BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

AFSCME LOCAL 621, COUNCIL 40

and

FAMILY HERITAGE NURSING & REHABILITATION CENTER (Carol Moore)

Case 7
No. 72827
A-6566

AWARD NO. 7891

Appearances:

Debra Pierce, ROMA Healthcare, 211 N. Broadway, Suite 2035, Saint Louis, Missouri, appearing on behalf of the Family Heritage Nursing & Rehabilitation Center.

Miguel Morga, Staff Representative AFSCME Council 40, 601 Alfred Street, Soldiers Grove, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

AFSCME Local 621, Council 40, and Family Heritage Nursing & Rehabilitation Center are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the employer concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to wages. The Commission designated Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held on March 20, 2014, in Black River Falls, Wisconsin. The parties filed written arguments, the last of which was received on April 11, 2014.

STATEMENT OF THE ISSUE

The parties stipulated at hearing to the following statement of the issue: "Did the employer violate the collective bargaining agreement when it reduced Carol Moore's wage to that of a new employee? If so, what is the appropriate remedy?"

The employer seeks to recast the issue in its brief, as follows: "[W]hether the grievant is entitled to keep her current rate of pay when she bumps a less senior employee in a different department when she has no relevant experience in the department."

I retain the statement of the issue as the parties stipulated at hearing.

RELEVANT CONTRACTUAL TERMS

ARTICLE VII – LAYOFF

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Section 7.02. … Employees who have been laid off shall have the right to bump a less senior employee provided the bumping employee has the requisite qualifications and training to perform the work.

* * *

ARTICLE XVI – WAGES

The Employer reserves the right to place new hires or promoted employees on the appropriate grid with credit for prior experience.

Starting Wage Rate (New Hires):

Maintenance: $11.21 C.N.A: $11.97 Cook: $10.14 All Other: $9.69 Resident Asst.: $10.32

New hires, after satisfactory completion of their 90 day probationary period, will receive a ten cent (.10) raise to their base hourly rate.

* * *

BACKGROUND

Family Heritage Nursing & Rehabilitation Center (hereinafter "Center" or "Employer") is a small private skilled nursing facility in Black River Falls, Wisconsin. Carol Moore, the Grievant, has worked for the Center for more than 40 years, in such positions as Certified Nursing Assistant, Dietary Worker, and Activity Aide.

On August 22, 2013, the Employer exercised its contractual right to eliminate positions, including the Activity Aide position Moore held. Pursuant to the collective bargaining agreement, Moore exercised her bumping rights and accepted a position in the Dietary Department. Several weeks later, the Employer reduced her hourly wage from $13.60 to $9.69, the starting rate for a Dietary Aide.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers there is no contractual language in the labor agreement allowing a unilateral reduction in salary to the "new hire" rate for an employee who bumps into a position, and that the only restriction on bumping rights regards qualifications and training. The fact that the Employer placed the Grievant into the new position without a formal training program shows it accepted that her training and qualifications were sufficient to perform the duties of Dietary Aide; for the Employer to then regard the Grievant as a new hire in setting her wages undermines the training and qualifications requirement of the layoff article and undermines the bumping rights of long-term employees.

The Union also notes that wages are set through negotiated increases and by a performance evaluation grid, neither of which is based on experience in a particular position. Because these increases are based on length of service, not service in a particular position, bumping into a new position does not negate past performance increases.

Citing specifically the testimony of Lisa Heller, the Union asserts a clear past practice exists to honor the length-of-service pay when employees change positions. The Employer, the Union notes, offered no testimony or evidence to the contrary.

It would be an accounting nightmare, the Union contends, if the Employer tried to maintain a database showing each employee's tenure in each position held, and the corresponding wage rates, which it would have to do to implement the pay structure it contends exists. There is no evidence the Employer has created such a database.

The Union notes that the Employer had previously claimed the Grievant had never worked in the Dietary Department, but stipulated at hearing that she had indeed done so in 2001, 2002 and 2004. The fact that the Employer had no records of this prior to hearing, the Union suggests, is because the Employer had never seen a need to distinguish between employees making the same rate.

The fact that the Employer initially put the Grievant at one wage rate, and only moved her several weeks later, the Union asserts, shows that it had no existing interpretation consistent with its claim.

Even if the Employer were correct that it could reduce the wage of a bumping or transferring employee to that of a new hire due to lack of experience, that would not justify its action here. The Grievant, a 40-year employee, was thoroughly cross-trained, and had previously worked in the Dietary Department; she was not a new employee and was not treated as such.

The wage structure at the Center, the Union asserts, is based on years of service at the facility, not years within a specific department; adjustments may be made for changes in classification, but not based on tenure within a particular department.

In support of its position that the grievance should be denied, the Employer asserts that the Union has not met its burden of establishing that the labor agreement "requires an employee to maintain her salary when she transfers to a different department." It notes that the agreement expressly provides the Employer may place a new hire or promoted employee on the appropriate grid for prior experience, and "would expect the same interpretation for a bumped employee as a new employee or a promoted employee." The Employer contends the agreement is clear and unambiguous and that the Union is attempting to gain by arbitration what it could not obtain through negotiations in 2013.

The Employer further asserts the Union has "attempted to divert the arbitrator's attention" from contract interpretation to past practice, but that there was no past practice permitting employees to transfer within departments and maintain their wages.

The Employer asserts that the Grievant was terminated as a Certified Nursing Assistant in 1996 and rehired as an Activity Aide the following year, at which time she received an hourly wage that was lower than when she was a CNA.

The Employer notes that the labor agreement from 1999 is not in the record and argues a one-time circumstance from 14 years ago does not establish a past practice.

The Employer asserts the Grievant did not have the requisite qualifications and training to perform the work of a Dietary Aide and, when she transferred to that position in 2013, she received exactly the type and length of training as do all new hires. Moreover, due to the frequent changes in state and federal regulations of long-term care facilities, any experience she might have received 10 or more years ago was no longer relevant.

The Employer concludes the Union did not satisfy its burden. The contract language is clear and unambiguous, it asserts; the record evidence established gives the Employer the discretion where on the salary grid to place an employee transferring to another department. Moreover, the Employer maintains, it does not have a past practice of keeping an employee's wages at a certain level when they transfer to a different department with outdated or no experience. The employee is being paid a fair wage consistent with other employees new to the job and the grievance must be denied in its entirety.

In its reply brief, the Union takes issue with several assertions in the Employer's brief which it contends are based on evidence not in the record, including the amount of training and supervision the Grievant received upon transferring to the dietary position; the course of her employment; the treatment of other employees; and the nature of state and federal regulations affecting the Dietary Department.

The Union also challenges the Employer's assertion that the labor agreement is clear and unambiguous, noting that the Grievant is neither being promoted nor a new hire and asserting the language has never been interpreted to let the Employer reduce an employee's salary. The Union further notes that the Employer paid the Grievant the higher rate for a full pay period after she transferred into the position, which it would not have done had the language actually been clear and unambiguous.

The Union reiterates that there is a clearly established past practice, as employees testified without challenge that they did not have their pay reduced when they changed positions, other than to reflect a difference in classification, and the veteran Union president testified, also without challenge, that she was not aware of a single incident where an employee bumping into a position had their wage reduced to that of a new hire. The Union further notes the Employer has offered no evidence, either at hearing or in its brief, that it had ever reduced a transferring employee's wage to that of a new hire.

In its reply, the Employer reiterates that since Article XVI allows it to place new hires or promoted employees on the appropriate grid with credit for prior experience, it would be nonsensical to suggest it could not treat bumping employees in the same manner. The Employer further asserts that it placed the Grievant in the Dietary Department, not because she had the training and qualifications to perform the tasks, but because the Union had threatened a grievance if Moore's bumping rights were denied.

The Employer further asserts that the contract provision which the Union cites does not address this situation at all, and that the provision which the Employer cites provides clear and unambiguous authority for its treatment of the Grievant.

The Employer repeats the statement, first made in its brief, that the Grievant left the facility's employment in 1996 and her wages, upon her rehire in 1997, were lower than previously.

The Employer again notes the absence of earlier labor agreements from the record, asserting this effectively rebuts the Union's argument about a binding past practice.

The Employer also rejects the Union's claim that employees are cross-trained; the fact that employees may have transferred to other positions, it maintains, reflects merely that they wanted different opportunities, not that they were trained for those other positions.

The Employer also asserts its recordkeeping – of not documenting in an employee's personnel file when they pick up extra shifts in a different department – does not support the Union's theory.

The Employer also rejects the Union's claim that it should have informed the Grievant her wages would be reduced upon transferring to the Dietary Department. As a Union member, the Employer maintains, she should have been aware of the situation and may have simply decided it was better to have a job at lower pay than no job at all.

The Employer reiterates that the labor agreement clearly and unambiguously gives it the right to place a transferring employee on the appropriate grid with credit for experience. It asserts Moore did not deny she received a full orientation when she transferred into the Dietary Department, indicating she had not been trained and was, to the Dietary Department, a new employee.

The Employer concludes the Union has failed to meet its burden of proof and failed to produce a prior labor agreement with the identical language and a corresponding situation which the Employer has applied differently. Finally, the Employer maintains that part of the reason it insisted upon language allowing it to place employees on the grid according to experience was to avoid a situation where transferring employees are paid a higher wage than others in their new department, including those who train them. Accordingly, the grievance should be denied.

DISCUSSION

This grievance concerns the wage which the contract requires the Family Heritage Nursing & Rehabilitation Center to pay to the Grievant, Carol Moore. At issue is the meaning and interpretation of the provisions of Article XVI, which provides as follows:

ARTICLE XVI – WAGES

> The Employer reserves the right to place new hires or promoted employees on the appropriate grid with credit for prior experience.
>
> **Starting Wage Rate (New Hires):**
>
> Maintenance: $11.21 C.N.A: $11.97 Cook: $10.14 All Other: $9.69 Resident Asst.: $10.32
>
> New hires, after satisfactory completion of their 90 day probationary period, will receive a ten cent (.10) raise to their base hourly rate.

As the parties recognize, it is axiomatic that clear and unambiguous language in a labor agreement is to be applied without resort to parole evidence. The Employer asserts the text above meets that definition and definitively negates the Union's argument.

The text is indicative but it is not dispositive. And it is not indicative in a manner supportive of the Employer's argument.

Under the labor agreement, there are three ways an employee can assume a position. They could be a new hire, they could be promoted into a position, or they could bump into a position as part of a layoff process.

Article XVI, however, only addresses two of those conditions. It explicitly provides that the Employer has the right to place new hires, and those who are promoted, on the appropriate grid with credit for past experience. "New hire" and "promoted employees" are specific terms in personnel administration and neither encompasses an employee who bumps into a position in lieu of being laid off.

Under the well-established principle of "the inclusion of one is the exclusion of another," the specific text of Article XVI supports the Union's analysis and not that of the Employer.

The record evidence also supports the Union's theory. Union witnesses testified that employees who bumped into another position had their base wage lowered if they bumped into a lower classification (e.g., CNA to Resident Assistant or Resident Assistant to Cook), but they retained their accumulated seniority for placement on the relevant wage grid.

The Employer asserts that, due to the Grievant's lack experience and need for full training, she was functionally a "new hire," and thus subject to the Employer's discretion regarding placement on the salary grid.

The Grievant may well have been without recent, relevant experience and in need of full training and orientation. However, there is no evidence in the record to establish that being the case. As the Union correctly notes, the Employer did not offer any witnesses, or cross-examine the Union witnesses, at hearing, but now attempts to offer into evidence a vast array of purported facts which have no foundation in the record. It cannot do so.

The Employer has included in its brief a significant number of purported facts, many of which would have been very relevant for my consideration. However, none of these facts are part of the record and, therefore, cannot be part of my analysis.

The language in the labor agreement suggests, but does not clearly and unambiguously establish, that Article XVI does not treat employees who bump the same as new hires or employees who are promoted into a position. The record evidence further supports the analysis, through testimony, that employees who bump into a position retain their longevity increases.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That the Employer violated Article XVI by placing the Grievant at the new hire rate when she bumped into the position of Dietary Aide. As remedy, the Employer shall restore the Grievant to the wage rate it initially paid her upon her bumping into the position and make her whole for lost wages. I shall retain jurisdiction for 90 days, or until released by the parties, to address any issues that arise in the implementation of this Award.

Dated at Madison, Wisconsin, this 21st day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Stuart D. Levitan, Arbitrator