BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1155, AFSCME, AFL-CIO	Case 24 No. 46268 A-4836
and	
ASHLAND MEMORIAL MEDICAL CENTER	

Appearances:
Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 182
DiRenzo & Bomier, 231 East Wisconsin Avenue, P.O. Box 788, Neenah, Wisconsin 54957-0788, by Mr. Howard T. Healy, for the Hospital.

ARBITRATION AWARD

Local 1155, AFSCME, AFL-CIO (the Union), and Ashland Memorial Medical Center (the Hospital), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Ashland, Wisconsin on March 26, 1992. No transcript was taken. The parties filed briefs and reply briefs, the last of which was received June 9, 1992. On August 31, 1992 the Arbitrator offered the parties an opportunity to brief the question of applicable law pursuant to Article 16, Section 7 of the collective bargaining agreement. The parties submitted those briefs by November 9, 1992. 1/

ISSUES

The parties stipulated to the following statement of the issues:

1/ Section 7 of Article 16 provides:

> Statutory Leave: This leave will be in accordance with applicable law.

In their briefs, the parties stated this section was irrelevant to the instant dispute.

1. Did the Hospital violate the Collective Bargaining Agreement when it denied the Grievant the right to bump after the Grievant was released to return to work after a Worker's Compensation injury?

2. If so, what is the appropriate remedy?

BACKGROUND

Grievant Bernice Roguski has been employed by the Hospital as a Licensed Practical Nurse since 1972. (A short break in employment of approximately a year is immaterial to this case.) At the time of the filing of the instant grievance, she was an Operating Room Technician. On February 5, 1990 she slipped on ice in the Hospital parking lot and shattered a bone in her left elbow. As a result she was absent from work, on workers' compensation leave, until May 5, 1990, at which time she returned to her former position with a five-pound weight restriction. With this restriction she was not able to perform all the duties of her position.

On January 7 & 8, 1991, the Hospital announced several lay offs and reductions in hours. The Hospital believed the reductions in staffing made it impossible to accommodate Grievant's work limitations for the full extent of her position and reduced the hours from her former position of .9 Full Time Equivalent (FTE) to .6 FTE. Director of Personnel Kathleen Carlson confirmed this reduction in a letter dated January 7, 1991:

> I am writing to confirm the temporary reduction in your work hours from your .9 position in the operating room to a .6 position in the operating room. As soon as your physician has released you to perform the full range of duties in your job description, you will return to your .9 position.
>
> Bernie, I believe John Malinoski has discussed with you the reasons that make this reduction in staffing necessary. We are experiencing a reduction in workload which has made staffing cutbacks throughout the hospital necessary. Since the staff in the operating room will be stressed by this reduction in staffing, we are no longer able to accommodate the limitations that your injury presents for the full .9 of your work schedule. We will continue to do that on a .6 basis. As I said, when your physician has released you fully, you will return to your .9 status.
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> . . .

On February 7, 1991, Grievant's orthopedic physician confirmed in writing his advice that she ask the Hospital for an assignment that would not require repetitive heavy lifting and stressing of the left elbow.

On February 25, 1991, a meeting took place among Grievant, Director of Nursing Dan Adams, Director of Personnel Kathleen Carlson, and Nursing Manager John Malinoski. Some portions of that meeting are in dispute, but it is not in dispute that as a result of the meeting, Grievant went on leave and received workers' compensation.

On May 8, 1991 Grievant telephoned Carlson to say she had been released

for work as of May 13, and wanted to resume her position in the Operating Room. Grievant said she would contact her doctor to determine whether there were any restrictions on her return to work.

During either the May 8, 1991 phone call or during the phone call that followed a May 13, 1991 letter, Carlson and Grievant discussed work possibilities for Grievant. Grievant asked for her position in the operating room. Carlson responded that there was no available work in the operating room, and she would explore other available work but was not certain of being able to find something by May 13. Grievant asked about her financial situation in the meantime, and Carlson said she believed Grievant would be eligible for Unemployment Compensation. Grievant also said she would exercise bumping rights to return to the Operating Room but Carlson insisted that she did not have that right.

It is unclear when Grievant filed for unemployment compensation, but the Initial Determination from that office shows that benefits were claimed for the week ending June 8, 1991.

On July 8, 1991, Grievant and Carlson had another telephone conversation in which Grievant asked for her former position and Carlson told her there was no opening in the operating room but Grievant was eligible for available work.

Grievant was given various other assignments, but did not return to her former position in the Operating Room. On July 8, 1991, Grievant wrote Carlson the following:

> This is to inform you of my intent to bump the least senior ORT in surgery.

The Hospital asserted Grievant did not have the right to bump into the Operating Room. A grievance was filed over the dispute and that grievance is the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE 6

LAYOFFS AND RECALLS

Section 1: When layoffs are necessary they shall be implemented as follows:

a) Layoffs shall be by classification and department. Employees with the least unit wide seniority in each classification within a department shall be laid off first.

b) Employees who are laid off shall have the right to bump the least senior employee in his/her classification, unit-wide, provided the employee is qualified to perform the work.

c) If an employee is unable to bump within his/her classification, then an employee may bump the least senior employee, unit wide in any classification where the employee has at least six months of documented equivalent employment experience.

THE POSITIONS OF THE PARTIES

A. The Union

The Union asserts the Hospital's practice in the past has been to hold open the position of an employe on sick leave until after the medical determination of the employe's likelihood of returning to work. Contrary to that practice, in Grievant's case, the position was filled prematurely. Additionally, Grievant was led to believe that the position was being held for her, and that she was not terminating her employment. The Union believes that Grievant was in fact laid off and as a laid off employe had bumping rights that she should be able to exercise. It concludes that she is entitled to a position in the operating room and entitled to be made whole for the period of time beginning with the filing of the grievance.

In its reply brief, the Union asserts that at the time of her leave initiated on February 25, 1991, Grievant was not aware that her position was going to be filled and in fact it was not filled because the March 8, 1991 posting was for a different classification. The Union believes Grievant was entitled to rely upon a January 25, 1991 letter from Personnel Director Kathy Carlson stating that when her doctor released her from restrictions she could return to her former, nine-tenths full-time-equivalent position. Finally, it asserts that the notice to exercise bumping rights cannot be untimely because Grievant was never given a clear and unambiguous answer to the question: "Am I laid off?"

B. The Hospital

The Hospital insists Grievant was not on layoff status but on medical leave and therefore is not entitled to bumping rights which under the contract are available only to those employes on layoff. It points to the evidence that other employes on medical leave have not had their positions held for them but rather had to accept the work that was available upon their return. It recites the events leading up to the leave taken by Grievant beginning on February 26, 1991 to demonstrate that Grievant initiated the leave and it could not be considered a layoff. It asserts the telephone conversations in May 1991 did not convert the medical leave to a layoff, but that even if the arbitrator should conclude that the leave became a layoff on that day, the request to bump was untimely presented.

ADDITIONAL FACTS AND DISCUSSION

The first question regards the nature of the leave that Grievant began on February 25, 1991 and from which she sought to return the following May. The Hospital maintains Grievant was on a medical leave of absence whereas the Union asserts the leave was either a layoff or was converted to a layoff in May.

As the Hospital points out, that leave resulted from Grievant's initiative relating to her medical concerns. When her doctor recommended that she have work that did not involve repetitive lifting and stressing of the injured elbow, the Hospital responded that they were unable to make that accommodation in her current position. Consequently, Grievant and Hospital representatives agreed, on February 25, 1991, that Grievant should go on a leave of absence. The leave was referred to by Carlson in her March 6, 1991 letter as a medical leave of absence. Finally, the leave was the occasion for worker's compensation benefits. All of these facts indicate a medical leave of absence.

When Grievant declined to sign the leave form, Carlson did not insist, and told Grievant that the signing was "merely a formality" and she would

consider Grievant on leave of absence even if she did not sign. Carlson did not indicate that the Hospital's waiving the requirement of a signature was thereby changing the nature of the leave and it cannot be concluded that the waiver transformed Grievant's leave into something other than a medical leave of absence.

Since the leave initiated on February 25, 1991 had the earmarks of a medical leave which are not overcome by the absence of signature on the leave form, I conclude the Grievant was on a medical leave of absence from that time until May 13, 1991.

What, then, are the rights of an employe upon returning from a medical leave of absence? The parties' collective bargaining agreement, Article 16, Leave of Absence does not address this question. The Article is a lengthy one of eleven sections, addressing seven different kinds of leaves of absence and including some details for the use of such leave. Among these other leaves, medical leave of absence is not specifically addressed and there is no mention of the job placement rights of employes returning from any kind of leave.

The Union asserts Grievant's rights to return to her former position are based upon the bumping rights provided by Article 6, Layoff and Recalls. (See "Relevant Collective Bargaining Agreement Provisions" above). Although Article 6 provides detailed descriptions of the exercise of bumping rights by laid off employes, it does not refer to employes returning from a leave of absence. Additionally, there is no basis upon which to infer that the parties intended these bumping rights to apply to such employes. The record shows that although some employes have been returned to their former position after a leave of absence, other employes have been reinstated to different positions. 2/ Returning employes to their former positions, when it occurred, appears to be the result of unilateral action by the hospital, for the Union did not present any evidence of any employes being allowed to exercise bumping rights upon return from a medical leave of absence. Grievant, therefore, does not have bumping rights derived from Article 6.

The Union argues that Article 5, Seniority also establishes a bumping right for Grievant. Article 5, Seniority defines seniority, specifies how it is calculated, how it is lost and finally, in section seven, requires certain procedures of an employe requesting transfer. Despite all these details, nowhere does the article describe when seniority is exercised; that is, Article 5, by itself, does not establish substantive rights. The extent of substantive rights conferred by seniority is treated under other articles, such as the Layoff and Recalls, Promotion, Work Day-Work Week-Overtime Pay and Vacations articles. In contrast to the substantive seniority rights conferred by these articles, the contract does not confer any seniority rights by which an employe returning from a medical leave of absence could bump into her former position.

The undersigned also rejects the Union's alternative argument that regardless of the type of leave Grievant originally had, she was in fact put on layoff status after she had her doctor's release but was not immediately given work. Grievant cannot be found to have been on layoff because her employment

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2/ The fact that the hospital has a history of not always returning employes from leave of absence to their former position was confirmed by Union President Denise Lampson who testified that "Basically the Hospital tries to bring employes back to their old positions, but in other cases they retrain the employes."

situation did not come from the Hospital's reduction in force, but rather the temporary unavailability of work. This temporary unavailability resulted from a series of events set in motion by Grievant's medical leave of absence. (As noted above, the medical leave was initiated by the Grievant, not the hospital.) In the face of that leave of absence of indeterminate length, the Hospital filled her former position.

Nor can it be said that the leave was a layoff because she received benefits pursuant to an Initial Determination, on June 22, 1991, from the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations (DILHR). DILHR is responsible not for interpreting the contract, but for compensating employes who are no longer receiving compensation from their employers for a variety of reasons, the most prominent of which is layoff. Such a determination does not, by itself, govern the contractual application of layoff rights.

There remains the question of whether Grievant was entitled to be reinstated to her former position by virtue of a promise or reassurance from the Hospital. The Union's argument in this regard refers to Carlson's January 7, 1991 letter to Grievant, cited above in the "Background" section.

The problem with the Union's argument is that the letter pre-dates the February 26 conference at which grievant and the Hospital agreed that Grievant would go on a leave of absence, thereby significantly changing the circumstances under which the January 7 letter was written. A promise to return Grievant to a .9 FTE from a .6 FTE position cannot operate to obligate the Hospital to return Grievant to her former position after she has been on a leave of absence.

The Union also argues that the Hospital is obligated to return Grievant to her former position because she was not told in the February 26 meeting that her position would be posted. That alleged fact is the subject of vigorous dispute, since Dan Adams testified that he did indeed tell Grievant that her position would be posted.

Even assuming, for the sake of analysis, that Grievant was not told her position would be posted, that silence would not obligate the hospital to hold the position open. Since the record shows that the Hospital has a mixed practice of sometimes filling in for employes on medical leave with a permanent replacement and sometimes merely filling in temporarily, this is not a case in which an employer is responsible for giving notice that a practice is being varied. Similarly, there is no evidence that Grievant was relying on a promise that her position would not be posted when she made her decision to go on leave of absence.

In summary, neither Article 16, Leave of Absence, nor Article 6, Layoff and Recalls, nor Article 5, Seniority, nor any other contractual provision allows the Grievant to exercise bumping rights to be restored to the position she held prior to her medical leave of absence. 3/

In light of the record and the above discussion, the Arbitrator issues the following

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3/ It is important to note that the parties stated the issue narrowly, addressing only Grievant's right to be returned to her former position. There was no dispute that grievant was entitled to work upon her doctor's release to work.

AWARD

1. The Hospital did not violate the Collective Bargaining Agreement when it denied the Grievant the right to bump after the Grievant was released to return to work after a Worker's Compensation injury.

2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 25th day of January, 1993.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator

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