Group Health

TIME REQUIRED TO RENDER AWARD: 54 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 113,	)	FEDERAL MEDIATION AND CONCILIATION SERVICE CASE NO. 05-50997
Union,	)	
and	)	
GROUP HEALTH, INC.,	)	DECISION AND AWARD OF ARBITRATOR
Employer.	)	

APPEARANCES

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On December 9, 2005, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by failing to assign the grievant, Kathleen A. Alm, to extra hours

of work for which she bid. Post-hearing briefs were received by the arbitrator on January 19, 2006.

FACTS

The Employer operates a health maintenance organization in Minneapolis and St. Paul, Minnesota, and the surrounding area. It provides service to its members at seventeen clinics, including one located in White Bear Lake, Minnesota, a suburb of St. Paul. The Union is the collective bargaining representative of many of the non-supervisory employees of the Employer, including those classified as Laboratory Assistants and as Medical Laboratory Technicians.

The Employer maintains a Central Laboratory, at which it performs about one hundred fifty possible analytical procedures ("tests") on specimens that are collected from patients at the clinics and are then forwarded to the Central Laboratory for analysis. In addition, at sixteen of the seventeen clinics, the Employer maintains a smaller laboratory ("Clinic Laboratory") at which several less complicated tests can be completed while the tested patient remains in the clinic. Generally, the tests completed at the clinic relate to blood chemistry or pregnancy.

The Clinic Laboratories are staffed with employees in two classifications, "Laboratory Assistant" and "Medical Laboratory Technician" (hereafter, "Laboratory Technician," as the parties refer to this classification). Laboratory Assistants collect the specimens to be tested -- whether at the Clinic Laboratory or at the Central Laboratory. Laboratory Assistants never conduct any part of analytical procedures.

The primary distinction between the work done by a Laboratory Assistant and the work done by a Laboratory Technician is that Laboratory Technicians perform all of the analytical work for tests completed in the Clinic Laboratory, though Laboratory Technicians also collect specimens. The parties estimate that about 30% of the work done by a Laboratory Technician consists of analysis and that about 70% of the work consists of the collection of specimens.

The job description for Laboratory Assistants requires a high school diploma or the equivalent, and the job description for Laboratory Technicians requires an "Associate degree in lab science or medical laboratory technology from an accredited institution, or [graduation] from a 12-month approved school for Certified Laboratory Assistants." The wage rate for Laboratory Technicians is about $4 per hour higher than the wage rate for Laboratory Assistants.

At the time the present grievance arose, in the summer of 2004, the Employer's staffing goal was to have at least one Laboratory Technician at each clinic during the hours of patient visits, so that clinic testing could be done during the visit. The total staff employed in each classification was then about fifty-nine Laboratory Technicians and about twenty-seven Laboratory Assistants. Some of those in each classification worked part-time.

The grievant has been employed by the Employer for about twenty-one years. In the summer of 2004, she was classified as a Laboratory Technician, and she was a part-time employee,

working about fifteen hours per week. She was usually assigned to one of three clinics -- the one in White Bear Lake, the one in Woodbury or the one in St. Paul. She testified that, though she works part-time by her own preference, she occasionally bids for more work when the Employer posts for bidding what the parties refer to as "temporary additional hours" -- extra hours that are made available when an employee who was originally scheduled to work those hours is unable to do so.

In June of 2004, by a system-wide e-mail, the Employer posted for bid four temporary additional hours -- from 8:00 a.m. through noon on July 29, 2004, at the White Bear Lake Clinic. The hours were made available for bid because Denise Jacobson, a Laboratory Technician who had been scheduled to work those hours, would be on vacation.

At the time of the hearing, neither of the parties had available a copy of the actual e-mail posting of the hours at issue. Several witnesses, however, testified about its wording. The grievant testified that, as she recalled the posting, in the column used to state the classification of the employee sought for the work, it specified, "Tech/Phleb." Witnesses for both parties explained that "Phleb" is an abbreviation for "Phlebotomist," a classification listed in the labor agreement, but no longer used. The work of a Phlebotomist consists of collecting blood specimens -- work that Laboratory Assistants and Laboratory Technicians do. Witnesses for the parties testified that a listing for a Phlebotomist is the equivalent of a listing for a Laboratory Assistant. Thus, as I understand the

testimony of the grievant on this subject, the "Tech/Phleb" listing she described would designate hours available to either a Laboratory Technician or a Laboratory Assistant.

Deborah L. Gladitsch, who has been a Laboratory Technician since 1989, gave testimony that I summarize as follows. Since 2001, one of her primary duties has been to schedule temporary additional hours that become available in the Employer's Clinic Laboratories. She posts the system-wide e-mails that notify Laboratory Assistants and Laboratory Technicians of the extra hours available for bidding, and she receives the bids. Before 2001, temporary additional hours were posted and filled consistent with the classification that was originally scheduled for those hours. Thus, when hours were vacated that were originally scheduled for work by a Laboratory Technician, the e-mail posting made the hours available for bid only by a Laboratory Technician. At that time, the Employer did not use many Laboratory Assistants to staff the Clinic Laboratories.

Soon after Gladitsch became the primary scheduler of temporary additional hours in the Clinic Laboratories, the Employer reorganized its staffing, increasing the ratio of Laboratory Assistants to Laboratory Technicians. The Employer adopted the policy of staffing each clinic with Laboratory Assistants when possible, but having at least one Laboratory Technician in each Clinic Laboratory whenever the clinic was open to patients. After that change, Gladitsch posted temporary additional hours, using the word, "Preferred," at the head of

the column that states the classification for which the hours are available.

In 2003, however, Gladitsch again changed the way in which she described temporary additional hours in her e-mail postings, eliminating the word, "Preferred," at the head of the column that lists the classification sought for the hours, and, instead, heading that column with the word, "Only." That change was made for the following reasons.

In the summer of 2003, in almost the same circumstances as those that led to the present grievance, Denise Jacobson, vacated four hours she had been scheduled to work as a Laboratory Technician at the White Bear Lake Clinic. Gladitsch posted the hours for bid by e-mail. Though she listed the hours as hours for the "Phleb" classification -- the equivalent of a Laboratory Assistant -- the posting used the word, "Preferred," at the head of the column that specified the classification. The grievant bid for the hours, but they were awarded to a Laboratory Assistant junior to the grievant. The grievant did not present a formal grievance about this 2003 incident, but when she asserted a claim to the hours informally, she was paid for the hours. Gladitsch testified that the payment was made because the "Preferred" heading created an ambiguity whether the Employer sought either a Laboratory Assistant or a Laboratory Technician to fill the hours. After this 2003 incident, the Employer decided that, in future postings, the heading for the column that lists the classification sought would be "Only" rather than "Preferred."

From this evidence, I find that the posting at issue used the word, "Only," at the head of the column describing the classification for which the hours were available and that, in accord with the Employer's policy of using a Laboratory Assistant when possible, the posting listed the Laboratory Assistant's classification as the one sought for those hours. As I describe below, the hours at issue in the present case were awarded to a Laboratory Assistant, and that fact implies that the posting listed the hours as hours to be filled by a Laboratory Assistant and not by a Laboratory Technician.

Thus, the four hours at issue -- from from 8:00 a.m. to noon on July 29, 2004, at the White Bear Lake Clinic -- were hours for which Denise Jacobson, a Laboratory Technician, had been originally scheduled, but which were posted as temporary additional hours for bid "Only" by a Laboratory Assistant.

The grievant sent Gladitsch a fax bid for the hours, but the hours were awarded to a Laboratory Assistant who had less system-wide seniority than the grievant.

DECISION

On August 3, 2004, the Union brought the present grievance in behalf of the grievant, seeking "benefits and 4 hour pay at applicable rate" for the hours at issue. The grievance alleges that the grievant was the most senior qualified employee who bid for those hours and that the Employer violated Article 15, Section 9, of the parties' labor agreement by failing to award her the hours. Relevant parts of Article 15, Section 9, are set out below:

Assignment of Temporary Additional Hours. If temporary additional hours are available within the clinic/location, the hours shall be distributed as follows:

1. Offer to employees who have been laid off or reduced in hours, pursuant to Article 11, Section 18. Should the most senior qualified Employee choose not to accept the additional hours, the next most senior qualified Employee shall be offered the additional hours.

2. If #1 is not applicable and/or there are no or insufficient Employees in #1 above, offer to the most senior qualified Employee permanently assigned to the clinic/location, including on-call Employees and float Employees "permanently assigned" to the clinic/location and for whom the additional hours would not require the payment of overtime. Should the most senior qualified Employee choose not to accept the additional hours, the next most senior qualified Employee shall be offered the additional hours. . . .

The Union urges that, by force of the second paragraph of Article 15, Section 9, the grievant was entitled to the temporary additional hours at issue because she was qualified to work those hours and she was the senior bidder.

The Employer argues that Article 3 of the labor agreement, which preserves the right of management to conduct operations, is controlling:

Management Rights. The Union recognizes that the Employer has the obligation of serving its members with the highest quality of medical care, efficiently and economically, and meeting medical emergencies. Except as specifically regulated by this Agreement, the Employer retains its rights, powers and authority including, but not limited to the right to hire, layoff, promote, demote, transfer, discharge or discipline for cause, to make and require observance of reasonable clinic/location rules and regulations, direct the work force, and the right to determine the materials, means, staffing and type of service to be provided.

The Union argues that the grievant was entitled to the hours at issue under the two criteria for selection established by the second paragraph of Article 15, Section 9. She was senior to the Laboratory Assistant who was awarded the hours,

and, as a Laboratory Technician, she had the skills to perform and did perform all of the duties of a Laboratory Assistant. As the Union interprets Article 15, Section 9, the Employer must make temporary additional hours available to employees who hold the same classification as that of the employee who was originally scheduled to work those hours. The Union argues that the Employer has acknowledged the Union's interpretation of Article 15, Section 9, by paying the grievant in 2003 when, on substantially the same facts, she claimed payment for the failure of the Employer to award her temporary additional hours that had been vacated by Jacobson.

The Employer argues that Article 3 preserves the usual right of management to decide about staffing, i.e., to determine the number and skills of the employees needed in its operations. According to the Employer, nothing in Article 15, Section 9, restricts that right to determine staffing when it is deciding how or whether to fill temporary additional hours.

I make the following rulings. As I have found above, the evidence shows that the e-mail posting for the hours at issue listed them as available only to a Laboratory Assistant. By so restricting the availability of those hours, the Employer changed its original staffing decision. It would now have the White Bear Lake Clinic Laboratory staffed on that Saturday morning by a Laboratory Assistant rather than by Jacobson, a Laboratory Technician. Presumably, if the Employer followed its general policy of having at least one Laboratory Technician on duty during patient hours, another Laboratory Technician was

also scheduled to work that morning -- though the evidence does not indicate what the total staffing of the Clinic Laboratory was that morning.

Nothing in the language of Article 15, Section 9, expressly or impliedly limits the right of the Employer to decide how it will staff its operations when originally scheduled hours are vacated. As I interpret Article 15, Section 9, it does not prevent the Employer from adjusting its staffing to fit recently known operational needs. Thus, the language does not limit the right of the Employer to decide not to fill the vacated hours at all -- if, for example, patient scheduling were to fall short of original expectations -- or from deciding to use employees with entirely different skills -- if, for example, an unusual mix of patients recently scheduled for the hours in question required the availability of differently skilled employees.

The Employer's payment to the grievant in 2003 after failing to select her to fill Jacobson's vacated hours does not establish a binding practice that the Employer must now accept. The evidence shows that the Employer made that payment because the e-mail posting, which used the word "Preferred" to list the classification of the employee sought for the hours, was ambiguous in its listing of the classification sought. The e-mail posting in the present case eliminated the ambiguity when the word "Only" was used to state the classification sought. Even in the absence of that difference in the facts, however, I would rule that one previous acceptance of a similar occurrence

does not imply a binding agreement that all such occurrences in the future must also be accepted. A contracting party's consistent and longstanding acceptance of a practice is necessary to a finding of an implied agreement to be bound by the practice in the future.

With respect to the Union's argument that the grievant met the requirements of Article 15, Section 9, because she was the senior bidder and was qualified to work as a Laboratory Assistant, I make the following ruling. As a remedy, the grievance seeks "benefits and 4 hour pay at applicable rate." The Union's arguments make clear that the "applicable rate" it seeks is that of a Laboratory Technician and not that of a Laboratory Assistant. The temporary additional hours that were posted, however, were available at the wage rate of a Laboratory Assistant, in accord with the Employer's staffing decision. Though I agree with the Union that the grievant was the senior bidder for the hours at issue and that she was qualified to work as a Laboratory Assistant, the grievance seeks a higher wage rate than what was posted for bid. Thus, as the grievance is presented, the failure of the Employer to award the temporary additional hours to the grievant at the wage rate of a Laboratory Technician does not violate Article 15, Section 9, of the labor agreement. Because the arguments of the parties do not present the issue, I do not decide whether a Laboratory Technician, if willing to accept the wage rate of a Laboratory Assistant, would have a right to temporary additional hours posted for a Laboratory Assistant.

AWARD

The grievance is denied.

March 14, 2006

Thomas P. Gallagher, Arbitrator