 45714 A-4785
and	
VISITING NURSE SERVICE STAFF ASSOCIATION	

Appearances:
Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Thomas R. Crone, Suite
Cullen, Weston, Pines & Bach, Attorneys at Law, by Ms. Carol Grob, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Union.

ARBITRATION AWARD

Visiting Nurse Service of Madison, Inc., hereinafter referred to as the Employer, and Visiting Nurse Service Staff Association, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the pay rate of an employe. Hearing on the matter was held in Madison, Wisconsin on August 21, 1991. During the course of the hearing a question concerning the arbitrability of the grievance was raised and the parties agreed to bifurcate the matter. Written arguments and reply briefs on the arbitrability question were received by the undersigned by September 20, 1991. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUES:

During the course of the hearing the parties agreed to leave framing of the issue to the arbitrator. The undersigned frames the issue as follows:

"Is the grievance arbitrable?"

If the answer to the issue is affirmative, a second day of hearing on the merits of the dispute will be scheduled.

PERTINENT CONTRACTUAL PROVISIONS:

. . .

Article 6
GRIEVANCE and ARBITRATION

6.04 Arbitrator's Jurisdiction: The arbitrator shall have no power or jurisdiction to change, add to, or subtract from the terms of this agreement. Such arbitrator shall have no power to nullify or modify any of the provisions of this agreement for the purposes of a particular case. The arbitrator's jurisdiction shall

be limited to determining if an express provision of this agreement was violated by the Employer and shall be limited to grievances arising during the term of this Agreement. The arbitrator's decision shall be final and binding.

. . .

2. ARTICLE 22: SALARIES AND WAGES

. . .

22.01 Professional Unit

22.01(g) RN salaries (all classifications). Effective February 1, 1991, the minimum hourly rate of pay for the RN classification is $12.50 to start; $12.71 upon completion of probationary period. These rates shall apply to all staff hired on or after January 1, 1990.

22.01(h) Except as provided in Section 22.01(j), effective February 1, 1991, increase the hourly rates for all RNs (except Judy Hoffman) on payroll as of that date, and who were hired before January 1, 1990, as follows:

(1) Increase current hourly rate by 6.78%.

(2) Adjust rate calculated in 22.01(h)(1) by giving credit of $0.10 per hour for each year of service completed on or before December 31, 1990 up to a maximum of five (5) years and by $0.05 per hour for each year of service of six (6) or more, but not to exceed a total service credit of $0.75 per hour. No credit shall be given for a partial year of service unless the employe was hired prior to July 1.

22.01(i) Effective February 1, 1991, reclassify all RN I, II and IIIs to RN. This reclassification shall not affect any employee's rate of pay.

22.01(j) Effective February 1, 1991, increase Judy Hoffman's rate of pay to $15.17 per hour.

22.01(k) Effective February 1, 1991, increase the current hourly rate for all other employees on payroll as of that

date by 7.0%.

. . .

BACKGROUND:

The Union and the Employer have been parties to a series of collective bargaining agreements since at least 1983. The collective bargaining agreements identified three (3) classifications for Registered Nurse (RN): RN I; RN II, 30 Credits; and RN III, BS. In 1980 the Employer hired Judy Hoffman, hereinafter referred to as the grievant, and placed her in the RN I classification. During 1987 the grievant raised a concern about her wage rate and classification. She was informed that as she did not have thirty (30) credits or a Bachelor of Science Degree the Employer was unable at that time to do anything about the matter. She was also advised to take the matter up with the Union's contract negotiations team. At that time the grievant was the only employe in the RN I classification. During March, 1991 the grievant became aware that since at least 1987 the Employer had been placing new hires into the RN II, 30 Credits classification who did not possess thirty (30) credits. The grievant raised the matter claiming unfair treatment but was unable to voluntarily resolve the matter. On March 25, 1991 she filed a grievance which was denied on March 27, at the first step of the parties' grievance procedure. The grievant appealed the denial on March 30, 1991 and the appeal was denied on April 16, 1991. On April 16, 1991 the matter was appealed to arbitration.

The parties 1990-1991 collective bargaining agreement contained a specific re-opener provision for the second year of the agreement. During January, 1991 the parties commenced negotiations and on March 13, 1991 the parties reached a tentative agreement which did away with the three (3) RN classifications. The three (3) RN classifications were all placed within a single RN classification. The parties in agreeing that the changes where to be retroactive to February 1, 1991, also agreed the reclassification would not affect any employe's rate of pay. However, the parties also agreed to a specific wage rate change for the grievant ($12.84 per hour to $15.17 per hour, effective February 1, 1991). The Employer ratified the agreement on March 25, 1991 and the Union ratified the agreement on April 11, 1991. The agreement was signed by the parties in late April, 1991.

EMPLOYER'S POSITION:

The Employer commences its arguments by pointing out there is no longer an RN II, 30 Credits classification to which the grievant may be reclassified, it having been eliminated almost two (2) months before the grievance was filed. The Employer points out the undersigned's authority is limited to determining whether a specific provision of the collective bargaining agreement was violated. The Employer contends that since the position the grievant desired to be reclassified to was eliminated and because the parties had agreed that the reclassification of RN's into a single classification would not affect any employe's rate of pay the grievance is not arbitrable. However, the Employer stresses the parties did agree to a substantial individual increase for the grievant. The Employer contends the grievant, in advancing her claim, must ask the undersigned to ignore the terms of the agreement as it existed on the date she filed her grievance and to base a remedy on a provision of the collective bargaining agreement which no longer exists. The Employer concludes such a remedy would be beyond the scope of the undersigned's authority.

The Employer acknowledges that beginning in 1989 it hired employes and assigned them to the RN II, 30 Credits classification when in fact they should have been RN I's. However, the Employer points out it has been free since at least 1987 to hire employes above the minimums of the collective bargaining

agreement. The Employer further points out that former Union President Ruth Hein acknowledged at the hearing the Employer could hire new employes at rates above current staff in the same classification, that the Employer had done so in the past, and that the RN classification assigned to a new employe had no effect on what the new employe's starting wage rate was, rates being based not on the collective bargaining agreement's minimums but upon market considerations.

The Employer also points out the grievant has asserted her claim is based upon Article 22, Section 22.02. Yet the grievant acknowledged at the hearing she is unaware of any employe who was reclassified from an RN I to a RN II, 30 Credits. The Employer argues the grievant is contending she is entitled to a 6% (six per cent) increase in pay, not because she meets the requirements of the classification, but because the Employer erroneously classified new hires. Here the Employer points out that in 1990 the parties agreed to Article 22, Section 22.04, which required the Employer to upwardly adjust the wage rate of current employes to that of a new hire. Employes already above the rate of a new hire would not receive an upward adjustment. The Employer further points out the grievant does not contend any violation of this provision. The Employer argues that even if the Union can get over the hurdle of basing a violation and remedy on a provision which no longer exists as of the date the grievance was filed, the Union is unable to demonstrate any harm to the grievant. At most, the Employer argues, if there was an error the error was the improper classification of six (6) new hires and the remedy would be to properly classify these employes, something which would have no effect on decreasing their wages or increasing the grievant's wages.

The Employer concludes by acknowledging the grievant originally asked to be reclassified back in 1987 or 1988. At that time she was informed there was no contractual basis for her request and informed her that if she wanted special consideration to have the matter addressed by her representative during negotiations. The Employer contends this was finally done during the 1991 when she received an increase and the RN classification system was scraped. The Employer argues the grievant now wants to have a previous agreement resurrected and a remedy based upon a previous agreement. The Employer asserts such a request exceeds the undersigned's authority.

In its reply brief the Employer argues both changes, the elimination of the RN classifications and the grievant's individual adjustment, were agreed to be retroactive to February 1, 1991. Thus, the Employer asserts, the grievance is a claim to have an employe reclassified to a position which no longer exists. The Employer points out the undersigned does not sit to simply dispense industrial justice but has a function which is specifically and narrowly defined by the parties collective bargaining agreement. The Employer argues the Union claim that the grievance arose in 1987 does not meet the requirement that the grievance arose during the term of the 1990-1991 collective bargaining agreement. The Employer also argues the grievance must allege a violation of an express provision of the collective bargaining agreement. The Employer claims the Union contention that Sections 22.03 and 22.05 were violated ignores the grievant's acknowledgement she was never reclassified. Finally, the Employer points out the Union's case calls for a claim of relief under a provision which had ceased to exist prior to the filing of the grievance. The Employer concludes the grievant's claim simply comes too late.

The Employer would have the undersigned find that the instant matter is not arbitrable.

UNION'S POSITION:

The Union contends the undersigned does have the authority to hear a grievance filed pursuant to the old collective bargaining agreement even though a later, retroactive modification of the collective bargaining agreement was entered into after the grievance was filed. The Union contends any doubts should be resolved in favor of coverage. In support of its position the Union points to In re City of Jackson v. United Steelworkers, 64 Lab. Arb. 1072 (1975; Goldman, Arb.). Therein the arbitrator found a new agreement which implemented time limits for each step of the grievance procedure did not bar a grievance which did not comply with the time limits and was filed before implementation of the new time limits even though the collective bargaining agreement was retroactive to a time preceding the filing of the grievance. The arbitrator held it was unreasonable to enforce time limits which were non-existent at the time the grievance was filed. The Union argues the instant matter is similar. The grievant filed her grievance when the new agreement did not exist. The Union argues the new amendment which did away with an old provision does not relieve the Employer from the liability for violating the old provision, particularly when the grievant brings the grievance forward while the old provision was still in effect.

The Union also points to the collective bargaining agreement's grievance procedure and argues that the phrase "this agreement" provides the undersigned with the authority to determine the instant matter. The Union contends that as the grievance was filed under the old terms the phrase "this agreement" refers to the same agreement the grievance was filed under.

The Union also contends the expiration of a collective bargaining agreement does not terminate a party's duty to arbitrate. The Union argues that just as a grievance continues when a collective bargaining agreement expires, the agreement with respect to RN classifications did not expire because the classification scheme was abolished in April 1991. Such an expiration does not relieve the parties of their obligation to resolve their dispute over the classifications via the arbitration process. The Union contends it was the classification scheme in effect that was violated by the Employer and that agreement is subject to the grievance procedure.

In its reply brief the Union argues the narrow issue to be addressed is whether a retroactive application should deprive the arbitrator of jurisdiction. The Union acknowledges that the elimination of RN classifications was discussed at the bargaining table during February and March 1991. However, the Union points out, neither party ratified the agreement prior to the filing of the grievance. The Union asserts that the agreement in effect at the time of the filing of the grievance contained three (3) RN classifications and if the grievance was considered on that date by an arbitrator the original 1990-1991 collective bargaining agreement would be the one applied. Thus, the grievance is a request not to ignore the terms of the collective bargaining agreement but a request to apply it as it existed at the time of the filing of the grievance. The Union argues the Employer contention that the agreed upon changes were in existence at the time of the filing of the grievance is a practical impossibility. The Union further argues that it is well understood that the terms of a collective bargaining agreement in effect at the time of the filing of a grievance are the terms to be applied in a grievance arbitration.

The Union also asserts the collective bargaining agreement under which the grievant filed her grievance is the agreement to be used to determine the appropriate remedy. There were RN classifications at the time the grievance was filed and the issue of whether any harm was done to the grievant by the Employer's actions can be addressed. The Union argues it is appropriate to determine whether the Employer is responsible for any retroactive wages.

The Union would have the undersigned find that the Arbitrator has jurisdiction to consider whether the original 1990-1991 collective bargaining agreement was violated.

DISCUSSION

The parties collective bargaining agreement places limitations on the undersigned's authority. Specifically, the undersigned has no authority to "...change, add to, or subtract from the terms of this agreement.". Further, the undersigned does not have the authority to "...nullify or modify any of the provisions of this agreement for the purposes of a particular case.". Clearly, the phrase "terms of this agreement" limits the undersigned's authority to the four (4) corners of the 1990-1991 collective bargaining and bars the undersigned from looking beyond the 1990-1991 agreement. Further, while the Union is correct that the modifications of the collective bargaining agreement ratified by the parties where not in existence on the date the grievance was filed, the parties specifically made their agreement retroactive to February 1, 1991. The grievant's claim in the instant matter is in effect a request that the undersigned nullify the retroactivity agreement of the parties. This the undersigned clearly does not have the authority to do.

Article 29 of the parties' collective bargaining agreement also specifies that the collective bargaining agreement cannot be modified except in writing by mutual agreement between the parties. Clearly, when the parties reached agreement on modifying the collective bargaining agreement they complied with this provision. When the parties modified the agreement they set forth its complete terms and the classifications of the agreement were modified as of February 1, 1991 to do away with the RN classification scheme. The undersigned finds he does not have the authority to undo what the parties have voluntarily agreed to do. While the undersigned may be sympathetic to the Grievant's plight and recognizes the Grievant's concern that an injustice has occurred, the undersigned's authority is controlled by the collective bargaining agreement between the Union and the Employer. To have jurisdiction in the instant matter the undersigned would have to conclude that the RN classification scheme was in existence on the date the Grievant filed her claim. To so do the undersigned would have to nullify the parties' specific agreement that the RN classification scheme ceased to exist as of February 1, 1991. The undersigned does not have the authority to reach such a conclusion.

The undersigned would also note here that unlike the Jackson case cited by the Union, the instant matter is not one where the successor agreement was a glimmer in the parties' eyes. Herein a mutual agreement was reached prior to the filing of the grievance. Both parties were aware of the grievance and still signed into effect the modifications identified above. Both parties were aware during the processing of the grievance the RN classification scheme was to be eliminated as of February 1, 1991. Both parties agreed that the elimination of the classification scheme would not effect any employe's wages with a specific exception for the grievant which was reached prior to the filing of the grievance. While the Jackson case does stand for the proposition that disputes should be resolved on the merits rather than technical grounds, it is distinguishable from the instant matter because in Jackson there was an agreement between the parties not to process the grievance during negotiations. The undersigned also notes the Jackson case does not cite the arbitrator's jurisdictional authority.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented by the parties the undersigned concludes the grievance

is not arbitrable. The grievance is thus dismissed.

AWARD

The grievance is not arbitrable and is therefore dismissed.

Dated at Madison, Wisconsin this 27th day of November, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator