BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 150 SERVICE AND HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO	Case 41 No. 47384 A-4918
and	
MERITER HOSPITAL, INC.	

Appearances:
Mr. Todd Anderson, Business Agent, appearing on behalf of the Union.
Axley, Brynelson, Attorneys, by Mr. Michael J. Westcott, appearing on behalf

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Mary Alt, concerning the Employer's refusal to allow her to continue in her long-standing position.

The undersigned was appointed and held a hearing on August 31, 1992 in Madison, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on October 21, 1992.

ISSUES:

The Union proposes the following:

> 1. Did Management violate Article I, Section 3 of the collective bargaining agreement, equal opportunity employment, in actions they took which lead Mary Alt's position to place medical restrictions on Ms. Alt resulting in loss of her position of employment with Meriter Hospitals, Inc.?

The Employer proposes the following:

> 1. Was the grievance timely filed as required by Article XXIV, Section 2, Step 1 and Section 6?
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> 2. Did the Hospital violate Article I, Section 3 of the collective bargaining agreement when it filled the grievant's .9FTE Food Service Worker position at the Capitol site?
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> 3. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE I. GENERAL CONDITIONS

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Section 3. Equal Opportunity Employment

It is agreed by the Union and the Employer that the Employer shall continue its present employment policy in accordance with all local, state and federal laws, and it is further agreed that neither the Hospital nor the Union shall discriminate against employees on the basis of age, sex, race, creed, national origin, color, handicap, sexual orientation or any other legally prohibited basis. Selection and continued employment will be based on qualifications and ability to perform assigned duties and responsibilities as set forth in this agreement.

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ARTICLE XXIV. GRIEVANCE AND COMPLAINT PROCEDURE

Section 1. Definition

A grievance is hereby defined as a controversy between the Employer on the one hand and the Union, or employee or group of employees (represented by one [1] designated employee) covered by this Agreement on the other hand, which controversy must pertain to any condition of employment or to the interpretation or application of this Agreement. A grievance shall not be considered under the grievance procedure unless the steps and time limits of the outlined procedures are followed.

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Section 2. Grievance Procedure

Grievances shall be resolved in the following manner:

STEP 1: Within five (5) working days of knowledge of the incident giving rise to the grievance, the employee shall discuss the matter with his/her supervisor. Within five (5) working days the supervisor will respond orally to the employee's concerns. If the matter is not amicably adjusted between them, the employee and Union representative shall submit a written grievance/complaint to the employee's supervisor within five (5) working days of the oral response, specifying the contract provision or provisions claimed to have been violated and the remedy requested. The supervisor shall give a written answer to the grievance/complaint and/or Union representative within five (5) working days.

STEP 2: If the grievance/complaint is not resolved in STEP 1, it may be appealed by the grievant/ complainant and/or Union representative to the grievant's department head or designated representative in writing, within five (5) working days after receipt of the answer in STEP 1. Within five (5) working days after such appeal, a meeting shall be arranged between

the grievant/complainant and/or the Union representative and the department head or designee to discuss the matter and its possible resolution. If the matter is not resolved in such a meeting, the department head or designee shall provide a written answer to the grievant/ complainant stating the reasons for his/her position within five (5) working days of the meeting.

STEP 3: If the grievance is not resolved in Step 2 it may be appealed by the grievant and/or Union representative to the Director of Personnel Services or his/her designee within five (5) working days after receipt of the answer in Step 2. Within five (5) working days after such appeal, a meeting shall be arranged within five (5) working days between the Union and the Director of Personnel Services or his/her designee. Following such meeting, the designated Hospital representative shall provide a written answer stating the reasons for his/her position to the grievant and the Union within five (5) working days.

STEP 4: If the grievance cannot be resolved at STEP 3, either party may request one (1) mediation meeting with a mediator assigned by the Wisconsin Employment Relations Commission. If neither party wishes such meeting, the grievance may be appealed to arbitration.

Section 3. Arbitration.

If the matter is not settled in Step 3 or Step 4, the grievance may be submitted to arbitration upon written request of either party delivered to the other within ten (10) working days of the Step 3 response or mediation meeting if one was held. Should the matter go to arbitration, the party desiring arbitration shall request the Wisconsin Employment Relations Commission (WERC) to appoint a staff member of the WERC to serve as arbitrator for the dispute.

A. Limitations

The arbitrator shall not have the power to add, modify, or change any of the provisions of this Agreement.

B. Arbitration Cost

The fees and expenses for the arbitrator and the transcript of the arbitration hearing shall be borne by the party who loses the arbitration case. Each party shall bear the cost of its own witnesses, exhibits and counsel.

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Section 6. Time Limitations

If an employee and/or Union fails to comply with

> the limitations of time specified herein, the Hospital may rightfully refuse to process a grievance further and the grievance shall be considered null and void. Nothing herein, however, limits the Employer and the Union from mutually agreeing to extend any time limitation. Time limitations expressed in working days shall not include Saturday, Sunday or holidays.

DISCUSSION:

Background

Grievant Mary Alt has been employed by Meriter and its predecessor Methodist Hospital since 1977 as a Food Service Worker. During virtually all of that time, she has suffered frequent epileptic seizures, which were known to the Employer. On many occasions, the grievant took time off from work as medical leaves; and on several occasions, she injured herself slightly, and on one occasion injured a co-worker slightly, in the course of fainting on the job. There is no dispute that over a substantial period of time the grievant's medical problems were well known to the Employer and that the Employer followed the recommendations of the grievant's physicians.

During 1990, the grievant changed her primary physician to Dr. Ronald Zerofsky, a physician affiliated with Physicians Plus, an entity which operates out of Meriter-related facilities. When the grievant had a particularly severe seizure in late June, 1991, Dr. Zerofsky placed her on a medical leave of absence for several months. On August 29, Dr. Zerofsky released Alt to return to work without restrictions. The Employer refused to return Alt to her existing job, pending inquiring from Dr. Zerofsky why he had removed all restrictions when a month earlier he had issued a set of restrictions which were quite extensive in anticipation of Alt's return to work. Dr. Zerofsky discussed the matter with an employe health nurse at Meriter, Mary Adler, who had been assigned to superintend the Employer's handling of the grievant's medical problems at work. On October 9, 1991, Dr. Zerofsky formally cleared Alt to return to work. The restrictions he set at that time included prescribed medications [three different types prescribed permanently] and a permanent restriction to "light heavy work", defined as "lifting 75 pounds maximum with frequent lifting and/or carrying of objects weighing up to 40 pounds".

The grievant returned to work on October 14, and had a seizure the same day which incapacitated her. On October 15, Dr. Zerofsky set new restrictions for Alt, including the following: not retrieving carts alone, not delivering nourishment to patient floors alone, not working near the dish machine [which generates steam and contains water at 180 degrees Fahrenheit], not operating the slicer machine, garbage disposal or coffeemaker, and not working in proximity to hot pellets in the kitchen area. Dr. Zerofsky testified that he was not aware at that time that the grievant had had a recent fall from a ladder which resulted in additional restrictions imposed by her chiropractor to protect an injured left shoulder. On November 5, 1991, Dr. Zerofsky wrote to Adler, confirming his list of restrictions and stating that they would remain in effect indefinitely.

Charlotte Riddle, the Hospital's Director of Food and Nutrition Services, testified that she calculated the proportion of Alt's job being excluded at over 50% as a result of Dr. Zerofsky's October 15th restrictions. Riddle prepared a memorandum to the Hospital's Manager of Labor Relations, Judy Peirick, to this effect on October 22. The memo also stated that because these restrictions were now indefinite, it was necessary to fill the grievant's position. Riddle testified that on October 21, she met with Alt, Training

Supervisor Dan Lamb, and Union President John Gibson to review the grievant's restrictions. The grievant was on that day beginning work at a different position, in the cafeteria at the Hospital's Park Street site. Riddle testified that the Park Street position, which was part of a larger operation, could be tailored in such a way that the grievant's restrictions could be accommodated, while at the smaller hospital on West Washington Avenue the grievant had to perform a greater range of functions. Riddle testified that she told the grievant on this occasion that the Hospital was posting her position at the other site and filling it, because of the fact that her work restrictions were now indefinite. Riddle identified the only restriction on the grievant that would apply at the Park Street site as being not delivering late trays to patient units unescorted. Riddle testified that the Hospital was able to accommodate this restriction.

Riddle also testified that she informed the grievant that the position she was being given at Park Street was a temporary position opened up by an employe who was on leave. On November 13, Riddle confirmed these steps by memorandum to the grievant, in the following terms:

> Mary, per our discussion on November 8, 1991 1/ with you and John Gibson, Dr. Zerofsky has stated to Mary Adler, RN (EHS) that the restrictions placed on your physical activity on October 15, 1991 are in effect indefinitely. (see attached) We cannot accommodate those restrictions at the Capitol site and are proceeding to post and fill your former position. At this time, we are able to temporarily accommodate your restrictions at the Park site, filling a food service worker position which is temporarily vacant due to a medical LOA.
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> Please let me know if you have questions or concerns.

Peirick testified that on January 9, 1992 she met with Employment Coordinator Char Groom, the grievant and her husband, Chief Steward Tom Elert, and Union President Gibson. Peirick testified that the purpose of the meeting was to identify other options for Alt once the temporarily absent employe, who held the Park Street job permanently, returned. Peirick testified that she pointed out to Alt that the Hospital had previously agreed to mail to her all job postings in the Hospital, and that she was to contact Groom if interested in any of them. Peirick testified that the grievant had not applied for three file clerk positions, none of which would have contravened Dr. Zerofsky's restrictions. Peirick also testified that in this discussion the grievant was offered training opportunities. The grievant's testimony essentially agreed with Peirick's.

Peirick testified, without substantial contradiction, that the grievant never took action on any of these opportunities, and that on January 20, Riddle wrote to Alt confirming that the incumbent in her temporary position was returning to work that day and that the Hospital would continue to provide work for her alongside the returned employe through January 31. That memo further stated that as of January 31 the grievant would again be placed on a disability leave of absence. The grievant was placed on disability status on January 31,

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1/ The record is not clear as to the date of this meeting, but the evidence is uncontroverted that such a meeting occurred, that the grievant was afforded union representation at the meeting, and that the meeting predated the cited memorandum.

1992. The grievance in this matter was filed on February 4, 1992.

The parties presented a wealth of detail as to the grievant's medical history, but the threshold issue is whether the grievance was timely filed.

Timeliness

What appears to be a Step 3 answer to the grievance was sent by Peirick to the grievant on February 24, 1992. It states as follows:

> Your grievance alleges that management has violated Article I, Section 3 of the Collective Bargaining Agreement by discriminating against you due to your handicap. It is the Hospital's position that this section of the contract has not been violated. It is also our position that you have not been discriminated against due to handicap or for any other reason. Charlotte Riddle notified you that your physician had not released you to your former position at the Capitol site and that we must therefore abide by the physician's letter.
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> On 11-13-91 you began the temporary position at the Park Street site which ended on 1-31-92. Since the contract requires that grievance be filed "within five (5) working days of knowledge of the incident giving rise to the grievance", this grievance is not timely. Without waiving this defense we will continue to work with you to resolve your concerns. If this matter does proceed to arbitration, we will raise timeliness as a defense.
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> We will continue to work with you in an effort to find permanent placement in another position at Meriter. There is no vacancy at this time which can reasonably accommodate your restrictions and that meets your requirements in terms of FTE and pay.

The Employer contends that it acted properly in objecting that the grievance was untimely and in proceeding to discuss and arbitrate the matter. In its reply brief, the Employer contends that it promptly raised the untimeliness issue and that as a matter of good labor relations it processed the grievance despite the untimeliness, while reserving its rights in this respect. The Employer notes uncontradicted evidence to the effect that the grievant was informed on (or before) November 13, 1991 that her former position would be filled and that she was serving in a temporary position which she could not expect to retain indefinitely.

The Union argues that the Employer "obviously has opted not to enact its remedy for the alleged grievance timeline violation", on the grounds that the Employer's proper remedy in the event that it believed the grievance untimely was to refuse to process the grievance. The Union further argues that the grievant, under Article XXIV, Section 2, had five (5) days of "knowledge of the incident giving rise to the grievance". The Union contends that Alt believed that she would always be gainfully employed by Meriter and that she would not logically realize that the incident "giving rise to" the grievance occurred before she was actually placed on a disability leave on January 31, 1992. The Union argues that since that was the effective date of her disability leave, the grievance filed four days later was clearly within the timelines of the contract.

While the written objection in the record 2/ to the timeliness of the grievance is dated February 24, 1992, the Union does not object that the Employer was late in raising this objection, and it appears that this was not the first mention the Employer had made of its timeliness argument. I do not find that under this contract language the Employer waived its timeliness argument by proceeding to process the grievance, for two reasons. In particular, the specific language in Article XXIV, Section 6 states that if an employe or the Union fails a time limitation, the Hospital "may" rightfully refuse to process a grievance further and the grievance "shall" be considered null and void. The language on its face thus draws a distinction between the treatment to be given the grievance and the procedure the Hospital may choose to follow. Under this language, there was every reason for the Employer to believe that it could process the grievance without waiving its right to claim strict compliance with the contractual timelines. A second reason is that by agreeing to process the grievance, while reserving its rights to argue timeliness at the hearing, the Employer did no more than to follow the pattern of grievance handling generally recommended by responsible labor relations professionals on both sides. The fundamental purpose of a grievance procedure is to resolve problems; and if a chance exists that a problem can be resolved to the parties' mutual satisfaction, setting aside a timeliness argument for later consideration in the event that confrontation proves unavoidable merely allows a process of discussion its fullest scope.

As I find that the Hospital did not waive its timeliness argument, it follows that the bulk of the events covered by the arguments raised by both parties fall outside the contractual time limit. The Union's assertion that the grievant did not have "knowledge" of these events is meritless. The record is replete with evidence that the grievant was fully informed of the Employer's views at all material times, and if there were any doubt, the November 13 memorandum sent to the grievant from Riddle, quoted above, specified on its face that the grievant's position was being posted and filled and that her current work at the Park site was in a temporary capacity.

The sole event which occurred within the contractual time period for filing grievances was the mechanical result of decisions made earlier. It is clear from all of the evidence that the grievant had every reason to know, and Union representatives were expressly informed, that the grievant's Park Street work would terminate with the return of the regular incumbent. While the Union attempts to make an argument of reliance from the fact that the Hospital retained the grievant an additional eleven days from January 20 to January 31, arguing that this created a doubt in the grievant's mind, the time period for protesting the posting and filling of her position had long since run by January 20. Meanwhile, the grievant's mere replacement in her temporary Park Street position by the permanent incumbent is not argued by the Union to be any kind of violation of the contract. And there is no evidence that the grievant was denied the opportunity to bid for another position that might meet her medical restrictions.

It is, perhaps, understandable that a long-service employe could not bring herself to believe that her preferred employment would not be kept open for her indefinitely. And despite the Employer's considerable efforts to proffer more suitable employment meeting the grievant's restrictions, as a matter of human nature it is also understandable that the grievant might resist accommodating herself to the realities of an unfortunate situation. Yet the

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2/ Joint Exhibit 3.

contract here does not speak in terms of the employe bringing himself or herself to terms with such unpleasant realities. It speaks instead in terms of knowledge; and knowledge, along with an informed Union representation, was given to the grievant long before the grievance was filed. I therefore find that the grievance was untimely under the terms of the collective bargaining agreement and that I lack jurisdiction further to address the merits of the matter.

In their briefs both parties request an Award which, under the terms of Article XXIV, Section 3 (B) of the Agreement, assesses the costs of the hearing transcript and WERC filing fee against the losing party. At the end of the hearing the Employer requested to depose a witness, who was unavailable on the day of hearing, on a subsequent day. The parties agreed that the Employer would assume the cost of that transcript, which is not covered by the Award below.

For the foregoing reasons, and based on the record as a whole, it is my decision

AWARD

1. That the grievance was untimely filed as to all incidents alleged except for the actual placement of the grievant on disability status as of January 31, 1992.

2. That the placement of the grievant on disability status as of that date did not violate the collective bargaining agreement, because it was the direct result of the permanent incumbent's return from medical leave to a position the grievant had been expressly given only as a temporary replacement.

3. That the grievance is denied.

4. That as the losing party, the Union shall pay the WERC's filing fee and the court reporter charges for the August 31, 1992 hearing.

Dated at Madison, Wisconsin this 15th day of January, 1993.

By _____
Christopher Honeyman, Arbitrator