BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1760, AFSCME, AFL-CIO	Case 21 No. 50301 A-5165
and	
SUPERIOR MEMORIAL HOSPITAL	

Appearances:
Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1760.
Ms. Gerry D. Stephens, Human Resources Director, and Mr. Tom Wiedell, Chief Finance Officer, on behalf of Superior Memorial Hospital.

ARBITRATION AWARD

Local 1760, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Superior Memorial Hospital, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 29, 1994, in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 8, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues, and have left it to the Arbitrator to frame the issues to be decided.

The Union would state the issue as being:

> Did the Employer violate the Collective Bargaining Agreement and Past Practice by reducing the Grievant's hours in such a manner as to arbitrarily ignore and thus violate the Grievant's seniority rights by keeping a non-seniority casual employee working?
>
> And if so, the Employer is to make the Grievant whole for any and all lost wages and benefits due to this action. Likewise, the Employer shall follow seniority when making staff reductions and employees with less seniority and Casual employees shall be laid off before more senior employees have hours reduced.

The Employer would state the issues being as follows:

> (1) Is the grievance timely?
>
> (2) Whether the employer violated management's rights and flexible staffing to meet hospital and patient needs? How the Employer going forward under the current contract should appropriately adjust the status of employes for

less amount of hours and provide coverage for vacancies of more senior employes given the fact that staffing by seniority is not a provision of the current contract and that management acted in the same manner as was recommended by one of the Union's officers to reduce staffing, flexible scheduling in another hospital department/past practice?

The Arbitrator concludes that the issues to be decided may be stated as follows:

(1) Is the grievance timely and therefore arbitrable?

(2) Did the Employer violate the parties' Collective Bargaining Agreement when it reduced the Grievant's hours while continuing to employ a part-time employe in the same department? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

The following are provisions of the parties' 1991-1993 Agreement:

ARTICLE 3 - AGREED RESPONSIBILITIES OF PARTIES

. . .

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.

. . .

ARTICLE 12 - DEFINITIONS

12.01 Regular Part-time Employees: Employees who work sixty-nine (69) or more hours per month on a regular

and continuous monthly basis. Regular part-time employees are not entitled to any fringe benefits, except part-time employee benefits specifically listed.

12.02 Temporary Employees: Shall not work for a period longer than one hundred twenty (120) days and will not be serialized.

12.03 Casual Employees: Are employees of the Hospital who are not regularly scheduled. They are utilized on an "as-needed" basis to cover absences of regularly scheduled employees. Casual employees are not eligible for any fringe benefits.

12.04 Part-Time Employees: Are employees of the Hospital who work less than sixty-nine (69) hours per month on a regular and continuous monthly basis. Part-time employees are not entitled to any fringe benefits, except as provided for as specified in this agreement.

12.05 Full-Time Employees: Are employees of the Hospital who work eighty (80) hours per pay period on a regular and continuous basis. Full-time employees shall receive fringe benefits as specified in this agreement.

. . .

ARTICLE 15 - GRIEVANCE PROCEDURE

. . .

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.

. . .

15.05 Time Limits: The time limits provided herein may be extended by mutual agreement of the parties. Failure by management to respond to a grievance in a timely manner shall be construed as a denial of the grievance and the Union may proceed to the next step. Failure by the Union to move a grievance to the next step in a timely manner shall be deemed a waiver of the grievance.

. . .

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 only apply to layoffs, rehiring and filling of vacancies in jobs. Seniority, beginning with the effective date of this agreement, shall accrue 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.

. . .

19.03 Layoff: In laying off employees, the policy of departmental seniority shall prevail. The person in the department and classification in which the Employer determines the layoff shall occur with the least departmental seniority shall be the first person laid off provided the remaining employees are capable, able and qualified to perform the work.

No full-time employee shall be laid off while there are part-time employees working in the department provided that said full-time employees are qualified to perform the work of said part-time employees. In the event that this provision is violated, the employee may time slip the Employer.

19.04 Low Census: If, because of low census, an employee is called to stay home, they may bump another less senior employee in the same department and classification who is working the same or another shift. The employee must give at least four (4) hours notice to their supervisor of the intent to bump the less senior employee. No employee will be allowed to bump, pursuant to this article, if it would result in the employee working more than eight (8) hours in the twenty four (24) hour work day, or over eighty (80) hours in the pay period, unless approved in writing by the Employer.

If an employee is given notice of a long-term layoff or an employee is called to stay home and, as a result, that employee's scheduled number of hours are reduced at least ninety six (96) hours in a calendar year, the employee may give notice of intent to bump the least senior employee in their job classification. The transfer which results because of this bumping shall occur two (2) weeks after notice is provided.

If an employee is given notice of a long-term layoff or an employee is called to stay home and, as a result, that employee's scheduled number of hours are reduced at least ninety six (96) hours in a calendar year and the employee is the least senior employee in the classification, the employee may give notice of intent to bump the least senior employee in an equal or lower paying classification provided the person being bumped has less seniority than the laid off employee and provided the laid off employee is capable, able and qualified to perform the work.

BACKGROUND

The Employer maintains and operates a hospital located in Superior, Wisconsin. Since approximately 1985, the Employer has been experiencing a decrease in patient census and revenues. The Grievant, Clara Komatz, has been employed in the Employer's Housekeeping Department for approximately 14 years. She began as a part-timer in March of 1980, and worked until July, 1980 when she was laid off. She was employed again in that same department on a full-time basis from February, 1981 until her hours were reduced in September of 1993.

On or about August 26, 1993, the Employer's Director of Materials Management, William Doane, also the immediate supervisor of the employes in the Housekeeping Department, held a meeting amongst the housekeeping staff at which time he advised them that, due to budget cuts, there would be staff reductions in the department consisting of the layoff of the least senior part-time employe, the reduction in hours of the other part-time employe in the department, Tammy Brandt, to 16 hours bi-weekly and the reduction in the Grievants' hours from 80 hours to 64 hours bi-weekly. Also present at that meeting was Diane Nindorf, Secretary-Treasurer for the Union and also an employe in the department. Nindorf questioned Doane as to whether he could cut the Grievants' hours if he kept Brandt on the schedule as a casual employe, and Doane said he would get back to them. Sometime around the very end of August or the very beginning of September of 1993, Doane provided the housekeeping staff with a draft of the "Housekeeping Action Plan" wherein he set forth the staffing levels in the department. The draft ended with the following statement

> "This is a very rough draft - everything is open to change -
>
> I am wide open to any suggestions."

On September 20, Doane sent the Grievant the following letter:

> Dear Clara,
>
> Per our conversation of August 26, 1993, your status in Housekeeping will be changed from Full-time to Part-time effective September 24, 1993.
>
> If you have any questions please contact me at any time.
>
> Sincerely,
>
> William Doane /s/
> William Doane
> Director Materials Management

On September 24, the Grievant began working 64 hours on a bi-weekly basis; with Brandt scheduled to work 16 hours on a bi-weekly basis. On September 28, 1993, the instant grievance was filed on the Grievant's behalf, listing as violations:

> STATEMENT OF GRIEVANCE:
>
> List applicable violation: 1. Clara's hours have been reduced while a less senior P.T. employee is still

employed.
2. Some hskg. work has been given to non union employees.
19:03 + 2:01 1/

The Employer responded to the grievance, denying it on the basis that: (1) "it was not filed timely"; and (2) "since there is no contract language to describe the process to reduce staffing, management handled staffing according to our interpretation of Article 3.04 - 'Management's Rights'". The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitration on the instant grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union views the action of the Employer in this case as an assault on the employes' seniority rights. The Union cites from Elkouri and Elkouri, How Arbitration Works, 4th Ed., as to the importance and impact of seniority as a matter of contractual right on both job security and as a limitation upon the exercise of managerial discretion. The Union asserts that the language in Section 19.03 of the Agreement is a clear indication of the manner in which the parties intended the conditions of work to be handled within the hospital. When layoffs occur, seniority determines the manner in which layoffs are to happen, with the only limiting factor being qualifications.

The Union notes the Employer's citation of its financial problems in the arbitration hearing and concedes there may be times when an employer needs to make reductions in the work force or the number of hours that employes work. However, it is not the exercise of management rights that is in issue, rather, it is "the proper exercise of management rights as checked/controlled by the seniority provisions of the Collective Bargaining Agreement." The Union cites the following from Elkouri and Elkouri regarding the relationship between seniority and management rights as it relates to the issue of layoffs:

> Recognition of seniority is the most significant type of restriction placed by many agreements upon the layoff right. Clauses requiring advance notice for layoff in order to permit employees to plan ahead are not uncommon, but such a notice requirement ordinarily is not severe from the employer's point of view since he also prefers to plan ahead.
>
> The meaning of the term "layoff" and allegations that employees have been laid off in fact even if not in name or form are frequent issues in arbitration. Arbitrators have ruled that the term "layoff" must be interpreted to include any suspension from employment arising out of a reduction in the work force, and that scheduling of employees not to work or use of the term "not scheduled" by management does not make the occurrence any the less a "layoff." One arbitrator defined "layoff," in the context of a particular clause, as an "actual severance from the Company's payroll, and a break in continuous service."

1/ The parties have indicated that the second part of the grievance has been resolved and is not a subject of this arbitration.

> Downgrading is often tied to layoffs. It has been held that downgrading "is an intimate concomitant of layoff" that layoff provisions must be applied in downgrading. Some contracts contain provisions permitting employees to accept layoff in lieu of downgrading. Where the contract was silent regarding the right of employees to choose layoff rather than downgrading, one arbitrator held that they are deemed to have such right if downgrading involves a significant reduction in pay. (At page 558).

While the Employer argues that there is not specific language in the Agreement stating that reduction of hours is covered under the terms of the Agreement, one can see that it was always the intent of the parties to use seniority as a levelling factor for the distribution and redistribution of work. It is a principal of contract construction that the agreement is not to be construed from a single word or phrase, but on the basis of the instrument as a whole, in order to determine the true intent of the parties.

The Union contends that it was the unanimous testimony of all of its witnesses that the past practice at the hospital has always been to use seniority as the means to handle layoffs and reduction of hours. The only deviations began in 1993 as a result of the methods and management style used by the present management firm to handle financial pressures, and those deviations have been grieved.

Regarding the issue of timeliness, the Union concedes that discussions occurred in the Housekeeping Department on or about August 31, 1993, regarding the possible reduction of hours. However, the Grievant properly followed the principle of "do it, and grieve later", or "wait until management acts and react." The Grievant testified that she waited until her hours were cut on September 24th, 1993 to file a grievance, which was done promptly on September 28th, only four days later. Hence, the grievance was filed timely.

The Union concludes that the Employer violated the Agreement by reducing the Grievant's hours while retaining a less senior part-time employe. As a remedy, the Union requests that the Grievant be made whole for any and all lost wages and benefits due to the Employer's action, and that the Employer be instructed to follow seniority in the event it decides to reduce staff hours further.

Employer

First, the Employer asserts that the grievance was not timely filed. The Grievant was provided adequate advance notice of her impending change of status when she was verbally notified by her supervisor on August 26, 1993 of the change. She was advised again in writing on September 20, 1993 that her position would be changed to part-time effective September 24, 1993. Testimony indicates the Grievant did not file the grievance, but that it was filled out by a Union officer four days after her status was changed. Thus, the grievance was submitted 34 days after the date on which the Grievant knew, or could have known, that her status would be changed. The Grievant's testimony that she did not submit a grievance earlier because she had "hoped" her status would not be changed, had no basis. Her supervisor testified that he never gave her any reason to think that such a change would not take place.

Regarding the merits of the grievance, the Employer asserts that it has the right under Section 3.04, Management Rights, of the Agreement, to manage and direct the work forces of the hospital and the right to determine the number of full-time and part-time employes necessary to perform the work. In the absence of contractual language addressing the appropriate manner in which to implement a reduction in hours, it honors past practice in that area.

The Employer asserts that it did not violate Article 19, Seniority, by reducing the Grievant's hours and changing her status from full-time to part-time while keeping a part-time employe in the department, because there is a bona fide work necessity based on the small number of housekeepers (5) in the department who have a great deal of seniority and a great deal of earned vacation time to cover. Further, the contract does not contain specific language outlining the appropriate procedure to follow in reducing the hours or status of an employe who is not being "laid off", nor is the term "layoff" defined.

The testimony of Doane, the Grievant, and Nindorf indicated that Doane has consistently been sensitive to employe needs and has attempted to create work schedules that would comply with the contract provisions and yet take into consideration staff preferences for vacation. The sample schedule that the then-acting President of the Union submitted at hearing to demonstrate that the Employer could maintain the Grievant at full-time status and sufficiently reduce hours in the department, concededly did not consider the need to cover vacations and holidays. Doane worked out a similar schedule and found that due to the seniority of the housekeepers, he would need to cover at least 1,040 hours when housekeepers were on vacation, or took a holiday off. Doane testified he reduced the Grievant's status, rather than laying off both the two least senior employes and hiring part-time employes, because he did not want to cause the Grievant any additional hardship. There is no contractual language addressing reduction in the work force. Doane thought the same situation applied in this case as when the Union made recommendations in the Physical Therapy Department in August to merely change the status of the two full-time Physical Therapy Aides to part-time, rather than laying off full-time employes and hiring part-time employes.

The Employer asserts that it wanted the instant grievance heard by a neutral third party, because both parties agree that the contract language needs to be updated to reflect the present situation, and because there is no current language in the Agreement that applies to a reduction in work force short of a layoff. Further, it wanted to expedite the matter to spare the Grievant any unnecessary hardship. The Employer felt that the recommendation of the Union regarding the Physical Therapy department was a reasonable one for both the employes and the Employer. It had hoped to use that same approach for the Grievant.

The Employer notes the testimony of the Union's Vice-President and its President that there has been no consistency in how the contract has been interpreted over the past 10 years. The Employer asserts it is its desire to and intent to deal in good faith and introduce new contract language to clear up these situations, and eliminate, or at least reduce, the inconsistent interpretations. There is no evidence that the Employer did not deal in good faith, or that it violated the Agreement.

DISCUSSION

With regard to the issue of timeliness, Article 15 - Grievance Procedure, Section 15.02, provides as follows:

> 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. . .

Subsection 15.05, Time Limits, provides, in relevant part, as follows:

> Failure by the Union to move a grievance to the next step in a timely manner shall be deemed a waiver of the grievance.

The evidence indicates that there was a meeting in the Housekeeping Department at which the supervisor, Doane, advised the staff of the impending reductions, including the reduction of the Grievant from full-time to part-time status. However, the evidence also indicates that on August 31 and/or September 1, Doane provided a copy of a rough draft of his "Housekeeping Action Plan" to the staff, in which he indicated at the end that "Everything is open to change - I am wide open to any suggestions". It was not unreasonable at that point for the Grievant to believe that something might occur which would forestall or eliminate the need for the change in her job status. She was subsequently advised in writing by Doane by letter of September 20, 1993 that she would be reduced from full-time to part-time effective September 24, 1993. Whether one uses the date of that letter, i.e., September 20, or the effective date of the reduction in hours, September 24, the grievance was filed within ten calendar days of either occurrence, i.e., on September 28. Therefore, it is concluded that the grievance was timely filed.

With regard to the substantive issue, the Employer asserts that there is no contractual language that specifically spells out the procedure for reducing an employe's hours or a change in status from full-time to part-time. It asserts that it has the management rights under Section 3.04 to determine the necessary staff to do the work. It is noted that there is no dispute that the Grievant's hours were reduced from 80 hours bi-weekly to 64 hours bi-weekly and that at the same time, a less senior part-time employe had her hours reduced to 16 hours bi-weekly, while another less senior part-time employe was laid off completely. Thus, the Employer continued to employ a less senior part-time employe at the same time it reduced the Grievant's hours.

Article 19, Seniority, of the Agreement, at subsection 19.02, sets forth the department's for the purpose of layoffs and rehiring, and defines housekeeping as a separate department. Section 19.03 of the Agreement provides as follows:

> 19.03 Layoff: In laying off employees, the policy of departmental seniority shall prevail. The person in the department and classification in which the Employer determines the layoff shall occur with the least departmental seniority shall be the first person laid off provided the remaining employees are capable, able and qualified to perform the work.
>
> No full-time employee shall be laid off while there are part-time employees working in the department provided that said full-time employees are qualified to perform the work of said part-time employees. In the event that this provision is violated, the employee may time slip the Employer.

As noted, there is no question that the Employer retained the less senior part-time employe 2/ while at the same time it reduced the Grievant's hours, and changed her status from full-time to part-time. The question then, is whether the parties intended that reductions in an employe's hours be covered by the layoff provision of 19.03. For the following reasons, it is concluded that the term "layoff" is intended to cover the situation of a reduction in hours.

2/ Contrary to the Union's characterization of Brandt as a "casual" employe, the testimony indicates Brandt's hours are scheduled, thus making her "part-time" under Section 12.04 of the Agreement.

First, the Arbitrator is not of a mind to say that the term "layoff", by itself, provides a clear answer to the question; 3/ rather, it is a matter of determining the parties' intent. Past practice does not provide much guidance in that respect. There was testimony from a number of Union witnesses that seniority has been followed in the past with regard to staffing, although it is not clear that those prior situations included circumstances similar to those in this case. The Employer cites the parties' resolution of the situation in the Physical Therapy Department where the full-time employes changed to part-time. The testimony, however, indicates that in that case both of the employes volunteered to go to part-time status based on their personal preferences, and not as a matter of the parties having agreed that was contractually required or permitted. Thus, very little guidance can be gleaned from past practice, as it relates to the specific issue.

The Arbitrator's conclusion as to the parties' intent is instead based upon a review of the parties' Agreement as a whole. Section 19.03, Layoff, in the Agreement, provides for layoff in a department and classification by seniority, with the least departmental seniority being the first person laid off provided the remaining employes are able and qualified to perform the work. That provision also provides that no full-time employes shall be laid off while there are part-time employes working in the department, provided the full-time employes are qualified to perform the work of the part-time employes. If the seniority provision in 19.03 does not pertain to a reduction in an employe's hours, presumably the Employer could reduce the hours of more senior full-time employes without regard to seniority, thereby making them part-time employes, and leave a less senior full-time employe unaffected. The Employer could then effect a full layoff and, in accordance with 19.03, have to layoff the part-time employes before laying off the full-time employe. Thus, the more senior employes would have gone from full-time to part-time status to total layoff, while leaving the less senior full-time employe employed, thus circumventing the seniority provision in 19.03 for layoffs.

Secondly, although not cited by the parties, Section 19.04, Low Census, provides, in part,

> "If an employee is given notice of a long-term layoff or an employee is called to stay home and, as a result, that employee's scheduled number of hours are reduced at least ninety six (96) hours in a calendar year, the employee may give notice of intent to bump the least senior employee in their job classification. . ."

Under that wording, the parties recognized that a "lay off" could result in the employe's scheduled number of hours being reduced. Such wording evidences an intent by the parties to include the reduction of an employe's hours, within the term "layoff".

It having been concluded that layoff is intended to include a reduction of hours, Section 19.03, Layoff, of the Agreement, provides that,

> "No full-time employee shall be laid off while there are part-time employees working in the department provided that said full-time employees are qualified to perform the work of said part-time employees."

As it appears that the Grievant and the part-time employe who remained in the

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3/ The Arbitrator is aware that there are other arbitrators who disagree and consider the term "layoff" to be clearly limited to actual severance from the payroll. Elkouri and Elkouri, at page 558.

department perform essentially the same work, there does not appear to be a question of the Grievant being qualified. That being the case, it is therefore concluded that the Employer violated Section 19.03, Layoff, of the Agreement, when it reduced the Grievant's hours while retaining a part-time employe in the department.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The Employer is directed to make the Grievant whole for all lost wages and benefits she would otherwise have received under the parties' Agreement but for the Employer's actions in reducing her hours while retaining a part-time employe in the Housekeeping Department, and to immediately return the Grievant to the work status she would have but for the Employer's actions.

Dated at Madison, Wisconsin this 6th day of September, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator

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