BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO	Case 311 No. 46078 MA-6859
and	
MILWAUKEE COUNTY	

Appearances:
Ms. Carol Beckerleg, Field Representative, Wisconsin Federation of Nurses & Health Professionals, AFT, AFL-CIO, on behalf of the Federation.
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of Milwaukee County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Federation and the County respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held in Milwaukee, Wisconsin on October 30, 1991. No stenographic transcript was made. The parties completed their briefing schedule on December 9, 1991. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

The parties at hearing were unable to stipulate to the framing of the issue.

The Federation proposed the following:

> Did the County violate Sec. 2.32(5) and 1.05 of the collective bargaining agreement when it denied a transfer to the grievant? If so, what should the remedy be?

The County frames the issue in this manner:

> Was the grievant the most senior qualified employe as the term has meaning with respect to Sec. 2.32(5)(e) of the memoranda of agreement when she was denied a transfer? If so what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

1.05 MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the workforce; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employes from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Federation.

In the event a position is abolished as a result of contracting or subcontracting, the County will hold advance discussions with the Federation prior to letting the contract. The Federation's representatives will be advised of the nature, scope of work to be performed, and the reasons why the County is contemplating contracting out work. Notification for advance discussions shall be in writing and delivered to the President of the Federation by certified mail.

2.32 TRANSFER POLICY.

(1) Transfer Priorities: For purposes of this section, transfer shall mean the filling of vacancies by the relocation of an employe from

one position to another within the same classification.

(2) Employes having been selected for either an intradepartmental posted vacancy, or an interdepartmental transfer within classification, shall have a three (3) month trial period to determine ability to perform on the job and desirability to remain on the job . If within three (3) months an employe does not successfully complete the trial period or desires to return to her former position, she shall be permitted to return to the former position from which she transferred in the event such position remains vacant.

If such position has been filled, she shall return to any vacant position in her classification in the department from which she transferred. If no such vacancy exists, the employe may remain where she is and may request a transfer to any other department in County service or will be transferred back to the first vacancy in her classification in the department from which she transferred.

(3) Interdepartmental Transfers:

(a) Employes desiring a transfer from one position in the same classification or to a position in a classification having identical minimum qualifications as determined by the Department of Human Resources but under a different appointing authority shall submit a request in writing to the Department of Human Resources which shall maintain a master file and on January 1st each year thereafter, all such requests shall be expunged from the master transfer file, by classification of all interdepartmental transfer requests. When a vacancy occurs in a department, the Director of Human Resources shall certify names from the eligible list for that classification to the department head in accordance with Section 63.05 of the Wisconsin Statutes, together with those on the transfer list in that classification.

(b) Employes shall not normally be entitled to file a request for a transfer until they have completed their probationary period. However, when the appointing authority deems it to be mutually advantageous, employes may be permitted to transfer prior to the completion of their probationary period, but will be required to serve their full probationary period in the position to which they have

transferred.

(c) Fitness being substantially equal, the most senior employe having a request on file shall be appointed to fill the vacancy. An employe seeking a transfer shall not be denied a transfer by the appointing authority in the department from which the employe is seeking a transfer for a period in excess of 20 working days.

(d) When an employe does not successfully complete her trail (sic) period and is returned to her former position or to another position in her classification, she shall do so with full seniority and whenever practicable shall be returned to the same shift.

(e) Whenever the most senior employe is denied a transfer or transferred employe does not successfully complete the trial period, the reason for denial or noncompletion shall be made known to her in writing by the appointing authority.

(4) Involuntary Transfers

(a) For the purpose of this section, an involuntary transfer shall mean the relocation of an employe from a department or ward which has been closed or reduced in staff, necessitating the transfer of such employe to another department or ward.

(b) When it becomes necessary because of the circumstances in par. (4)(a) above that an employe be transferred from a department or ward, the least senior qualified employe in the affected classification shall be transferred first.

(c) An employe transferred by the County from one department or ward shall return to a position in the same classification in her original department or ward, when a vacancy occurs, if she so requests.

(d) When two or more employes are transferred, the most senior employe shall return to her department or ward first, if she so requests.

(e) The County agrees to notify the Office of the Federation of Nurses and Health Professionals prior to the opening or closing of any ward.

(5) Intradepartmental Posting

(a) For purposes of this section, a transfer shall mean the filling of vacancies by the relocation of an employe from one position to another within the same classification under the same appointing authority.

(b) Notices of all positions within established bargaining unit classification which are to be filled shall be posted in one location at the Milwaukee County Medical Complex, one location in the Laboratories and one location at the Mental Health Complex, as mutually determined by the Council and the appointing authority or his designee 7 days prior to filling. Postings shall include department, unit, and shift. Employes wishing to be considered for appointment to such vacancies shall make their requests in writing during the posting period to the appointing authority. Copies of posted vacancies shall be sent to the Federation at time of posting.

(c) Employes shall not be selected for posted vacancies in their classification more than once per 12 month period except for vacancies within the employes own unit which only result in shift changes.

(d) Any employe having been selected for a posted vacancy may not be retained in their current position for a period in excess of 20 working days.

(e) Posted vacancies shall be filled by the most senior qualified employe within the same classification and department, before it is filled by the most senior qualified employe under the same appointing authority.

(f) Whenever an employe is denied a request for a posted vacancy whether they are the only requestor or the most senior of several requestors, the reason for denial shall be made known in writing to such requestor by the supervisor who rejected the request.

(g) Employes shall not normally be entitled to file a request for a transfer until they have completed their probationary period. However, when the appointing authority deems it to be mutually advantageous, employes may be permitted to transfer prior to the completion of their

probationary period, but will be required to serve their full probationary period in the position to which they have transferred.

(6) The provision of this section are subject to the requirements of the Order issued by the Honorable Myron L. Gordon in Johnnie G. Jones, et al. vs. Milwaukee County, et al, Civil Action No. 74C-374.

(7) Nothing in the above sections shall preclude administrative transfers with mutual consent of the union and management and said administrative transfer shall have priority over transfer requests.

BACKGROUND:

The facts in this matter are virtually undisputed with the exception of whether or not the County effectively repudiated and terminated a past practice which was contrary to the express language of the agreement. On March 4, 1991, two part-time RNI positions in Flight for Life were posted at the Milwaukee County Medical Complex. The grievant, Yvette Morrow, an RNI in the Emergency Department was the second most senior person to post for one of the positions. The most senior employe who applied was offered one of the disputed positions but refused it. The two positions were subsequently filled by employes with

less seniority than Morrow. The County denied Morrow's transfer application because it found her to be unqualified on the basis of her poor attendance record.

The record indicated that Milwaukee County had a fairly structured absenteeism policy in place. Continuous review occurs and should an employe's absentee rate exceed 5%, they are subject to a counseling conference. If absenteeism exceeds 7%, they receive a formal written warning, and absenteeism in excess of 10% subjects an employe to suspension or discharge.

Morrow had received two counselings for absenteeism prior to April of 1991. In October of 1990, she was informed that her rate for the proceeding nine months from January of 1990 to September of 1990 was 6.3%. In January of 1991, she was informed that her rate had been reduced to 4.7%. On April 4 or 9, 1991, she was informed that her rate was 5.1%.

Morrow had applied for the transfer in late March of 1991. She was denied said transfer on April 7, 1991 and informed that she was unqualified due to her attendance.

The parties do not, however, agree upon the interpretation of the language applicable to the instant dispute. The County claims that in 1988 it repudiated or terminated any past practice which may have existed wherein it interpreted "qualified" to mean employes holding a position in a given classification with regard to intradepartmental transfer. It substituted a new definition of "qualified" as meaning the employe best meeting the minimum qualifications as determined by the appointing authority. Federation witness Shirley Uribe testified that the County withdrew this notice as to the purging of the past practice at the next bargaining session and that a committee on Qualifications was set up instead. The County disagrees, maintaining that the notification terminating the past practice was never withdrawn. It points to both sets of bargaining minutes and the "Qualifications" language in the contract.

During the bargaining for the 1991 Memorandum of Agreement, the County proposed deleting language in Section 1.05 referring to transfer language subject to "existing practices" and proposed to include language specifically granting the County ". . . the right to determine competencies for specific areas and monitor their continued compliance. . . ." These proposals were ultimately withdrawn by the County and not included in the 1991 contract.

In 1991, the parties settled a grievance in which another employe, Gail Vierra, was involved. In settling said grievance, the County agreed to offer the position to the most senior person on the certification list, or in the event of refusal, the next most senior person on the list.

It further appears that attendance had been used as a basis, or partial-basis, for denying transfer on two other occasions in May of 1990 and January of 1991, involving employes Linda Reynolds and Drexella Ward. The Federation, however, maintained that it was unaware of any County practice applying attendance criteria in denying transfer until the instant case.

POSITION OF THE PARTIES:

Federation:

The Federation argues that the clause in dispute is a "sufficient ability" clause requiring the employer to determine only whether the employe with greater seniority can in fact do the job. Under such a clause, the senior bidder must be selected if he possesses ability sufficient to perform the work. The Federation argues that because the clause is a sufficient ability clause, there is no basis for comparison between applicants; and the grievant is entitled, unless she cannot perform the requisite duties. It suggests that the grievant, by virtue of holding a position as a Registered Nurse, is qualified for the position.

The Federation points to its two witnesses who testified that the County withdrew its notice purging the past practice in support of its position. It further notes that the Committee on Qualifications has not completed any recommendations with respect to RNI transfers. It also stresses that during the 1991 bargaining the County proposed changes in the management rights language which it later withdrew. According to the Federation, the County is attempting to gain through arbitration what it was unable to achieve through bargaining.

The Federation also argues that repudiation of a practice which gives meaning to ambiguous language in the written agreement would not be significant - the effect of this kind of practice can be terminated only by rewriting the language.

The Federation also points out that the County never produced any evidence to dispute Federation witness testimony that transfers were awarded solely on the basis of seniority. It stresses inconsistencies in County evidence wherein one witness states that for the past three years attendance had been looked at for transfers and promotions, while a step 3 grievance response claims that the County had been using attendance in considering transfers for the last one or two years.

The Federation notes that other arbitrators have refused to permit attendance to be the sole factor in denying the senior bidder the position. It also stresses that the County has an inconsistent practice in transferring employes with an absence rate of 5% or greater.

In sum, the Federation submits that the language in dispute involves a sufficient ability clause; that any change in transfer procedure must be bargained; and that other settlements plus the County's past actions have shown a practice of utilizing seniority without review of employe attendance for transfers. It, therefore, maintains that the grievance should be sustained and the position awarded to the grievant.

County:

Looking at the disputed language, the County argues that the issue of seniority "kicks in only if the most senior person is qualified." "Qualifications" or fitness for holding a particular position are determined by the County's Department of Human Resources. According to the County, the language regarding intradepartmental transfers clearly carries with it the expectation that the appointing authority will examine the qualifications of employes when considering transfer requests. Only once employes are deemed qualified will the most senior qualified employe be granted a transfer.

The grievant, the County submits, at least for purposes of transfer, was

not qualified because of her less-than-stellar attendance record. This is the County's sole reason advanced for finding her not to be qualified. The grievant was the subject of minor discipline in order to correct said attendance problems.

The County disputes the credibility of Federation witnesses who testified that the Federation was unaware that attendance was being used as a qualification for purposes of transfer because a Federation witness's daughter was denied a promotion based upon her poor attendance.

Noting that no factual dispute exists as to whether or not the past practice was terminated, the County stresses that it was then incumbent upon the Federation to bargain the practice. It submits that the practice vanished. Pointing to successor language insuring against waiver of rights, the County asserts that if it were still bound by the practice, it would have virtually no rights to waive. Looking at the applicable language without any past practice to define it, the City argues that the language is clear and unambiguous and supports its position. Even if said language is found not to be clear, the County maintains that a new practice whereby satisfactory attendance is required to make one "qualified" has been in place for three to five years.

Noting that the grievant's attendance problems are unrefuted, the County believed her to be "unqualified" within the meaning of the language. It requests that the grievance be denied.

DISCUSSION:

In order to interpret the applicable language in the instant case, it is necessary to decide whether or not the County terminated a past practice of awarding transfers based solely upon seniority. Although Federation witnesses testified that the County had withdrawn its termination notice at the February 9, 1988 negotiating session, neither party's minutes reflect such a withdrawal. The undersigned believes the minutes to be a more accurate reflection than memory in this instance and would find that the past practice in effect at that time had been terminated. This conclusion is buttressed by successor language inserted into the agreement dealing with the issue of qualifications, because there would be no need for the successor language if the County were to continue to be bound by strict seniority in allowing transfers.

Having found that past practice which existed prior to January of 1988 was terminated by the County, the question of whether the applicable language is clear and unambiguous must next be addressed. Both the language provisions dealing with interdepartmental transfers and intradepartmental transfers are modified seniority clauses. The language applying to interdepartmental transfers, i.e. "fitness being substantially equal, the most senior employe . . . " to be appointed, is a relative ability clause where comparisons between qualifications of employes bidding on the job are necessary, proper and appropriate. This language involving interdepartmental transfers gives the County greater latitude in evaluating applicants for transfer with respect to their qualifications than does the language which applies to intradepartmental transfer. This intradepartmental transfer language, which provides that "posted vacancies shall be filled by the most senior qualified employe within the same classification and department before it is filled by the most senior qualified employe under the same appointment authority," is, as the Federation notes, a sufficient ability clause. Moreover, "minimum qualifications are enough under a sufficient ability clause." 1/

1/ Elkouri and Elkouri, How Arbitration Works, (4th Ed.) p. 612.

In order for the County to prevail it must demonstrate that the grievant was not qualified under a sufficient ability standard. The County argues that it was entitled to determine employe applicant-for-transfer qualifications and that it found Morrow to be unqualified based upon her attendance record. Many arbitrators have held that ordinarily, management cannot deny postings solely on the basis of a poor attendance record. 2/ Additionally, others "have held that an employe's attendance record is not a factor to be used in determining the ability or qualifications of an employe. They reason that nothing in the contract permits management to use this factor to pass over a senior employe who otherwise meets the contractual requirements, and further, that if an employe is guilty of absenteeism it is a matter of discipline . . ." 3/

This line of reasoning is persuasive to the undersigned with the following reservation. An employer may certainly consider attendance in its evaluation of qualifications if it can demonstrate that satisfactory attendance as it relates to the new posted position is of greater urgency or more critical than that required in the current position(s) from which the employes are bidding. Here no such exception exists or has been advanced. The grievant currently works in the Emergency Department. She bid for a vacancy in the Flight for Life program. The County has not established that attendance is of greater importance in the Flight for Life program than in the Emergency Department. Although the County has attempted to apply its attendance criteria uniformly; on at least two occasions it permitted transfers where said criteria had not been met. One instance was due to a calculation error. The other was a response to a threat by the aggrieved employe to quit should she be denied a transfer. These occasions buttress the conclusion of the undersigned that attendance is not an appropriate criteria to be utilized by the County under the circumstances especially when a sufficient ability standard is being interpreted.

Finally, the County argues that the Federation acquiesced in its decision to apply attendance criteria in the case of transfer. It stresses that it denied three other employes transfers prior to denying the grievant based upon their poor attendance. This argument is rejected. The three denials occurred within a one-year period and the Federation categorically denied that it was aware of the County utilizing attendance as a criteria for denying transfers. The testimony of Federation witnesses Uribe and Kelsey is found credible in this respect. While Uribe may have been aware of an employer change in applying qualifications for promotional purposes, there is nothing in the record to refute her testimony as to Federation awareness of the County's changed transfer policy.

Accordingly, it is my decision and

AWARD

2/ Ibid., p.637, footnote 265.

3/ Supra at 638. See also, Welsh Plastics, LTD, 71 LA 80, 81-82 (Kahn, 1978); Dearborn Fabricating & Engineering Co., 64 LA 271 (Kallenbach, 1975).

1. That the grievant was the most senior qualified employe as the term has meaning with respect to Sec. 232(5)(e) of the memorandum of agreement when she was denied a transfer.

2. That the County is directed to grant the grievant, Bertha Yvonne Morrow, a transfer to the Flight for Life program immediately and to make her whole for any losses that she may have incurred as a result of the denial therefrom.

Dated at Madison, Wisconsin this 3rd day of March, 1992.

By _____
Mary Jo Schiavoni, Arbitrator