

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

and

MT. CARMEL HEALTH AND REHABILITATION
CENTER

Case 29
No. 53451
A-5432

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Attorneys at Law, by
Mr. Matthew R. Robbins, appearing for the Union.

Jackson, Lewis, Schnitzler & Krupman, Attorneys at Law, by Mr. Thomas H. Riley, Jr.,
appearing for the Employer.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Mt. Carmel Health and Rehabilitation Center, herein the Employer, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Milwaukee, Wisconsin, on April 24, 1996. A stenographic transcript was made of the hearing. The parties completed the filing of post-hearing briefs on July 18, 1996.

ISSUES:

The parties did not stipulate to the issues. The undersigned believes the following to be an accurate statement of the issues:

Did the Employer violate the collective bargaining agreement either by eliminating the position of Patient Services Assistant, or by creating the position of Health Information Technician, or by refusing to include the position of Health Information Technician in the bargaining unit represented by the Union? If so, what is the appropriate remedy?

BACKGROUND:

The Employer is a 692 bed skilled care nursing facility and provides a variety of health care services, including long-term care, inpatient and outpatient rehabilitation, home health care and senior adult day care. The Employer occupies a single story facility which is comprised of 12 nursing units and spans over 15 acres.

In 1990, the Employer tested a computer program called resident care systems, which was based on the federal regulations governing nursing homes. The test started with one personal computer, herein PC, and one module on one nursing unit. Subsequently, the Employer decided to use the program for the entire facility and added a printer and another PC so that data could be entered for the assessments and the care plans for all of the residents. By 1993, the program had expanded to a central processing office unit with five terminals, three printers and eight employees.

In 1995, in response to new federal regulations and a new federally mandated resident assessment instrument due to be implemented on January 1, 1996, the Employer decided to improve accessibility to the information in the system by changing the entire resident care system department, herein RCS, through an increase in the technology and a decentralization of the system. There are now thirty-eight PCs located throughout the facility at each of the nurses' stations and also in each department. As a part of the decentralization, the Employer eliminated the positions of Patient Services Assistant (herein PSA), RCS Secretary, and Data Technicians I and II. There were nine employees, the equivalent of six full-time positions, in the Data Technician classifications and one RCS Secretary, none of which positions were in the bargaining unit. There were fourteen employees in the PSA classification, which positions had been in the bargaining unit.

At the same time that it eliminated the positions specified above, the Employer created sixteen positions classified as Health Information Technicians, herein HITs, and posted announcements of the openings for the HIT positions throughout its facility for any interested employee to apply. On November 14, 1995, the Employer met with the Union and the affected employees to inform them that the PSA positions were being eliminated and to encourage the PSAs to apply for the new HIT positions. Of the fourteen PSAs working when the changes occurred, ten of them were hired into the HIT positions. Not all of the PSAs applied for the HIT positions. The remaining PSAs continued to be employed by the Employer in bargaining unit positions performing patient care duties. Six of the employees from the RCS department were hired into the HIT positions. The other openings were filled by other employees of the Employer. The employees who were hired as HITs received training on the computers for two hours a day on four days a week for a period of approximately six to eight weeks.

The PSA employees had not worked in a central office, but rather, they had worked at the nurses' stations in the units. PSA employees were also referred to as ward secretaries or unit clerks. They had to be Certified Nursing Assistants, although at least three long-time PSA employees had been exempted from said requirement. The PSA position description stated the basic purpose of the position as follows:

Maintain medical records to ensure that information is current,

review medical records in accordance with Medical Librarian's checklist, maintain storage of other documents and order inventory/order supplies. Functions as a PCA per facility needs.

The PSA employes also assisted the nursing employes in providing patient care, including the following tasks; passing meal trays, feeding residents, waking residents, bathing and dressing residents, assisting residents in using the toilet, transferring residents out of bed to a wheelchair or vice versa, and, answering resident call lights. PSA employes performed non-clerical duties for a range of approximately one to four hours a day. Sometimes PSA employes had to fill in for Nursing Assistants for an entire shift.

HITs perform only clerical duties and do not perform any patient care duties. Those clerical duties include the clerical duties previously performed by the PSAs. The HITs perform their duties on computers rather than through manual record keeping as the PSAs had done. They are assigned to work at the nurses' stations out in the units, just as the PSAs had been assigned.

POSITION OF THE UNION:

The contract contains a very broad inclusion clause. Where similar clauses have existed, arbitrators have, absent the specific exclusion of a new position, found the position to be covered by the contract. In the present case, the Employer would exclude the HITs as office clerical employes. However, it is clear that the HITs do not work out of a central office area as the RCS employes had done and do not qualify to be excluded from the bargaining unit as office clerical employes.

Simply put, the HITs are PSAs by another name. They are performing virtually identical work in the same locations, i.e, at the nursing stations. The HITs neither work in the Employer's office area nor do they perform the business office type of duties associated with office clerical employes. The PSAs did filing, charting, recording of physicians' orders, ordering of supplies and x-rays, and a variety of other clerical tasks related to the residents. The HITs are performing the same tasks. The same records are being kept by the HITs as were kept by the PSAs. The only difference is that the employes now are using personal computers for data entry, rather than manually recording the data. The same customers/clients are being served. In a normal eight hour day, most of the PSAs would spend only one hour in non-clerical functions. That one hour was primarily spent in passing food trays to the residents.

The training given to the HITs was of a minor nature involving the basic input of data with a personal computer. Indeed, the job description of a PSA also provided for the use of a computer. A high school education is required for the HITs, which was the same requirement for the PSAs. While the job description for a PSA required an employe to be a certified nursing assistant, some PSAs were not certified nursing assistants. Further, the technological change present in this matter is not sufficient to turn bargaining unit positions into non-bargaining unit

positions.

The National Labor Relations Board has included employees, who perform such functions as the HITs perform, in bargaining units of service and maintenance employees in nursing homes. The Board has stated that the term "office clerical" has long referred to business office clericals. 1/ In the present matter, the HITs are in daily contact with the bargaining unit employees at the nursing stations, just as the PSAs were.

The Union requests the arbitrator to find that the HIT positions are covered by the contract and to make whole each employee for all losses resulting from the Employer's violation of the contract. The Union also asks the arbitrator to retain jurisdiction for sixty days in the event the parties are unable to agree upon the details of the remedy.

POSITION OF THE EMPLOYER:

Arbitrators have long held that, in the absence of explicit limitations in the contract, an employer has the right to implement technological changes, to eliminate unneeded jobs, and to rearrange or redistribute the work of those employees in the eliminated jobs to those employees in the remaining jobs. The Employer's right to eliminate a bargaining unit position is expressed in the contract and is limited only by the requirement of a prior notice being given to the Union. Such prior notice was given to the Union in the present case.

Arbitrators have sustained the elimination of positions when the eliminations were implemented in good faith for justifiable business reasons. In the instant matter, the restructuring was due to expanded federal government regulations, including a mandated resident assessment instrument, which resulted in a complete conversion and enlargement of the resident services computer program. To meet the new requirements, the Employer has increased the amount of its computer hardware from five PCs to thirty-eight PCs in the RCS department. Based on said increase, the Employer decentralized the RCS department from its one office and placed a PC in every department and at each nursing station.

Employees who perform office clerical duties are expressly excluded from the bargaining unit by the contract. Employees in the HIT positions perform only office clerical duties and do not perform any patient care positions. On a typical day, the former RCS employees spent as much as fifty percent of their time working out on the units. Those employees were excluded from the bargaining unit because they performed office clerical duties, even though they spent

1/ Lincoln Park Nursing Home, 318 NLRB No. 123, 151 LRRM 1075 (1995).

one-half of the time out in the units. Other clerical employees, who spend part of their time out in the nursing units, also are excluded from the bargaining unit. Therefore, the location where the HITs work is not a relevant factor to a finding that they should be excluded from the unit.

The Employer asks the arbitrator to dismiss the grievance.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 1 -- RECOGNITION

1.1 The Employer recognizes the Union as the exclusive bargaining agent for the employees in the collective bargaining unit consisting of all employees of the Employer at its Greenfield, Wisconsin, location, excluding office clerical employees, professional employees, licensed practical nurses, registered nurses, guards, maintenance personnel and supervisors as defined in the Act.

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ARTICLE 6 -- MANAGEMENT RIGHTS

6.1 The right of Management of the Home and the scheduling, direction and arrangement of the working forces, including the right to hire, suspend and discharge for cause, and the right to relieve employees from duty because of lack of work, is vested in the Employer, subject to the provisions of this Agreement. No bargaining unit position will be eliminated without prior notification to the Union.

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ARTICLE 15 -- GRIEVANCE PROCEDURE

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15.7 The jurisdiction and authority of the arbitrator shall be confined to the interpretation of the provisions of this Agreement. The arbitrator shall not have the power to add to, ignore or modify any provisions of this Agreement. The award of the arbitrator shall be final and binding upon the parties to this Agreement.

...

DISCUSSION:

The undersigned agrees with the Employer's contention that the only specific contractual reference to the elimination of positions is found in Article 6. The Employer did provide the Union with prior notification of the elimination of the PSA positions as is required in said provision. However, the real issue is whether the new positions, i.e., the HITs, which are now performing certain clerical duties previously performed by the PSAs, should be included in the bargaining unit.

The Union cites numerous National Labor Relations Board cases in which the Board has distinguished between business office clericals and other clericals, consistently including the latter in service and maintenance units in hospitals. The Union urges the arbitrator to adopt a similar approach in the instant case. On its surface, such an argument has a certain appeal and, standing alone, the positions at issue herein would appear to be of the type which the NLRB would include in the unit as non-business office clericals. However, such an interpretation of the term "office clerical," as that term is used in Section 1.1 of the contract, would ignore the interpretation which the parties appear to have applied to said term.

The Employer's Assistant Administrator, Lisa Thomson, testified, without contradiction, that there are other clerical employees who are assigned to work in offices which are not in the business office area, e.g., environmental services, admissions, medical records, and rehab services. Many of those clerical employees spend a substantial portion of their workday out on the wings, i.e., in the nursing units, in the facility, sometimes in excess of fifty percent. Nevertheless, none of those clerical employees have been included in the bargaining unit. Accordingly, the undersigned concludes that the parties have not interpreted the term "office clerical" to mean only business office clericals. Rather, it is concluded that the parties have interpreted the term "office clerical" to mean any employee who, on a regular basis, performs only clerical duties and no patient care duties, even if those clerical duties are performed in an area apart from the central business office. The record in the instant matter is clear that the HITs do not perform any patient care duties as a part of their normal workday, but rather, they perform only clerical duties.

As noted by the Union, while the HITs perform certain clerical duties which were not performed by the PSAs, the HITs work with much of the same information and data as did the PSAs and perform many of the same clerical functions, albeit by entering the information into a computer as compared to a manual recording system, as did the PSAs. Nonetheless, the controlling fact in this matter is that the HITs perform only clerical duties.

The work stations of the HITs are out in the units, as was the case for the PSAs. The HITs are the only clerical employees assigned to work stations out in the units. However, the undersigned is not persuaded by the Union's contention that such a work site prevents the HITs from being classified as office clerical employees within the meaning of Section 1.1 of the

contract. As concluded above, the undersigned is persuaded that the parties have interpreted the term "office clerical" in Section 1.1 to refer to the duties performed by the employees, rather than to the location at which such duties are performed.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the collective bargaining agreement by eliminating the position of Patient Services Assistant, or by creating the position of Health Information Technician, or by refusing to include the position of Health Information Technician in the bargaining unit represented by the Union; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 27th day of November, 1996.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator