

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**BAY AREA MEDICAL CENTER EMPLOYEES' UNION,
LOCAL 3305, AFSCME, AFL-CIO**

and

BAY AREA MEDICAL CENTER

Case 20
No. 66489
A-6260

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54401, on behalf of the Union.

von Briessen & Roper, S.C., by **Attorney Daniel T. Dennehy**, 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, on behalf of the Employer.

ARBITRATION AWARD

At all times material, Bay Area Medical Center Employees' Union, Local 3305, AFSCME, AFL-CIO (herein the Union) and Bay Area Medical Center (herein the Employer) were parties to a collective bargaining agreement covering the period from October 1, 2004 to September 30, 2007. On November 22, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the timing of the scheduled wage step increases for Debra Friedland (herein the Grievant). The undersigned was appointed to hear the dispute and a hearing was conducted on April 18, 2007. The proceedings were not transcribed. The parties filed initial briefs by May 21, 2007, and reply briefs by June 4, 2007, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Did the Center correctly determine the place on the salary schedule to place the Grievant?

If not, what is the appropriate remedy?

The Employer would frame the issues as follows:

Should Ms. Friedland's future wage step adjustments occur on her employment anniversary date or on the date she began her new position?

I characterize the issues as follows:

Did the Employer violate the collective bargaining agreement when it determined that the Grievant's transfer date of May 30 was the appropriate anniversary date for future step movement?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 8 CHANGE IN CLASSIFICATION

8.02.1 **Upward Transfer:** Upward transfer is the movement of an employee from one classification to another classification having a greater job rate within a department or unit, or within another department or unit. When an employee moves to a position with a greater job rate, he/she shall serve a 160 hour trial period. If the employee does not demonstrate the skills and ability to function in the new position, he/she will return to his/her former job.

Immediately upon transfer:

...

2. If the new position is a position that requires licensed credentials, an associate's degree, or bachelor's degree, and the employee's previous position did not, the employee's pay will be the start rate for that particular classification unless the primary job duties of their previous position significantly relate to the job duties of their new position. If the duties significantly relate, and the employee has been employed for at least two (2) years, the employee's pay will change to Step 4 (the 2-year level) for their new position. If the employee has been employed for less than two (2) years, the employee's pay will change to the level on Schedule A at which the employee is currently.

3. The employee resides in a position that requires licensed credentials, an associates, or bachelor's degree, and the jobs are significantly related, and the new position requires licensed credentials, an associates, or bachelor's degree, the person would transfer to the new classification at the same Schedule A step at which the employee is currently. If the jobs do not significantly relate in this circumstance, the employee will go to the starting rate of the new position.

SCHEDULE A

9/18/05 – 9/30-06	Step 1 Start	Step 2 6 MOS	Step 3 1 YR	Step 4 2 YRS	Step 5 3 YRS	Step 6 4 YRS	Step 7 5 YRS	Step 8 7 YRS	Step 9 10 YRS
	...								
Polysomnography Technician	16.870	17.774	18.677	19.581	20.485	21.388	22.292	23.196	24.099
Polysomnography Technologist	18.746	19.496	20.268	21.082	21.928	22.806	23.717	23.196	24.099

OTHER RELEVANT PROVISIONS

Transfers and Pay Increase Practices
9/28/05

In the AFSCME contract under Article 8.02, there is language that explains what step an employee moves to when transferring. The step is determined by the new position and its credential requirements. However, the language is silent about the next step increase after the transfer. After speaking with AFSCME President Tammy Johnson and reviewing HR practices, we are in agreement to the following:

1. If neither the employee's current or new position require licensed credentials, an associates, or bachelors degree, his/her pay will change to the job rate for that particular classification, according to the level the employee currently resides in. **His/her next step increase will continue on schedule from hire date.**
2. If the new position is a position that requires licensed credentials, an associates degree, or bachelors degree, and the employee's previous position did not, the employee's pay will be the start rate for that particular classification unless the primary job duties of their previous position significantly relate to the job duties of their new position. If the duties significantly relate, and the employee has been employed for at least two (2) years, the employee's pay will change to Step 4 (the 2-year level) for their new position. If the employee has been employed less

than two (2) years, the employee's pay will change to the level on Schedule A at which the employee is currently. His/her next step increase will be determined by the transfer date. (For example if the positions do not significantly relate and the employee transfers to the start rate, the next rate increase will be six (6) months from transfer date to the six (6) month step. If the employee moves to the two (2) year step, his/her next increase would be one year from transfer date to the three (3) year step.

3. The employee currently resides in a position that requires licensed credentials, an associates, or bachelor's degree, and the jobs are significantly related, and the new position requires licensed credentials, an associates, or bachelor's degree, the person would transfer to the new classification at the same Schedule A step at which the employee is currently. If the jobs do not significantly relate in this circumstance, the employee will go to the starting rate of the new position. His/her next step increase will be determined by the transfer date. (For example if the positions do not significantly relate and the employee transfers to the start rate, the next increase will be six (6) months from the transfer date to the six (6) month step. If the employee moves to the two (2) year step, his/her next increase would be one year from transfer date to the three (3) year step.

/s/ Kristy Brock 9-28-05
BAMC Representative

/s/ Tammy Johnson 9-28-05
AFSCME Leadership

BACKGROUND

Debra Friedland (the Grievant) was hired by Bay Area Medical Center on July 12, 1999 as a Patient Care Technician, which is a non-credentialed position within the Employer's Table of Organization. That is to say, the employee in that position is not required to have licensed credentials, or an associate's or bachelor's degree to hold the position. While in that position, her anniversary date was the operative date for receipt of her scheduled step wage adjustments per the contract. In April 2004, the Grievant transferred to a Polysomnography Technician position in the Sleep Lab, which is a credentialed position, and was placed at Step 2, the 6-month rate, on the wage grid for that position. Subsequently, she received her scheduled step wage adjustments on the anniversary of her original hire.

On May 30, 2006, the Grievant transferred to a Polysomnography Technologist position, also a credentialed position, and was placed at Step 5, the three year rate on the wage scale, for that position. Thus, her wage rate increased from \$20.48 per hour to 21.928 per hour. When the Grievant reached her next anniversary date in July 2006 she did not receive a scheduled step wage adjustment. Upon inquiring as to the reason, she was told that, as of her

transfer to the Polysomnography Technologist position, her anniversary date for purposes of step movement was changed to her transfer date of May 30. She grieved the matter and the grievance proceeded through the contractual procedure to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union notes that the contract sets forth processes for upward transfers for employees in Article 8. Accordingly, when an employee moves upward from one credentialed position to a significantly related, but higher, credentialed position, the employee is to be placed on the wage grid for the new position at the same step as his or her former position. Subsequently, the parties entered into a Letter of Agreement to address the timing of step movement after a transfer.

The record shows that when the Grievant was transferred to the position of Polysomnography Technician in 2004 she was placed at the 2 year step, even though she had then been employed for four years. When she transferred to the position of Polysomnography Technologist in 2006 she was placed at the 3 year step, even though she had then been employed for nearly seven years.

The Polysomnography Technician position and the Polysomnography Technologist position are both credentialed and are significantly related, as established by the testimony of the Grievant. Paragraph 3 of the Letter of Agreement states that when the transfer is to an unrelated credentialed position, the transfer date becomes the operative date for step movement. It says nothing about the transfer date when the positions are significantly related. There is nothing in the contract itself that addresses the transfer date.

The parties explicitly created a detailed scheme for handling pay adjustment and step movement on transfer. By the fact that they did not specify that the transfer date would govern step movement in this circumstance one can infer that the parties intended that the original anniversary date would remain the trigger for step movement.

There is also no record of binding past practice in this area. In the first place, the language is explicit, making resort to practice unnecessary. Further, the burden is on the Employer to establish the existence of the practice and prove its elements. The record shows no similar cases of employees moving from a credentialed position to a significantly related credentialed position, or any similar event in this employee's work history. E-mails between the Union President and the Human Resources department also show that there was no established practice. Thus, the grievance should be sustained.

The Employer

The Employer asserts that the Memorandum of Understanding between the parties was created to clarify the practice regarding the timing of step increases subsequent to transfer. The three scenarios addressed were: 1) non-credentialed position to non-credentialed position, in which the next step increase would be on the hire date; 2) non-credentialed position to credentialed position, in which the next step increase would occur on the anniversary of transfer; and 3) credentialed position to credentialed position, in which the next step increase would occur on the anniversary of transfer. The Employer provided examples to the Union President of how the procedure would work and the parties subsequently signed the agreement.

Paragraph 3 of the Memorandum, by common consent, controls this case and specifies that the Grievant's next increase is to come on her transfer date, because both positions were credentialed and significantly related. Credentialed employees are rewarded by being placed on the same step in their new position, rather than the starting rate, but by the same token, they must wait longer for their next increase. The record shows that, under this system, the Grievant received nearly a 20% pay increase over two years for doing virtually the same work.

The Union's interpretation of the Memorandum is logically inconsistent and would make the third paragraph contradictory to the second paragraph. It is a basic rule of contract construction that words and phrases should be interpreted in such a way that all have meaning and an interpretation that does so is to be favored over one that does not. Further, Memorandum was negotiated in good faith and signed by both parties, so, in the event it is determined to be ambiguous, that ambiguity should not be construed against the Employer.

The Union in Reply

The Union asserts that Employer Ex. #5, which purports to be a statement of facts is, in reality, an interpretation of the facts from the Employer's point of view and should not be construed to support the Employer's perspective. Further, reference to the Grievant's wage increases over the years is irrelevant to this matter. Her increases have come from moving into higher paying positions and should not bear on whether the timing of her increases should be tied to her anniversary date or her transfer date.

The Employer also misinterprets paragraph 3 of the Letter of Agreement to say that when movement is from a credentialed position to a related credentialed position, the transfer date is used for step increases. There is no reasonable way to read the language of paragraph 3 to have such a meaning. There is a clear distinction between "significantly related" positions and those that are not, which the Employer chooses to ignore. It is logical that where the positions are significantly related and the employee has obtained education and training in the field that the transfer should not affect the timing of step increases.

The Union reiterates that there is no evidence of a binding past practice and that, if the arbitrator finds the Letter of Agreement to be ambiguous, it should be construed against the author, that is, the Employer.

The Employer in Reply

The Employer wishes to clarify that the Union's position, as set forth in its brief, seems to be that the Grievant's proper step increase date is in April, consistent with her transfer to the Polysomnography Technician position. If so, that is only one month different than the Employer's position, leaving only the proper 2006-2007 and subsequent wage increases to be determined.

Paragraph 3 of the MOU is clear. The examples set forth demonstrate that the Grievant's next step increase should have occurred on her transfer date. The Union misconstrues the intent of language by referring to the fact that the Grievant was placed on Step 3 of the wage scale, rather than Step 2. It is the fact that both positions were credentialed, not which step she was placed on, that is significant.

The Employer has also clearly established an existing practice, which, if the MOU language is held to ambiguous, should control. Examples offered by the Employer show that the transfer date has consistently been used in similar cases and evidence the parties' intent that it should be used here.

DISCUSSION

In this case, the parties developed contract language in Article 8.02 to govern step placement on the pertinent wage grid upon the transfer of an employee from one position to another within the bargaining unit. The language was designed to address situations where the transfer was from a non-credentialed position to a non-credentialed position, from a non-credentialed position to a credentialed position and from a credentialed position to a credentialed position. It also included permutations based on whether the former and new positions were or were not significantly related. What the language did not do was address the questions of whether or how such transfers would affect the employee's scheduled step movement after the transfer.

To deal with that issue, the parties entered into a Memorandum of Agreement in 2005, which purported to reflect the parties' understanding of when future step movement would occur for transferred employees under the various scenarios outlined above. The Memorandum sets out the operative contract language describing the various transfer scenarios in three numbered paragraphs and then includes shaded language at the end of each paragraph that is intended to address the step movement question. In this case, the Grievant's transfer was from a credentialed position to a higher, but significantly related, credentialed position. That much is undisputed. The operative language governing the timing of future step movement in such a case is found at the end of Paragraph 3 of the Memorandum, and states:

His/her next step increase will be determined by the transfer date. (For example if the positions do not significantly relate and the employee transfers to the start rate, the next increase will be six (6) months from the transfer date to the six (6)

month step. If the employee moves to the two (2) year step, his/her next increase would be one year from transfer date to the three (3) year step.

The parties do not agree as to the correct interpretation of this language. The Employer asserts that the provision clearly specifies that the date of transfer becomes the effective date for step movement in all cases. The Union maintains that the given example makes it clear that the transfer date only applies where the transfer is to a non-related position and that the anniversary of hire remains the date for step movement where the positions are related. Both parties put forward various rules of contract construction for the arbitrator to apply in resolving this dispute.

As the parties have pointed out, the first step in construing the pertinent language is to determine whether or not is ambiguous, that is, whether it is capable of more than one reasonable interpretation. If it is clear and unambiguous, it should be applied according to its plain meaning. If it is susceptible of more than one reasonable interpretation, however, various rules of construction may be applied to determine its proper meaning under the circumstances. In my view, the language is clear and unambiguous and does not require resort to rules of construction.

In this case, each paragraph of the Memorandum has shaded language at the end addressing future step movement. Each shaded section begins with a declarative statement beginning with the words, "His/her next step increase will..." followed by the agreed trigger date. In Paragraph 1, dealing with non-credentialed to non-credentialed movement that is the original hire date. In Paragraphs 2 and 3, dealing with non-credentialed to credentialed movement and credentialed to credentialed movement, respectively, the trigger is the transfer date. Paragraphs 2 and 3 then contain parenthetical language giving examples of how the language is to be applied. In each case, these examples explain that if the positions are not significantly related, and the employee, per contract, is placed at the beginning rate for the new position, the move to the 6-month step would be 6 months from the date of transfer. Where the alleged ambiguity arises is in the additional language, which describes future movement where the employee is placed on something other than the beginning step, and also uses the transfer date as the trigger, but makes no reference to whether the positions are significantly related or not. The Union asserts that this means that the transfer date was only intended to apply where the positions are not related and the original hire date applies where they are significantly related. I disagree.

There is no question that the language of the Memorandum could have been drafted more artfully. That does not mean, however, that it is ambiguous. Here, it is clear that the declarative statements beginning each shaded section are intended to control future step movement in all eventualities arising under the applicable paragraph and the parenthetical examples are just that. The shaded portion of Paragraph 3 begins, "His/her next step increase will be determined by the transfer date." That language is clear and unqualified and makes no distinctions between movement from one credentialed position to another based on whether they are significantly related or not. The examples are clearly designed to show how this would

apply depending on whether the positions are related or not. If not, the contract dictates that the employee be placed at the starting rate for the position, and according to the example, the next step movement would be to the 6-month rate, which would occur 6 months after transfer. If the positions are related, the contract requires that the employee be placed on the same step in the new position as he or she occupied in the old position. In the example given, if the hypothetical employee is placed at the two-year step in the new position, the next move would be to the three-year step, and would occur one year after transfer. It is true, as the Union points out, that the shaded language of Paragraph 3 doesn't specifically state that it applies to significantly related positions, but read in context it is susceptible of no other reasonable interpretation. The contract language upon which this paragraph is based only makes distinctions on initial step placement based on whether the positions are significantly related or not. There are only two parenthetical examples in the shaded language addressing movement between credentialed positions. The first specifically addresses movement between unrelated positions and the second is silent on the relationship between the positions. By inference, however, it can only apply to movement between significantly related positions because of the contract language to which it is tied.

In its brief, the Union argues that the transfer date reference in Paragraph 3 only relates to the immediately preceding sentence referring to unrelated positions. If that were true, however, the same would apply to the identical language in Paragraph 2, which immediately follows a sentence referring to employees in significantly related positions who have been employed for less than two years. The following parenthetical language in Paragraph 2, however, demonstrates that this cannot have been the intent of the parties, because it begins by addressing transfer between unrelated positions. Thus, the declarative statements beginning each shaded area in Paragraphs 1, 2 and 3 of the Memorandum clearly are intended to apply to all of the preceding contract language to which they are appended. This means that where a transfer is between non-credentialed positions, the step movement date remains the date of hire anniversary. Where the movement is from a non-credentialed to a credentialed position, or between credentialed positions, however, the transfer date becomes the trigger date for future step movement. In this case, the Grievant's transfer date was May 30, 2006, and so her operative date for future step movement is also May 30.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Employer did not violate the collective bargaining agreement when it determined that the Grievant's transfer date of May 30 was the appropriate anniversary date for future step movement. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 4th day of January, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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