

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
LOCAL 1760, AFSCME, AFL-CIO : Case 20
and : No. 49598
SUPERIOR MEMORIAL HOSPITAL : A-5100
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Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council
40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Ms. Gerry D. Stephens, Human Resources Director, appearing on
behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-93 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 job posting grievance of Carol Marvin.

The undersigned was appointed and held a hearing on December 9, 1993 in Superior, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on February 28, 1994.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the terms of the collective bargaining agreement and past practice by denying the grievant the opportunity to fill a job/shift vacancy?
2. If so, what remedy is appropriate?

The Employer proposes the following:

1. Is the grievance timely?
2. Will the Department allow staffing by

seniority?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 3 - AGREED RESPONSIBILITIES OF PARTIES

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3.04 Management's Rights: Except as herein otherwise provided, it is agreed the Employer retains the sole right to manage and direct the working forces of the hospital. Such functions are to include (but are not limited to) the right to: Determine the methods and procedures, regulate the use of equipment and other property of the Hospital; formulate and establish the type of equipment, procedures and methods to improve hospital care and efficiency; determine the basis for selection, retention and promotion of employees not covered by this Agreement; maintain discipline of employees, including the right to make rules which are reasonable and justifiable, and which are not inconsistent with the terms of this Agreement; direct generally the work of the employees in a manner not in conflict with the terms and conditions of the Agreement, including the right to hire, discharge or otherwise discipline employees, or to promote employees, to demote or transfer them, to assign them to shifts, to determine the amount of work needed, the job classifications needed, the number of employees to be assigned to job classifications, the prerequisites for such job classifications, to lay employees off because of lack of work. Said prior prerequisites shall be consistent with the requirements of the job classification.

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ARTICLE 15 - GRIEVANCE PROCEDURE

It shall be the policy of the Employer and the Union to attempt to settle all disputes arising between the parties at the lowest level of the grievance procedure.

15.01 Definition: A grievance is defined as any dispute arising between the parties with regards to wages, hours, terms and conditions of employment or any provision of this Agreement.

15.02 Step One: Should any employee covered by this Agreement feel a grievable situation

exists, the employee shall within ten (10) calendar days of when the employee knew or could have reasonably known of the event(s) giving rise to the grievance, present the grievance orally to their immediate supervisor. The supervisor shall respond to the grievant within five (5) calendar days from the date it was presented to the supervisor.

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ARTICLE 19 - SENIORITY

19.01 Employee's Original Date of Hire: Every employee covered by the terms of this contract shall have seniority from the date of his/her original date of hire as posted on the seniority list unless seniority is broken for reasons specified herein. Seniority shall apply only to layoffs, rehiring and filling of vacancies in jobs. Seniority, beginning with the effective date of this agreement, shall accrue (sic) to employees based on the number of hours worked or benefit hours paid in lieu of worked hours. No employee shall lose their respective position in the seniority roster as of the effective date of this provision except as may be affected by future hours worked by employees. Low census hours shall be considered worked time for seniority and benefit calculation.

19.02 Posting of Seniority List: The Employer will on the first day of April of each calendar year, prepare a seniority list of employees covered by this Agreement and post on a bulletin board in the hospital. The seniority list shall specify both the department and unit seniority of each employee. Within fifteen (15) days thereafter, the employees may file any objections to the seniority ratings with the Employer. Within twenty (20) days of posting, the Union and Employer shall mutually agree on correction. After corrected, seniority ratings will be permanent and shall not be subject to change except as to new employees whose names are placed on subsequent seniority lists. A copy of the list will be mailed to the secretary of Local 1760.

The foregoing provisions shall apply to layoffs and rehiring in each department of the unit and to promotions in the department if

the employee is qualified to fulfill the job duties. Such departments are:

- 1) Housekeeping - Housekeeping Aides
1a) Linen Room Aides
- 2) Nursing Department - Nurse Aides, Orderlies and all other persons in the Nursing Department excluding registered nurses, graduate nurses and licensed practical nurses;
2a) Ware Clerks
- 3) Engineering - Engineers, Maintenance personnel
- 4) Dietary - All persons who are primarily engaged in the preparation and service of food
- 5) Central Supply

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19.06 Posting of Job Vacancies: If any job vacancy or new position occurs in any of the above departments, it shall be posted on the bulletin board for seven (7) calendar days. Any employee may apply in writing for vacancy or new position during the seven day period.

Employees of the department in which vacancy or new position occurs, if qualified, shall be given preference according to seniority in filling the position. If no one in the department in which the vacancy or new position occurs applies, or if applicant is not qualified, then any employee outside the department applying shall be given preference according to seniority in the unit. The Employer during this period may temporarily assign an employee to position. (sic)

It shall be at the discretion of the hospital to evaluate the individual's qualifications and shall place people in positions according to the best interest of the patient population served.

DISCUSSION:

Grievant Carol Marvin has worked in the hospital's food service department for 14 years. For the first 12 of those years, she was a full-time employee, but in August of 1992 the Department

reorganized and three positions were abolished. At that time the grievant was reduced to part-time. One of the three positions which was abolished was that of Audrey Kidd, who had previously worked as a full-time relief person, filling in on all shifts. Marvin testified that up to that time, there was never any issue over seniority in the food service department because Kidd filled in on all the jobs. After August, 1992, however, there were four part-time and three full-time positions. Marvin testified that management scheduled all the part-timers wherever management wanted them, without regard to seniority. Marvin testified that to her understanding, as a Union Steward of ten years' standing, this was not consistent with the way the rest of the hospital operated.

In June, 1993, Marvin testified, one employee had not showed up for work for two to three months regularly, because of personal issues. The position was posted for permanent filling as a part-time position on June 11, 1993. The posting stated that applications would be received from June 11 through June 18, 1993, described the position as "One Food Service Aide -- part-time" and added that "hours and responsibilities varied based on department needs." Marvin testified that the position in question carried hours from 9:00 a.m. to 5:30 p.m., while she was then working from 11:00 a.m. to 7:30 p.m. Marvin requested that she be given the job during the posting period, on or about June 13. She testified that her supervisor told her she could not have that position, and that the supervisor gave the work to Brian Wickland, who was then a casual employee. Shortly thereafter, the grievant received a full-time position as a result of successfully bidding for a vacant cook position.

Union Vice-President Bob Eastman testified that every department of the hospital that is under this agreement awards positions by seniority for both full and part timers, except in the food service department. Eastman testified that since the reorganization, the food service department has awarded full-time positions by seniority, but not part-time positions, and that the Union has objected to this and several times he thought the hospital had reached an agreement to staff such positions by seniority. Union Secretary-Treasurer Dianne Nindorf testified to the same effect. Kitchen Aide Audrey Kidd testified that on one occasion since she was made part-time, she requested an earlier shift when she found that an employee with less seniority was scheduled for an early shift. Kidd stated that the supervisor changed the shift for her. Another Union witness, Patti Westlund, testified that she was employed in the food service department for 20 years, and that when she was a part-timer from 1974 to 1979, she recalled open shifts being awarded by seniority among part-timers.

Food Service Department Head Cindy Roden testified that Brian Wickland was a part-time employee, not a casual employee, since

June 11, 1993. Roden further testified that in food service, the full-time positions were bid on by seniority, but even prior to August 1992 the part-time positions had been scheduled around the full-timers, and were scheduled to equalize early and late shifts.

She testified that while some prior full-time employees became part-time at that time, the scheduling methods did not change. Roden denied that Audrey Kidd changed schedules with Brian Wickland as a result of a claim based on seniority, contending that she had denied that request but had said she would accommodate a shift trade if both employees agreed. Roden added that the two employees agreed to trade shifts, so she honored that agreement. Roden stated that all employees except one in the department have been cross-trained, and her practice has been to allow them to switch shifts by mutual agreement. Roden contended that the grievance could not be timely because all employees in the department should have known since August, 1992, at the latest, how the shifts were being scheduled for part-timers.

Food Service Supervisor Louise LaJoie, who has held that position for 11 years, testified consistently with Roden. She stated that she normally gives the "oldest" part-timer the eight-hour day and splits the four-hour shifts between the others in order to treat them equitably. She added that if there is an extra eight-hour day, she will try to give that to the senior part-timer, and will normally call in the senior part-timer if there is a call-in. But she stated that she scheduled the remaining four-hour shifts in rotation, unless employees agree to trade.

On recall by the Union, Nindorf testified that it was her responsibility to handle part-timers' changes and that Brian Wickland had not become a part-time employee until June 19, 1993. Roden then testified that she has traditionally scheduled casual employees, and that she referred to Wickland as part-time because she thought of him in that context when scheduling.

The Union contends that the vacancy suddenly arose on June 12, 1993, and that a posting for the vacant position was up for a period of seven days. The Union contends that the grievance is really directed toward the interim period in which a temporary vacancy existed, constituting an early shift. The Union argues that the grievant was the most senior employee who had an interest in the temporary vacant position, but that contrary to the grievant's request, the position was filled with a temporary employee. The Union contends that the evidence shows that the exercise of employees' departmental seniority has no impact on the operation of this department, because the employees are qualified and are interchangeable. The Union argues that the same principle of seniority which always governed the assignment of full-time shifts should govern the assignment of part-time shifts since August of 1992, but that the grievance in this instance is timely because the vacancy in question occurred on June 12, 1993 and the grievance was filed on June 17, 1993. The Union requests that the grievance be sustained, that the Employer be ordered to make the grievant whole for any and all lost wages and benefits, and that

the Employer be ordered to honor seniority rights of part-time employees as well as full-time employees when open shifts occur.

The Employer contends that the grievance was not filed timely, because the practice of scheduling which was followed in June, 1993 was the same practice as was in effect even before the August 1992 reorganization date. The Employer contends further that the grievant knew or should have known how the department was staffed at least by the time she personally was affected in August, 1992. With respect to the merits, the Employer contends that the staffing pattern, according to evidence in the record, has been unchanged for at least ten years, and that it was adopted in order to treat part-time employees equitably by scheduling equal numbers of early and late shifts as much as possible. The Employer further contends that the situation involved in this case was not an open or unscheduled shift and was not a job vacancy. The Employer argued that the Food Service Department has been consistent in honoring provisions of the agreement in posting job vacancies, but there was no evidence that a job was posted in this instance or that the grievant submitted a bid for such a position. The Employer requests that the grievance be denied.

Both the Employer and the Union have argued largely based on contentions related to the impact of seniority on the filling of permanent positions, but I am struck by the fact that the position actually at issue in this case was a temporary one. The timeliness issue is easily disposed of by noting that there is a difference between the impact of past practice which might indicate that a grievant should expect a certain disposition of a grievance, and the impact of specific language limiting the time period for filing of a grievance from the date of a particular alleged infraction. In this instance, the position at issue became available no earlier than June 11 (there is some confusion in the record as to whether June 11 or June 12 was the date on which the position was actually available) and the grievance was filed by no later than June 17. This is well within the ten days allowed for by Article 15.02 of the Agreement. I therefore find the grievance timely.

As to the merits, however, I note that there is a sentence in Article 19.06, not referred to in any way by the Union, which governs the filling of temporary positions while the position is being posted for permanent assignment. In saying that "the Employer during this period may temporarily assign an employee to position (sic)," the collective bargaining agreement draws a distinction between the rules governing the filling of permanent positions and those governing the filling of temporary positions.

It is clear that this language allows the Employer to assign "an employee" to a certain position while that position is being filled permanently. The Employer indirectly argues the distinction by noting that the temporary vacancy created by the posting was not itself posted, and that the grievant did not explicitly bid for it.

The contrast between the specification that "an employee" may be temporarily assigned to the vacancy, and the references to seniority and qualifications in the same section as governing the permanent filling of that position, lead me to conclude that the intent of this language is to allow the Employer to fill the temporary position with any employee. This allows the Employer to fill an open job while it is being posted with whomever can most easily be spared from other duties, without doing any serious damage to such weight as seniority has been given in this Agreement for the more valuable and longer term job vacancies. But since the grievant in this instance grieved the filling of a temporary opening, that sentence of Article 19.06, which I find allows the Employer broad latitude, applies in this case. I therefore do not reach the larger question of whether the Employer has routinely violated seniority provisions of the Agreement by its shift assignment practices in the department generally as they apply to part-timers.

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

AWARD

1. That the grievance is timely.
2. That the Employer did not violate the Agreement by refusing to award a temporary position to the grievant.

Dated at Madison, Wisconsin this 2nd day of June, 1994.

By Christopher Honeyman /s/

Christopher Honeyman, Arbitrator