

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5, Local 1164**

and

FAIRVIEW UNIVERSITY MEDICAL CENTER

**DECISION AND AWARD OF ARBITRATOR
FMCS 080123-52903-3**

JEFFREY W. JACOBS

ARBITRATOR

July 7, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 1164,

and

DECISION AND AWARD OF ARBITRATOR
FMCS Case # 080123-52903-3
Grievance matter

Fairview University Medical Center.

APPEARANCES:

FOR THE UNION:

Kurt Errickson, Business Representative
Grievant
Deb Bourgeois, grievant's QRC
Tony Iverson, NST, Cardiac Cath Lab
Willis Munn, HIMS Clerk II
Cheryl Ogbozo, Central Services Clerk, Steward

FOR THE EMPLOYER:

Paul Zech, Attorney for the Employer
Vicki Erickson, Triage Supervisor
Linda Bailey, Supervisor Protein & Endocrine Labs
Barbara Rowe, Case Mgr, EOHS
Nancy Swenson, Sr. Career Counselor
Gretchen Gromatka, Human Resources Rep.

PRELIMINARY STATEMENT

The hearing in the above matter was held on May 16 and June 3, 2008 at the FMCS Offices, 1300 Godward St. NE, in Minneapolis, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Post-Hearing Briefs dated June 23, 2008.

ISSUE PRESENTED

Did the Employer fail to use reasonable efforts, as that term is used in the labor agreement, to find alternate suitable work for the grievant under these facts and circumstances? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from August 1, 2006 through July 31, 2009. Article 26, section 2 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNION'S POSITION

The Union's position was that the Employer violated the labor agreement by failing to use reasonable efforts to find the grievant suitable work, refused to accommodate her disabilities and discriminated against her by placing junior people into positions for which the grievant was qualified. In support of this position the Union made the following contentions:

1. The Union asserted that the grievant is a 30-year employee of the Employer and has a vast wealth of experience. She had been an LPN for many years but that the work activity resulted in a work related injury to her wrist that limits her ability to perform the essential functions of her job as a Lab Care Attendant, LCA. The Union agreed that her disabilities, both work related and non-work related prevent her from returning to the LCA position. The Union acknowledged that the grievant also has limitations as the result of a shoulder injury as well as limitations due to upper respiratory condition and allergies, including latex allergies.

2. The Union asserted that following her work injury the grievant was assigned a QRC to assist her in returning to work. The QRC worked diligently with the grievant and the Employer to try to find alternate work within the organization and soon found that that they were stymied at every turn, The Union asserted that the grievant was placed on a transitional work status for 12 weeks but was not able to find work. After the expiration of that time frame, the grievant and her QRC worked with the Employer to try to find something that met her restrictions but were not able to. This was in large measure due to the refusal by the Employer to even allow the QRC to determine if a job or jobs could be modified to accommodate the grievant's disabilities by performing an onsite job analysis.

3. Some jobs that the grievant and her QRC felt she could perform had their position descriptions changed after the grievant applied for them so that the restrictions no longer were within the essential functions of the job.

4. The Union further argued that the Employer violated the provisions of the labor agreement pertaining to posting of job vacancies when they took down a posting and re-posted with the same information on it. The grievant never realized this was a new posting and so did not apply for it since she had been already turned down for the first posting.

5. The Union further argued that the Employer violated the grievant's privacy when it shared health information with managers before there was even a job offer made. In so doing, the Employer was essentially sabotaging the job search efforts by showing the grievant's limitations to the managers in order to demonstrate to them what the grievant could not do.

6. The Union relied on several provisions of the labor agreement in support of its positions and assertions herein as follows:

ARTICLE 13 – Leaves of Absence. Section 5 – Reinstatement after leave. Any employee returning after an approved leave of absence as covered by this Article will be returned to the job that was held at the time the leave was granted or to an equivalent job vacancy. In the event the job has been eliminated or there is no equivalent job vacancy, the returning employee shall be entitled to the set of options identified in Article 21, Layoff and Recall, Section 1(A), (B) or (C). Reasonable efforts will be made to place an employee unable to perform his/her regular duties into a position for which he/she is qualified.

ARTICLE 17 – Filling of Vacancies. Section 1. Posting of Vacancies. Whenever a vacancy occurs which the Employer determines to fill, the Employer shall post notice of the opening on designated bulletin boards for a period of not less than seven (7) calendar days. The posting shall contain the classification, title, shift, department and/or work location, the list of the requirements for the position and authorized hours.

Section 2 ... Vacancies shall be awarded to the senior employee applicant where the employee currently meets the qualifications set forth in the requisition in the following order:

- A. The senior employee applicant in the classification and work location where the vacancy is located;
- B. Next, the senior employee applicant in the classification;
- C. Next, the senior applicant in the bargaining unit;
- D. Next, the Employer may fill the vacancy in any manner, which may include, the Employer's discretion, consideration of bargaining unit employees.

The provisions of Section 1, Posting and Section 2, Applicant Consideration may be waived by written agreement between the Employer and the Union in order to return a bargaining unit employee who is on a leave of absence resulting from a disability or Workers Compensation to a bargaining unit job.

ARTICLE 22 – Pledge Against Discrimination. Section 1. The provisions of this Agreement shall be applied equally to all employees in the bargaining unit without discrimination as to protected class status. For purposes of this Article “protected class status” means the employee’s age, sex, marital status, affectional preference and/or sexual orientation, race, color, creed, or religion, national origin, political affiliation, Veteran’s Status, or because of a physical or mental disability or Union activity. Every employee shall have the right to a workplace free from discrimination based on his/her protected class status, including freedom from:

- A. unwelcome, derogatory jokes, slurs and comments,
- B. discriminatory discipline, and
- C. other forms of discriminatory treatment such as the discriminatory application of work rules and work assignments.

7. The Union argued that the provisions of Article 17 state that a vacancy “shall” be awarded to the senior applicant where the employee currently meets the “qualifications set forth in the requisition.” The Union noted that in many of the examples where the grievant applied for jobs but was denied hiring, there was a common contract violation: the job postings did not contain a list of requirements for the position, in violation of Article 17, Section 1, Posting of Vacancies.

8. In several cases the grievant absolutely did meet the qualifications set forth in the requisition order only to have the Employer change those qualifications later on in the process or to find that the requisition order did not fully and completely set forth the qualifications.

9. The Union asserted that these tactics made it clear that the Employer was in effect changing the rules as it went along here to prevent the grievant from being hired into jobs she was qualified for even with her limitations.

10. Moreover, the Union asserted that the anti-discrimination provisions of Article 22 require that the Employer make reasonable accommodations of her disability to find her suitable work. The Union asserted that the Employer failed woefully in this effort. As an example, when the grievant and her QRC wanted to explore the possibility of a one handed keyboard to allow the grievant to type, they had not even heard of such a thing even though they have been on the market for years. They refused to purchase one for her even though the training is inexpensive and minimal and cost no more than a “regular” keyboard.

11. The Union argued that the provisions of the Americans With Disabilities Act, ADA, should be read into the labor agreement and that those provisions clearly require reasonable accommodations of a person's disability. Here that did not happen. The Employer's own policy on Transitional Work Program for Health Care Workers with Restrictions," discusses issues related to temporary assignments and transitional work plans but does not describe procedures for assessing opportunities for reasonable accommodations. The Union asserted that the arbitrator should as part of the decision mandate that such a procedure be promulgated by the Employer in order to comply with Article 22 of the labor agreement and in accordance with the ADA.

12. The Union then went through several positions for which the grievant applied but was denied and noted that the requirements for the job were either never listed on the requisition, as required by article 17, or were changed midway through the process in an obvious attempt to keep the grievant out of that particular job.

13. In at least one case a junior worker, a casual employee with no formal seniority rights at all was hired into the position of Clinic Scheduler in Radiation Therapy, the grievant also applied for the job. This of course can only mean that no one else with any formal seniority applied, yet the grievant, one of the most senior people in the unit, was passed over for this job.

14. In others, the Union disputed the accuracy of the listed requirements of various jobs. In several cases, incumbents were asked to describe the actual duties and gave very different versions of what they actually do as compared to what the Employer asserted the job requirements were. The Union again asserted that this demonstrates a clear pattern of discrimination designed to keep injured workers in general and this employee in particular from getting re-employed in suitable jobs at this facility.

15. The essence of the Union's argument is that the Employer has violated Article 13 by failing to put forth reasonable efforts to place the grievant in a suitable position for which she is qualified, Article 17 because it continually failed to list the correct qualifications on the requisition and Article 22 because it has consistently treated the grievant discriminatorily by denying her jobs for which she is qualified or which she could easily do with reasonable, even very minor, accommodations.

16. The Union requested that the arbitrator select whichever one of these jobs was most appropriate for her and order that she be placed into that position and to make her whole by appropriate back pay and reinstatement of contractual benefits.

The Union seeks an award of the arbitrator ordering the Employer to place the grievant in a position for which she is qualified and requiring that each posting contain a specific list of the essential versus the marginal job functions.

EMPLOYER'S POSITION:

The Employer's position was that there was no contract violation in the matter. In support of this position the Employer made the following contentions:

1. The Employer acknowledged the grievant's many years of experience and service to the Employer but argued that her many physical restrictions make it impossible to find her suitable employment that meets those restrictions.

2. The Employer asserted emphatically that this case arises out of and is limited to the labor agreement. It is not a case arising under the Minnesota Workers Compensation Act, the Americans With Disabilities Act, ADA, the Minnesota Human Rights Act or any other statutory scheme. The grievant already has a matter pending under the ADA with the EEOC but that is an entirely different matter over which the arbitrator here has no jurisdiction or authority. See also Article 26, Section 3 Arbitrator's Authority, which is specifically limited to the "interpretation and application of the expressed terms of this agreement."

3. The Employer asserted that there is no provision of the labor agreement that has been violated and that it has tried quite diligently to make “reasonable efforts” to place the employee. The Employer pointed to the provisions of Article 13 that provide in relevant part as follows:

Article 13 Leaves of Absence: Section 5 Reinstatement After Leave. Any employee returning from an approved leave of absence as covered by this Article will be returned to the job that was held at the time the leave was granted or to an equivalent job vacancy. In the event the job has been eliminated or there is no equivalent job vacancy, the returning employee shall be entitled to the set of options identified in Article 21, Layoff and Recall, section 1(A), (B), (C). Reasonable efforts will be made to place an employee unable to perform his/her regular duties into a position for which he/she are qualified.

4. The Employer noted that there is no dispute that the grievant’s current restrictions will not allow her to return to her former position, even with accommodations, so the issue is whether the Employer has made reasonable efforts to find alternate work pursuant to the provisions of article 13 set forth above. The Employer asserted that it has met and even exceeded its contractual requirements to use “reasonable efforts” to find alternate work for the grievant and that accordingly there is simply no contractual violation at all. The Employer asserted that the mere fact she has not found suitable alternate employment does not mean that the efforts to find her one have not been reasonable or diligent. The Employer argued that the decision here is based on the reasonableness of the effort made to secure a position not on the outcome. Otherwise the contract would read very differently.

5. The Employer noted that the process used here is the one used all the time in similar situations. The job is posted, any interested employee may sign it and apply; interviews are scheduled; if the employee is qualified, the hiring manager makes a conditional offer contingent on passing any tests or examinations; if all is approved the job is offered; if not then the conditional offer is withdrawn. The grievant never got beyond the conditional offer and once her limitations became known and they were compared to the requirements of the job, in those cases the offer was withdrawn. There is no contract violation in that scenario.

6. The Employer also pointed out that only very late in the process did the Union begin relying on the provisions of Article 17, section 1 and its permissive waiver provisions. These allow the Union and the Employer to essentially waive the posting requirements to fill vacancies in order to return an employee who is on a leave of absence resulting from a workers compensation disability. The Employer argued that this provision clearly says “may” and is thus not mandatory at all.

7. Moreover, the Employer noted that the Union has never even requested that this provision be invoked in the grievant’s case. The grievant herself has never requested that this provision be invoked either despite having knowledge of the contents of this article and being quite involved in all aspects of this case.

8. The Employer argued that its occupational health experts have been more than diligent in trying to find an appropriate job for the grievant but have simply been unable to. This however was due in large measure to the multitude of physical limitations she has both due to her work related injury as well as respiratory issues and other orthopedic problems and limits on her ability to use her hands and arms, to stand, walk, lift and even to sit. She has severe limitations on keyboarding, as that will likely aggravate her already serious medical conditions to her hands and wrists.

9. The Employer pointed to several of the positions the grievant claimed she could do and noted that her restrictions in fact make it impossible for her to actually perform the duties of those positions. The Employer and its witnesses testified that in many cases the grievant self-limited her search either because of the physical requirements of the job or because she was not qualified to do the work by training or experience or because of the schedule.

10. In some cases the physical requirements of the job were out of date and when this was noticed the Employer implemented changes to those in order to make sure they were accurate. The Employer also does not want to place the grievant in a position for which she is not qualified or which will prove to be outside of her physical capabilities in order to prevent her from re-injuring herself or injuring some other body part.

11. The Employer argued most strenuously that the Union has not stated a viable claim for relief. Certainly the arbitrator does not have the power to create some sort of policy or procedure for determining the job suitability as the Union requests. Neither does the arbitrator have the power to create a job for the grievant nor to simply place her in one of the arbitrator's choosing. To do so would, in the eyes of the Employer, be for the arbitrator to substitute his arbitral judgment for those of trained medical and occupational professionals.

12. The essence of the Employer's arguments is that there has not only been no contract violation here but that the Union is asking the arbitrator to do things the arbitrator has no authority to do under the labor agreement. The Employer strenuously asserted that in each case where the grievant was not hired it was due to her lack of qualifications for the job or the physical limitations she has. Finally, there is no contractual requirement that the Employer "try harder" to find the grievant a job and that the Employer is more than willing to continue to work with the grievant and her QRC to locate suitable employment for her as long as she is able to do the job.

Accordingly the Employer seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The grievant has been with Fairview for approximately 30 years. She has been an LPN, although she let her license lapse and no longer practices nursing. In addition she has been employed in a variety of positions within the facility including the job of Lab Care Assistant, LCA. Her work performance is not involved in this matter.

The grievant suffered a work related injury to her left arm and hand as the result of the repetitive movements mostly from venapuncture operations, i.e. drawing blood. This resulted in a number of permanent physical restrictions on the use of her hand, wrist and arm. In addition, the grievant suffers from a number of other health related issues, including a shoulder injury, respiratory restrictions, latex allergies and trouble standing or walking for extended periods of time.

It was undisputed that the grievant is unable to perform the essential functions of the LCA position even with accommodations and that she is unable to return to that job. The Union did not make a claim that she must be reinstated to that position.

The physical limitations on the grievant as the result of these injuries are quite extensive. There were several medical reports relative to this. Union exhibit 4 showed that she is unable to lift more than 15 pounds, although there are many functions she is unable to perform at any more than 10 pounds, is unable stand for more than 3 hours and then for no more than 10 to 15 minute intervals, walk for more than 4 hours and is restricted to “occasional” to “rare” use of her left hand. Union exhibit 5 showed much the same set of restrictions in a somewhat different format. Employer exhibits 4, 6, 7 and 8 also indicated permanent restrictions to her left hand but showed that her lifting restrictions are no more than 10 pounds on a frequent basis and no more than 15 pounds on an occasional basis. She is unable to keyboard or type for more than 10 minutes at a time and no more than 35 minutes in any one hour. She is unable to bend or twist her left wrist at all.

Somewhat troubling was the Functional Capacities Evaluation, FCE, that was performed on August 7 and 8, 2007. The comments to the FCE showed that the grievant had considerable trouble working with her hand, standing for any extended period of time and walking. After only a very few minutes, i.e. 3 to 4, of computer keyboarding the grievant reported burning and numbness in her left hand. These comments show that the grievant begins to have some trouble with some functions well before even the stated times. However for our purposes, the restrictions set forth by her medical doctors are the relevant ones to use to determine the issue involved in this case.

In summary, the grievant has left ulnar neuropathy, left wrist tenosynovitis and left carpal tunnel syndrome. She wears a wrist splint for these conditions and must do so almost constantly. The occupational specialists knew of these restrictions along with the grievant’s other limitations set forth herein as well as her desire not to start work before 8:00 a.m. due to a history of depression, see Employer exhibit 12 at the 6-25-07 entry.

The grievant was placed on a Transitional Work Program for 12 weeks. There was no dispute about that program or the time she spent in that period. When the Employer received the medical documentation that the restrictions were permanent and that these would render the grievant unable to return to her former position as an LCA, the grievant was placed on a medical leave and was referred to the Workforce Development Office for assistance in locating and obtaining suitable alternate work within the Fairview health system. As the wrist injuries were considered work related, she was also provided the assistance of a QRC through the Workers Compensation System, Ms. Debra Bourgeois, who also helped the grievant with job search and applications for employment.

Ms. Bourgeois expressed considerable frustration with the Employer's efforts to find alternate work for the grievant. She indicated that there were efforts to sabotage the job search by letting hiring managers know of the grievant's restrictions before a conditional job offer had been made and even before the interview. The Union claimed that such actions are a clear violation of the grievant's rights under a variety of statutory scheme, including the ADA and HIPAA. As will be discussed below, that may well be true as there was some disturbing testimony about that, but the arbitrator's jurisdiction is limited to the interpretation of the labor agreement and does not extend to determining violations of state or federal law. As the grievant already has a pending claim with EEOC, that must be left to other forums.

More to the point, the evidence showed that the QRC tried most diligently to find suitable employment with the Employer to no avail. The evidence also showed a very diligent job search effort made by the grievant as well, also to no avail. While there were some instances where the grievant withdrew from consideration the evidence showed that this was in most cases due to confusion about what the qualifications for the jobs really were and an inaccurate listing of those requirements on the job posting, a topic that will also be discussed more herein. In summary, the evidence showed amply that the failure to find work was in no way due to any lack of effort by the grievant or her QRC.

On the other hand, the Employer argued and provided some credible evidence that it too tried diligently to find work for her but that the restrictions made it difficult if not impossible to accommodate her restrictions. The Union argued that in several instances a minor accommodation would have resulted in the grievant being qualified for certain positions but that the Employer refused to implement or even explore those options. This was especially true of the one-handed keyboard so the grievant could type with her right hand only. The question though of whether reasonable accommodations were made within the meaning of the ADA is not strictly involved here and while this testimony was troubling the question remains whether there was a violation of the labor agreement in this case. The question is thus whether the Employer provided reasonable efforts within the meaning of the labor agreement to find the grievant suitable alternate employment.

Turning now to the standard that governs the inquiry of this case it was apparent that the Union desired an expansive reading of Article 22 to include the ADA and in fact many of the statutory standards governing the anti-discrimination laws both state and federal. Article 22 provides some support for this view. The language cited above from this provision mirrors closely state and federal law with regard to anti-discrimination law and evidences an intent that employees are not to be subjected to disparate treatment based on the listed protected categories, including physical disability. The language is quite clear on that point. The language of article 22, Section 1 even goes so far as to provide that “a grievance brought under this Article may be based on a disparate treatment or disparate impact theory.” Here the allegation is something of both.

The Union argued that the ADA is the proper measure by which this case must be judged and that if the arbitrator determines that reasonable accommodation under that statutory scheme was not provided the grievance must be sustained. This is not as easy an inquiry as it at first may seem.

There is something of a division amongst arbitrators on questions like this. Elkouri notes that “Arbitrators often construe collective bargaining agreement in light of statutes and case law. ... Especially in the context of rising numbers of discrimination claims, the arbitrator’s role may be viewed as changing. ... [W]hile arbitrators may not base their determination entirely upon their views of the applicable legislation without regard to the language of the agreement, where the rights set forth in the agreement are similar to those created by enacted legislation, they must consider external law.” Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. at page 486-87. However, other arbitrators “have refused to apply external law in rendering their decisions.” Elkouri at 486.

Clearly contractual language must mean something and this interpretation is not to say that the terms of Article 22 are without meaning. The notion that disparate treatment of similarly situated employees has long been at the very heart of labor relations and if an employee is treated differently as the result of being in a protected class those provisions would apply. Here though, there was insufficient evidence that the grievant was treated differently *as the result of her disability*. Her disability is the reason she is in this situation but there was no evidence that she was treated that way because of it.

Clearly too, Article 22 demonstrates an intent that the employees not be subject to disparate treatment or discrimination but some caution needs to be exercised by arbitrators drawn by the allure of suddenly becoming elevated to the position of Federal District Court Judge by imposing on the parties a standard and a set of case law surrounding such case law without a very clear showing that this is what the parties intended and that such jurisdiction was clearly conferred upon the arbitrator. Labor arbitrators still derive their powers from the four corners of the labor agreement; this is as true now as it was in 1960 when the U.S. Supreme Court made that abundantly clear to us all. Thus while it is clear that some use of external law can be used as long as the arbitrator bases the decision on the terms of the labor agreement the notion that literally all of the interpretive statutory and case law holdings are incorporated into this labor contract is simply without sufficient support.

There was for example no showing that the parties used the ADA as a model for the language of article 22 nor was there a sufficient showing that the parties intended for a labor arbitrator to use federal or state case law as a guide to interpreting it. This case must therefore rise and fall on the terms of the contract. Here that requires a review of Article 13 and Article 17 as well. More importantly, the provisions of Article 13 and 17 are far more specific and related to the facts presented in this matter and are the provisions upon which the inquiry must proceed. Thus while the Union argued ably that the terms of the labor agreement require “reasonable accommodation “ within the meaning of the ADA, no such language appears in the contract and in this record none can be placed there by a grievance arbitrator.

The Employer objected to the inclusion of Article 17 as the basis for the Union’s claim arguing that it was only used for the first time at the hearing. Arbitrators tend to be loathe entertaining “last minute” arguments on the theory that this is a surprise. Such new theories of the case may be rejected and objections to them may well be sustained if it shown that they are essentially new claims or place the other side at a significant disadvantage or that some prejudice has been shown. None was shown here. While the grievance documents reference only Articles 13, 22 and 35. See Union exhibit 1, there was little doubt what this grievance was about and no surprise or prejudice was shown by the addition of a claim that Article 17 was violated as well. Moreover, the evidence showed that the parties were long in discussion about this case and that the Union made its concerns about how this was being handled long before the arbitration hearing.

The Union’s argument that the provisions of Article 17 were violated are based on the assertion that the grievant was the senior applicant for many of the positions she did not get. This alone does not carry the day since in many cases she was not able to perform the essential functions of the job.

The evidence did not support a contractual violation with respect to the so-called waiver provisions of Article 17 Section 2. That language provides that “the provisions of Section 1, Posting and Section 2, Applicant Consideration may be waived by written agreement between the Employer and the Union in order to return a bargaining unit employee who is on a leave of absence resulting from a disability or Workers Compensation to a bargaining unit job.” There is no requirement that any of the provisions of Article 17 be waived by the parties. The fact that they were not in this case means nothing in terms of whether there was a contract violation. Moreover, the evidence showed that the Union did not request such a waiver in the grievant’s case and neither did she. Under these circumstances it can hardly be said that there was a violation.

On the other hand, the evidence did show that the Employer failed to comply with the provisions of that part of Article 17 that requires that “Vacancies shall be awarded to the senior employee applicant where the employee currently meets the qualifications set forth in the requisition ...” The record was replete with examples where the posting did not contain accurate or up to date information about what the qualifications were. In one case the requirements of the job were actually altered after the grievant had interviewed for the job. The Employer explained that the Employee Occupational Health Services, EOHS, personnel noticed that the position description appeared obsolete or otherwise inconsistent with the requirements of the job. Frankly that should have been done before the grievant interviewed for the job and certainly before she was given a conditional offer of employment. The terms of the language are clear that the qualifications must be set forth in the requisition and that the most senior person must be given the job if they meet those. See Article 17 Section 1 that provides “the posting shall contain the classification, title, shift, department and/or work location, the list of the requirements for the position and authorized hours.”

The evidence was also clear that in at least one case the grievant *did* meet the qualifications for the position as they were listed on the posting. The Employer’s intentions may have been good but the process followed was not in compliance with the agreement.

There is also the question of whether the Employer has made “reasonable efforts” to return the grievant to her position within the meaning of Article 13. That language provides that “reasonable efforts will be made to place an employee unable to perform his/her regular duties into a position for which he/she is qualified.” The most obvious question is thus whether the Employer used reasonable efforts to place the employee.

As noted above, everyone seems to have the grievant’s best interest at heart here and there was insufficient evidence of any nefarious motives on the part of the Employer or any hidden agenda to simply keep the grievant from getting any job. Neither was there any evidence on this record of true discrimination and the contract violation noted above was apparently done without any malice toward the grievant. However, the Employer did not follow the proper procedure here in many of the postings for these jobs. It should be noted that the one example cited above was but one example; there were others where the evidence showed that the posting did not contain accurate information about the qualifications or requirements of the job. Obviously, one part of the remedy will be to require that the Employer comply with the provisions of Article 17 insofar as it requires the placement of the current and accurate “classification, title, shift, department and/or work location, *the list of the requirements for the position* and authorized hours.”

The final, and clearly most difficult, question is what to do about that. The Union seeks the imposition of policy to comply with the ADA. The latter request is clearly beyond the jurisdiction of the arbitrator in this setting. With all due respect to the labor arbitrators of the world whom Frank Elkouri described as laboring “earnestly and ably,” most labor arbitrators, especially this one, are no more competent to promulgate a policy for complying with the ADA than they are able to deliver quality health care in a medical setting. Simply stated, promulgating a policy for compliance with the ADA or any other statutory scheme is for the Employer to determine. If they do it right they do it right; if they do it wrong the Courts will re-direct it somehow.

The Union also seeks reinstatement or “instatement” for the grievant into whichever position the arbitrator deems appropriate. Some thought was given to doing that but on this record it was simply not appropriate to simply pick a job and place the grievant into it. That would be as the Employer put it, the substitution of arbitral judgment in place of medical and occupational experts.

The arbitrator is more than mindful that this may appear a pyrrhic victory for the grievant and the Union. The essential feature of this case is that while there was a violation in the procedure, it still was not completely clear that the grievant could do any of the jobs she applied for given her extensive restrictions, both from the work injury and otherwise. The best that can be done here is to require the Employer to follow the procedure set forth in Article 17 and not be changing the postings or the requirements for jobs after they have been posted and certainly not after the grievant has applied for, interviewed for and been given a conditional job offer for one. Obviously too if the grievant is qualified to perform the essential functions of any future position for which she applies and she is the most senior person to apply she is to be hired. The arbitrator is also quite mindful that this may be the very sort of “try harder” order the Employer noted in its Brief. At the end of the day, getting the grievant back to work in a suitable job will be in everyone’s best interest. At the very least the Employer needs to demonstrate that this is exactly what they have been working for all along.

Accordingly, the grievance is sustained in part and denied in part. The Union's request for a policy to comply with the ADA must be denied. The Union’s further request for the arbitrator to select a position and place the grievant in it is also denied. The grievance is sustained to the extent that the Employer is ordered to comply fully with the provisions of Article 17 by placing the accurate and complete “classification, title, shift, department and/or work location, the list of the requirements for the position and authorized hours” on the requisition and posting.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above.

Dated: July 7, 2008

AFSCME 1164 and Fairview University Medical Center.doc

Jeffrey W. Jacobs, arbitrator