BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 150, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

and

MERITER HOSPITAL, INC.

Case 77
No. 52456
A-5352

Appearances:

Mr. Todd Anderson, Business Agent, Local 150, Service Employees International Union, AFL-CIO, appearing on behalf of the Union.

Axley Brynelson, Attorneys at Law, by Mr. Michael J. Westcott, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 150, Service Employees International Union, AFL-CIO, hereinafter referred to as the Union, and Meriter Hospital, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Madison, Wisconsin, on June 21, 1995. The hearing was not transcribed and the parties filed post-hearing briefs which were received on July 24, 1995.

BACKGROUND:

The facts underlying the grievance are not in dispute. The grievant, Patrick Bodie, has been employed as a Mechanic II by the Employer since October 1, 1990. On January 11, 1995, the grievant was given a written warning related to his work performance. 1/ On January 30, 1995, and again on February 7, 1995, the grievant applied for a promotion to a vacant

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1/ Ex. 7.

Mechanic III position. 2/ The two applications were for the same position. The Employer notified the grievant he was not eligible for the position pursuant to the Employer's Transfer and Promotion/Demotion Policy because he had a written reprimand in his file that was less than six months old. 3/ The matter was grieved on February 7, 1995, 4/ and was denied on March 20, 1995, on the basis of the Employer's Policy. 5/ The Employer's Policy has been in effect for at least 14 years and five (5) other employes since 1992 have been found ineligible for transfer or promotion pursuant to the Employer's Policy. 6/ No grievances have been filed on the Employer's Policy until the instant grievance which is the subject of this arbitration.

ISSUE:

The parties were unable to agree on the issue. The Union sees the issue as follows:

> Did the Employer violate Article VI, Employment Status, of the collective bargaining agreement when it denied Patrick Bodie the right to bid for an open Mechanic III position?

The Employer states the issue as follows:

2/ Exs. 5 and 6.

3/ Exs. 4, 5, 6 and 8.

4/ Ex. 2.

5/ Ex. 3.

6/ Exs. 9 - 15.

> Whether the Employer violated Article VI of the collective bargaining agreement when it determined that Patrick M. Bodie was not qualified for the Mechanic III position; and if so, what is the appropriate remedy.

The undersigned frames the issue as follows:

Did the Employer violate Article VI of the parties' collective bargaining agreement when it determined that Patrick M. Bodie was ineligible for the Mechanic III position pursuant to the Employer's Transfer and Promotion/Demotion Policy?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISION:

ARTICLE III. EMPLOYER RIGHTS

Section 1. Scope

The parties recognize that this contract addresses the employer-employee relationship existing between the hospital and its employees in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of employer and employee.

It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Hospital and the direction of the work force including, by way of example and not by way of limitation, the right to select, hire and assign employees, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Hospital, direct and assign work, determine work schedules, transfer employees between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Hospital's goals and objectives are to be attained, and to discharge employees for just cause or relieve employees from duty for lack of work or other legitimate reasons are vested exclusively with the Hospital, but this provision shall be construed to harmonize with and not to violate other provisions of this Agreement.

It is further understood that all functions of management not otherwise herein relinquished or limited shall remain vested in the Hospital.

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ARTICLE VI. EMPLOYMENT STATUS

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Section 3. Promotions and Transfers Within The Bargaining Unit

Promotions and transfers will be granted to the most qualified applicant. Promotions and transfers shall be based on the criteria set forth in the job description and/or position questionnaire, (including education, training, work experience), and current attendance and job performance as reflected in the personnel records of the Hospital and the appropriate department. Applicants are also encouraged to submit resumes prior to consideration for the position. Where these qualifications are equal, bargaining unit seniority shall become the determining factor. Attendance shall not be used unless it has gone to the verbal warning stage or above within the past twelve (12) months.

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D. Job Posting

Regular job openings which are not of a supervisor or managerial nature will be posted on the appropriate bulletin boards as soon as practical and will remain posted for five (5) calendar days, two days of which shall be over a weekend. In order to quicken the process of filling a job opening, the Hospital reserves the right to simultaneously seek other candidates, either inside or outside the Hospital. These other candidates will be considered if, after five (5) full calendar days from the date of posting, no employee bids for the open job, or if all employees who bid for the job have qualifications noticeably less than the outside applicant as described in Section 3 of this Article. In order to maintain an efficient continuation of services in all departments, the Hospital also reserves the right to determine the number of employees who may be transferred from any department within any given period of time. Final selection of a candidate remains vested with the department head or supervisor where the opening exists. Such decision is subject to the grievance procedure.

Such posting shall include job title, wage grade, either FTE or hours worked per week, unit or area worked (where relevant), shift, and date posting period begins. Job descriptions and/or position questionnaires defining qualifications necessary will be available in the appropriate department office or Personnel Department.

Within two (2) weeks of the job bid award, the successful employee will be informed of the date of transfer to the new position. Those additional employees that applied for said position shall be notified verbally or in writing that they were not granted said position.

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E. Bidding on Posted Jobs

In accordance with Article VI, Section 3. D., and subsequent to Article VI, Section 3. D. 1., all vacancies within union classifications will be posted on the designated bulletin boards at both Hospital sites and in the department in which the opening occurs. An employee may bid on a posted job after successful completion of their initial ninety (90) day probationary period if the job opening is in the department where he/she currently works; however, he/she may bid on a job opening posted in another department/nursing unit only after completion of continuous six (6) months' service in their new job. Employees may bid on portions of available job openings posted in the department/unit. Such bids will not be unreasonably denied. Reasons for denying said request(s) include, but are not limited to, inability to recruit candidates for remaining position, inability to provide weekend coverage, or inadequate numbers of employees to staff department, unit or work group. The final decision rests with management. (Employees are not permitted to bid on portions of the FTE when the position available is a 1.0). In the case of a job title and/or department or nursing unit change, an employee will be on an orientation/training period and must perform in their new job and/or in the new department/nursing unit for a continuous period of ninety (90) days in a manner acceptable to the Hospital before being regularly assigned to the new job. An employee who has been successful on a job bid in a new job, and/or in a new

department/nursing unit must complete at least six (6) continuous months on their new job before being eligible to bid on another job in a new department/nursing unit. Such a successful bid will result in a new ninety (90) day orientation/ training period.

Job bids for change in job title and/or department/nursing unit must be submitted to the Personnel Department in writing on an Application for Transfer/Promotion Form.

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UNION'S POSITION:

The Union contends that the Employer by automatically excluding the grievant from bidding on an open Mechanic III position because he had received a written reprimand within six months of his application violated the grievant's contractual rights by refusing to fully consider his qualifications for the position. It argues that the Employer's promotion/transfer policy is superseded by the eligibility standards of the parties' collective bargaining agreement. It points to the testimony of the Employer's witnesses that once it was determined that an applicant was disqualified due to a written reprimand, that applicant received no further consideration. The Union points out that the Employer has claimed its transfer/promotion policy applies because the contract is silent on this issue, but the Union submits that this is incorrect and the contract is not silent. It observes that Article VI, Section 3. provides that "promotions and transfers will go to the most qualified applicant" and the factors used are set out in detail as "Education, training, work experience, as well as job performance." It also notes that reprimands and other material contained in personnel files can be used as a factor, along with the previously mentioned factors, to determine who is the most qualified applicant. It alleges that the Employer's use of its transfer/promotion policy instead of the collective bargaining agreement denied Bodie the full consideration to which he was entitled. It submits that all the Employer looked at was whether there was a written reprimand in his file and no consideration was given to either the nature or severity of the reprimand. It maintains that none of the factors set forth in Article VI, Section 3. is given more weight than any of the others, yet that is precisely what the Employer did by making the personnel file factor paramount. The Union cites Roseville Community Hospital, 92 LA 421 (Concepcion, 1989), as being nearly identical to the instant case. It contends that in Roseville, the employer had a policy of automatic disqualification for anyone receiving a written reprimand within the previous 45 days and the arbitrator held that such a rule without examining the nature of the written warning is arbitrary and capricious and while a written warning reflected upon an employe's merit, the automatic disqualification of applicants without considering their additional qualifications violated the contract. The Union insists the rule here is identical to that held to be arbitrary and capricious in Roseville. It observes that in Roseville the factors the employer was required to use to determine qualifications were not defined and here they are precisely defined and the Employer's failure to consider these demonstrate that the grievant was not given the full

consideration guaranteed by the contract. The Union claims that Article VI, Section 3. recognizes that reprimands come in various forms and those based on attendance are weighed differently and verbal reprimands for attendance can be considered whereas non-attendance related reprimands must be written to be considered. It argues that the failure to consider the nature and severity of Bodie's written reprimand is further evidence that the Employer's policy violates the contract's requirement that each applicant's qualifications be fully considered.

The Union contends that the Employer is unilaterally imposing new eligibility standards which conflict with the parties' contract. It rejects the Employer's claim that the Union knew of the policy and never grieved it. It claims that the evidence fails to prove the Union knew the Employer was applying the policy to bargaining unit employes. The Union takes the position that it has demonstrated that the Union was not aware of the policy. It observes that the Employer's example that a union official's inquiry about whether a verbal warning made an employe ineligible for transfer proves nothing. It points out that the official was told the employe was eligible and this does not establish that the official was aware of the written reprimand policy nor does it establish that that official was aware that the Employer's policy was being applied to bargaining unit employes. It concludes that the Employer failed to prove that the Union knew of the application of the policy to members but failed to grieve it. It urges a finding that the Employer violated Bodie's rights by automatically disqualifying him from the Mechanic III position due to a recent written warning.

EMPLOYER'S POSITION:

The Employer contends that Article III, Section 1., the "management rights" clause, clearly gives management the right to determine what the qualifications of any given job are. It points out that it also provides that the promotion and demotion decision includes job performance as reflected in the Employer's personnel records. The Employer observes that it has decided to only consider a written warning or above that is less than six months old. It claims that the Union alleged that Bodie had not been allowed to "bid" on the position and labels this argument as disingenuous because the term "bid" means to submit an application for transfer/promotion which Bodie did twice. The Employer argues that Bodie was deemed unqualified or ineligible because he had a written warning in his file that was less than six months old. It submits that Bodie was treated no differently than any other employes. It asserts that the Union cannot point to any contractual provision that this established practice or the treatment of Bodie violated.

The Employer contends that if Article VI, Section 3. is ambiguous, past practice supports the Employer's position. It claims that the past practices are undisputed and the Employer has followed its Policy on Transfers and Promotions/Demotions without exception for 14 years and never once did the Union grieve or otherwise object to this longstanding practice. It notes that there have been no significant changes in the language of Article VI, Section 3. over the last several contracts. It asserts that the past practice demonstrates that the parties interpreted the

agreement as allowing the Employer to exclude individuals from consideration when they have a written warning that is less than six months old.

It submits that the Union has been aware of the Employer's practice and has never objected to it. It observes that the Employer's Labor Relations Manager had a meeting with the former local segment president of the Union with respect to a transfer. It notes that the local

president was concerned that an employe who had received a verbal warning would not be eligible for transfer and the manager explained that the "trigger" for ineligibility was a written warning. It observes that the Union's local segment president did not challenge, object to or grieve the policy. It urges that acquiescence by the Union demonstrates that it did not believe the Employer's conduct violated the agreement.

The Employer maintains that even if the Union had no firsthand knowledge of the policy, its alleged ignorance does not change the outcome of this case. It states that the Union has an obligation to police the contract and cannot allow conduct that it contends violates the agreement to occur repeatedly and later assert that the conduct violates the agreement. It claims that a party may be assumed to know what is transpiring and the conversation with the former local segment president should have removed all doubt.

In summary, the Employer observes that a practice that has been followed for the past 14 years is now being objected to by the Union even though there have been no significant changes to the contractual language. It alleges that Bodie was allowed to bid on the job and was determined to be ineligible or unqualified because he had a written warning that was less than six months old. Such conduct, according to the Employer, does not violate the language or the spirit of the contract and it requests that the grievance be denied.

DISCUSSION:

Article VI, Section 3. states, in pertinent part, as follows:

> Promotions and transfers will be granted to the most qualified applicant. Promotions and transfers shall be based on the criteria set forth in the job description and/or position questionnaire, (including education, training, work experience), and current attendance and job performance as reflected in the personnel records of the Hospital and the appropriate department.

This language is unambiguous and straightforward. It is clear that the Employer makes the decision who is the most qualified based on the factors listed in this section. It is obvious that it is in the Employer's best interest to select the most qualified applicant and in doing so it will consider all the factors carefully and objectively. It would not be in the Employer's own interest to make promotions on the basis of personality or favoritism or discrimination or on a single factor but rather the Employer would make its judgment on an evaluation of all the factors set forth in Article VI, Section 3. Not only is that in the best interest of the Employer but is required by the terms of the contract. Article III, Section 1. provides that the Employer will "fairly evaluate

relative skill, ability, performance or other job qualifications, . . ."

In the instant case, the Article VI, Section 3. allows and may require the Employer to consider the disciplinary record of an employe. An employe who is otherwise eminently qualified but has been disciplined for violating safety rules or for insubordination or poor performance may not be the most qualified employe. On the other hand, an employe who has been disciplined for chewing gum, punching in early, or not keeping normal records because an emergency at work prevented the employe from doing so, may be the most qualified. In making the decision to promote, the Employer must exercise its discretion and be objective and not arbitrary and capricious.

In the instant case, the automatic disqualification of a bidder based on a written warning within six months prevents the Employer from exercising its discretion in a reasonable manner. Here, an employe in the employment office automatically rejects a bid if there is a written warning in the file within the last six months. It makes no difference if it is on the first or last day of the six months, it makes no difference what the warning was for and it does not require any exercise of judgment but is a rote decision made automatically. It is telling a bidder they are unqualified without exercising any judgment or discretion. Article VI, Section 3., D provides: "Final selection of a candidate remains vested with the department heard or supervisor where the opening exists." With this right comes the responsibility to exercise it in a reasonable manner. The supervisor or department head who takes into account all of the factors in Article VI, Section 3. might find a person with a written warning less than six months old to be the most qualified by far over other applicants, but the department head or supervisor never exercises the right to make that decision where, as here, the bidder has been automatically rejected. This is not in the Employer's best interest and the automatic rejection without exercising any judgment is arbitrary and capricious and violates Article VI, Section 3. It is not the use of the disciplinary record that is unreasonable because the Employer can consider the disciplinary record of an applicant but it is the application of the policy where the applicant is automatically eliminated before the decision maker exercises his/her judgment that violates Article VI, Section 3.

The Employer has argued that it has applied its policy for at least 14 years, that the Union was aware of its policy and its application and did nothing to challenge it and thus waived any objection to it. The Union's acquiescence in the practice, the Employer asserts, prevents it from grieving the matter now until changes are negotiated in the contract. However, arbitrators have frequently held that where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in, the matter will be treated as closed insofar as it relates to past transactions; but repeated violations of an express rule by one party or acquiescence on the part of the other ordinarily will not affect application of the rule in future operations. 7/ In the instant case, the undersigned, for purposes of his analysis, concludes that the

7/ Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at pp. 399-408.

Union was aware of the application of the Employer's policy and choose not to grieve it. The Employer's practice in the instant case conflicts with the clear and unambiguous provisions of the contract, namely, Article VI, Section 3. and the plain language of the contract must be given effect. The Union's failure to grieve past violations of Article VI, Section 3. by application of the Employer's policy does not forever bar the Union from seeking adherence to clear contract language in future cases. 8/ It is therefore concluded that the Union's failure to grieve the application of the Employer's Policy on Transfers Promotion/Demotion does not preclude consideration of the instant grievance based on the clear and unambiguous language of Article VI, Section 3.

The Employer's automatic exclusion of bidders without exercising its judgment to determine which applicant is the most qualified violates the contract, i.e., Article VI, Section 3. As the language of Article VI, Section 3. is clear and unambiguous, the failure to grieve it does not preclude consideration of the instant grievance. Here, the automatic exclusion of Bodie violated Article VI, Section 3., and therefore the issue of remedy for this violation must be determined. The Employer could be directed to reconsider the applicants including the grievant, but such would be inadequate as a negative result which may in fact be fair, could be perceived as prejudicial. 9/ In the instant case the grievant was disciplined on January 11, 1995, for not changing the air filters on Air Handling Unit #16 for at least three months and apparently recording that they were changed. 10/ His applications for promotion were less than a month later. 11/ The offense goes directly to work performance and occurred close to his dates of applications. It is not clear on the record that given this type of offense that the grievant would have been promoted over someone without a warning for six months even if the Employer had exercised its judgment of all the factors in Article VI, Section 3. at the time of the promotion. 12/

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

8/ Rock County, Wisconsin, 80 LA 1217 (Briggs, 1983); BASF Wyandotte Corp., 84 LA 1055 (Caraway, 1985); Hayward School District, 89 LA 14 (Concepcion, 1987).

9/ Roseville Community Hospital, 92 LA 421 (Concepcion, 1989) at 424.

10/ Ex. 7.

11/ Exs. 5 and 6.

12/ Roseville Community Hospital, 92 LA 421 (Concepcion, 1989) at 424.

The Employer violated Article VI of the parties' collective bargaining agreement by determining that Patrick M. Bodie was ineligible for the Mechanic III position pursuant to the Employer's Transfer and Promotion/Demotion Policy. As a remedy for this violation, the Employer shall cease and desist from applying its Transfer and Promotion/Demotion Policy to the bargaining unit to the extent that applicants are automatically disqualified if they have a written warning within the prior six-month period or in any other manner that conflicts with the parties' collective bargaining agreement.

Dated at Madison, Wisconsin, this 28th day of August, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator