LABOR RELATIONS CONNECTION
DISCIPLINARY GRIEVANCE ARBITRATION

In the Matter of the Arbitration between

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1445
Union,

And

UMASS MEMORIAL MEDICAL CENTER,
Employer.

OPINION

AND

AWARD

Grievance: [redacted]-Transfer
LRC Case No. 297-22

BEFORE: Jeffrey M. Selchick, Esq.
Arbitrator

APPEARANCES:

For United Food and Commercial Workers, Local 1445
Pyle Rome Ehrenberg, PC
Alfred Gordon O'Connell, Esq.

For UMASS Memorial Medical Center
Jackson Lewis, PC
Kevin M. Sibbernsen, Esq.

In accordance with the Collective Bargaining Agreement (hereinafter "Agreement") (Joint Exhibit 1) of the parties (hereinafter "Union" and "Hospital"), the undersigned was designated Arbitrator. A hearing was held remotely via Zoom on February 3, 2023.

The parties were accorded a full and fair hearing including the opportunity to present evidence, examine witnesses, and make arguments in support of their respective positions. The parties filed post-hearing briefs, and the record was closed on or about April 17, 2023.

ISSUE

Whether the Hospital violated Article 29 and/or Article 64 of the CBA when it did not place the Grievant in the position of Anesthesia Technician?

If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Article 23 ("Grievance Procedure and Arbitration") of the parties' Agreement reads in pertinent part:

> **Arbitration**
>
> In the event the grievance is not resolved at Step Three, the Union can file for arbitration within twenty (20) calendar days of receipt of the Step Three response. If there is failure to request arbitration within the twenty (20) calendar day time period, the grievance shall be waived, deemed denied and ineligible for submission to arbitration thereafter.
>
> The jurisdiction and authority of the arbitrator and his opinion and award shall be confined exclusively to the interpretation and/or application of the specific provisions of this Agreement.
>
> The arbitrator shall have no authority to add to, detract from, alter, amend, or modify any provision of this Agreement or to establish or alter any wage rate or wage structure or to interpret any Federal or State statute or local ordinance when the compliance or noncompliance therewith shall be involved in the consideration of the grievance. The arbitrator shall have no authority to award punitive or exemplary damages.

The arbitrator shall have authority to award relief only to individuals who have filed or are clearly identified by name in the written grievance as interested parties directly affected by the contract violation alleged in the grievance.
The written award of the arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority shall be final and binding on the aggrieved employee, Union, and UMMMC.
(Joint Exhibit 1, 18).

Article 28 ("Job Description") of the parties' Agreement reads:

The Union recognizes the right of UMMMC to establish jobs, define duties and issue job descriptions. UMMMC will offer the Union the opportunity to discuss changes in job descriptions. UMMMC will bargain with the Union over the impact of all changes affecting wages, hours, and condition of employment of any employee covered under this agreement prior to implementing such changes. All new employees and other employees, upon request, shall be furnished a copy of their job description.

When a job description needs to be updated, the management will draft a proposed copy and submit it to a Union Representative for review. Within fifteen (15) work days, the Union Representative will return the job description to the management with any request for changes. If the management does not agree with the amended job description, an ad hoc committee comprised of management, a Union Representative and a small group of employees representing the position in question shall meet to resolve the differences. However, the final contents of the job description including duties and the appropriate qualifications remain the responsibility of the management. (Id., 24)

Article 29 (“Job Posting”) of the parties’ Agreement reads:

Posting Positions

Open positions will be posted electronically for seven calendar days. Additionally, management will post the position within the department in which the position is being offered.

The posting will be dated and initialed by the manager or designee. All postings will be clear as to state weekends, holidays, on call, rotating shift requirements, and specific site locations.

The most senior, qualified applicant within the department in which the position is being offered will be awarded the position.

If another “within the department” position becomes available as a result of filling the first position, the manager fills that position by offering it to the most senior, qualified bargaining unit applicant within the department. This process repeats itself until a position is posted and there is no “within the department” bargaining unit member interested and qualified for the position.

Each available position with no interested and qualified “within the department” bargaining unit member will then be awarded to the most qualified applicant. UFCW applicants will have preference in any case where all other qualifications are similar. If no one is awarded the position, it will be available to qualified, external candidates.

The Parties agree to meet after ratification to further discuss the Union’s concern regarding the length of time that it takes to fill job postings and will work together in an effort to improve the process to the benefit of UMMMC and UFCW members. (Id., 24-25).

Article 64 (“Transfer Policy”) of the parties reads:

UFCW vacancies will be posted and conducted in accordance with the Job Posting Article of this Agreement. Employees must be in their current position for at least six (6) months before applying for transfer to a posted position. (The six (6) month period may be waived for employees interested in applying with the approval of management and Human Resources). Employees with written warnings and final written warnings in the last twelve (12) months may not be eligible to apply for transfer. This hiring restriction may be waived at the discretion of the hiring manager.

Employees who are interested in applying for a posted position and want to transfer must complete an “Internal Transfer/Change of Hours” form, either on hard copy (Public Folders) or through OurNet (listed under Staff Center: Employment Opportunities) or through the internet (www.umassmemorial.org) as an “internal” applicant and submit it to Human Resources within the appropriate posting period (See Job Posting Article). A staffing partner will review and assess the qualifications of the transfer candidate and refer qualified transfer candidates to the hiring manager for consideration. The hiring manager may review the employee’s personnel file.

When a candidate for transfer is notified that he/she is a finalist for the posted position, he/she must advise his/her current manager/supervisor within two (2) business days. Candidates seeking transfer should advise the current manager that the hiring manager may want to obtain a reference or speak to the employee’s current manager/supervisor. A candidate selected for transfer must give his/her current manager/supervisor at least two (2) weeks notice before moving to the new position. The employee’s transfer to the new position may be delayed by the mutual agreement of the current manager and the hiring manager for operational needs up to thirty (30) days.

Current UFCW members who transfer to another UFCW position will not be subject to a ninety (90) calendar day probationary period in the new position. Employees who transfer from other unions or non-union positions into UFCW positions will be subject to a ninety (90) calendar day probationary period. The probationary period may be extended an additional 30 days by mutual agreement between UFCW and UMMMC. The manager/supervisor may dismiss the employee for any reason during this probationary period. (Id., 48).

BACKGROUND FACTS

The instant grievance was filed on February 28, 2022 on behalf of Grievant [redacted]. (Union Exhibit 1). According to the grievance, the Hospital violated the parties' Agreement, including Articles 29 and 64, when Grievant was "offered position as Anesthesia Tech and after being offered the position and Accepting the position, was contacted and had offer withdrawn unfairly and in violation of C.B.A. and past practice." (Id., emphasis in original). The record shows that Grievant entered the Hospital's employ in 2016 and has worked in the position of Operating Room Secretary in the Department of Anesthesia & Perioperative Medicine. (See Employer Exhibit 1). Before her employment with the Hospital, Grievant worked for three years at Massachusetts General Hospital as a specimen receiver in the operating room and as a clinical laboratory assistant. (Id.).

The events that led to the instant grievance began when Grievant applied for an Anesthesia Tech position in the Hospital in September 2021. The job description for the position includes the following under "Qualifications and Experience":

> **III. Position Qualifications:**
> **License/Certification/Education**:
> **Required:**
> 1. Equivalent to high school plus additional specialized training.
>
> **Experience/Skills:**
> **Required:**
> 1. Knowledge of a variety of patient care and anesthesia procedures.
> 2. Three to twelve months experience.

> Unless certification, licensure or registration is required, an equivalent combination of education and experience which provides proficiency in the areas of responsibility listed in this description may be substituted for the above requirements.
>
> Department-specific competencies and their measurements will be developed and maintained in the individual departments. The competencies will be maintained and attached to the departmental job description. Responsible managers will review competencies with position incumbents.
> (Union Exhibit 4).

The record indicates that the Department in which the position was located is the same Department where Grievant worked as Operating Room Secretary. The Anesthesia Tech position was under the supervision of [redacted], Chief Certified Registered Nurse Anesthetist. It is relevant to note that Mr. [redacted] did not testify in this proceeding.

Grievant first applied for the Anesthesia Tech position in April, 2020. According to Grievant, at that time, she asked [redacted] whether she was qualified for the position and was informed by him that she would be taught everything she needed to know for the position. Grievant, however, was not hired at that time, and her April 2020 application is not the subject matter of this proceeding. Rather, it is Grievant's application for the Anesthesia Tech position in September 2021 that forms the subject matter of the grievance. According to Grievant, [redacted] informed her that he asked the Hospital's Internal Talent Acquisition Manager, [redacted], to offer her the job.

The record contains an October 15, 2021 email from [redacted] to [redacted] in which [redacted] stated:

> I would like to offer the current 3-11 anesthesia tech position to [redacted]. I have already spoken with her and she is waiting to hear from you. If you have any questions or concerns or if you need any additional information, please let me know. (Union Exhibit 11).

Grievant testified that [redacted] communicated with her, and Grievant learned that she would have to take a significant pay cut if she accepted the position, which she decided not to do. An October 20, 2021 email from [redacted] to [redacted] stated that "[redacted] will not be accepting the position due to pay. Did you have another candidate in mind?" (Id.).

Grievant testified that she then learned from [redacted] in early January 2022 that there was a recent pay scale increase for the Anesthesia Tech position and that he suggested that Grievant communicate with Talent Acquisition to see if the position was still open. On January 6, 2022, Grievant transmitted an email to [redacted]:

> [redacted] [redacted] suggested I reach out to you regarding the recent pay scale increase for the Anesthesia Tech position. I am still incredibly interested in taking the position, but as I mentioned I couldn't afford to lose that much money. Especially when the job entails much more than I am currently doing as the OR secretary. Am I at least able to make the same base pay that I'm making now? (Union Exhibit 5).

On January 11, 2022, [redacted] transmitted an email to Grievant stating "I just wanted to check back with you to see if you were going to pass on this position, or if you wanted to move forward. The team would like an update." (Id.).

Grievant replied on the same date to [redacted] that she had spoken to [redacted] "last night and I told him I'd take the position at $20/hr. I'm looking forward to moving into this position as soon as possible." (Id.). In less than ten minutes, [redacted] transmitted the following email to Grievant:

> Great. I'll confirm with compensation we can get you at $20. Once I can confirm that I'll give you a call. (Id.).

Several hours later, [redacted] emailed Grievant as follows:

> I can confirm the $20/hr. Who is your current manager? I will let them know you have accepted the tech position and we can discuss a transfer date. (Id.).

Grievant replied to [redacted] email:

> "Thank you so! My manager is [redacted]." (Id.).

Later on January 11, 2022, Grievant sent the following email to [redacted]:

> Today I accepted the anesthesia tech position that was offered to me a while ago. I'd like to start that role as soon as I can. January 26th will be my last day in my current position. (Union Exhibit 12).

On January 13, 2022, Grievant received the following email from the Hospital's "Recruiting Team" regarding her "application for anesthesia technician." (Union Exhibit 6). The email stated:

> "We value your continued service to UMass Memorial Medical Center and we are happy that you are interested in continuing your professional growth internally. We have carefully reviewed your professional experience and have elected not to pursue your candidacy for the position referenced above. (Id.).

At the time the above email was transmitted, Grievant received the following voicemail message from [redacted]:

> Hi [redacted]. This is [redacted] calling with UMass Memorial. I wanted to touch base in regards to the Anesthesia Tech position. We are not going to be able to transfer you due to a written warning. Any candidate in our system who is on a warning is unable to transfer, so I wanted to go over that with you if you can give me a call back ... Thanks so much. … (Union Exhibit 15).

According to Grievant, she phoned [redacted] back several minutes after the voicemail message was left. Grievant testified that, in this phone call, all that was discussed was the "written warning." Grievant testified she informed [redacted] that the written warning was more than a year old and could not be used to block her transfer. According to Grievant, [redacted] essentially responded that the Hospital had made up its mind and was moving on. [redacted] testified about this phone call and, contrary to Grievant's testimony, stated that, in addition to speaking about a warning, she informed Grievant that her qualifications did not meet the requirements for the position.

Grievant testified that when she received the email from Talent Acquisition and spoke with [redacted], she went to [redacted] to ask what had happened. Grievant testified that [redacted] told her that [redacted] had spoken with the Head of Anesthesia, a Dr. [redacted], to block Grievant's transfer. Ms. [redacted] is the Director of the Department in which both the Anesthesia Tech position and Grievant's position as Operating Room Secretary are housed. [redacted] testified that she did go to Dr. [redacted] to state her concerns about Grievant's qualifications.

For her part, [redacted] testified that she did speak with [redacted] before informing Grievant she would not be given the transfer and that [redacted] had informed her in this phone call about Grievant's "warning" and that Grievant lacked the qualifications for the position. [redacted] and [redacted] both testified that the essential part of their discussion was Grievant's lack of qualifications. According to [redacted], the concerns she expressed to [redacted] were based on the fact that Grievant did not have knowledge of or experience with patient care or anesthesia procedures.

After the grievance was filed, [redacted] informed the Hospital's Human Resources in a March 1, 2022 email as follows:

> No, a formal offer was never sent by me. … [redacted] [[redacted]] did verbally offer [redacted] the position and she asked me what the pay rate would be, I did give a pay rate but no offer was ever made by me or sent because [redacted] doesn't meet minimum qualifications, which she understood when I called her. (Union Exhibit 9).

When the Grievant's Union Rep inquired of the Senior Director of Talent Acquisition as to why Grievant did not receive the position, the Senior Director responded:

> … I was able to look into this situation and I have been informed that the manager expressed a verbal offer to [redacted] and when he connected with the TA Consultant, we confirmed the application and reviewed the qualifications to the role. It was at that time that we saw that [redacted] didn't meet the qualifications for the role as she didn't have the 3 to 12 months of experience. The consultant discussed this with [redacted] and confirmed that we wouldn't be moving forward with an officer for the role. (Union Exhibit 10).

The record also contains a March 13, 2022 email from Grievant's Union Rep to Human Resources and [redacted] asking that the grievance be moved to Step 2. (Union Exhibit 14). The following day, HR Business Partner, [redacted] informed the Union Rep in an email, as follows:

> I sent you a message letting you know that [redacted] was never offered this position – is there something specific you're looking for? I checked with [redacted] [redacted] from talent and she confirmed that she never offered [redacted] the position. (Id.).

On March 15, 2022, the Union Rep responded to this email, as follows:

> As for whether there is something specific I am looking for, I have filed a grievance on behalf of my member. Respectfully, the company simply replying everything was done correctly is not sufficient. An offer was definitely made by the manager. When I first reached out to TA and asked if an offer was made, I was replied to in the affirmative. Now we are being told it was because she does not meet the minimum qualifications for the position. … (Id.).

On the following day, the HR Business Partner [redacted] forwarded the Union Rep's email to [redacted] and [redacted] with the following message:

> Do you have time for a conference call next Tues. [redacted] [redacted] you need to be there to help explain that you may have told [redacted] that you were interested in her as a candidate but that you didn't offer her the position and that all offers must come from TA. (Id.).

Shortly after receiving [redacted]'s email, [redacted] replied in the following email:

> … [redacted] interviewed with the team and told her they would like to move forward. [redacted] then called me and asked what the pay would be. I went to compensation and was able to provide the number to [redacted]. I then was told by [redacted] they wanted to move forward, when I went to get a reference from [redacted] [redacted] we realized [redacted] did not meet qualifications. [redacted] needs at least 4 months clinical experience (at the time they just had changed the qualifications for anesthesia techs) I let [redacted] know we couldn't formally offer her the position or move forward because she did not meet qualifications, and

> she said she understood and that is when she was dispositioned from the req and communication stopped. (Union Exhibit 13)

When the grievance was denied during the parties' grievance process, the Union appealed to arbitration resulting in the instant proceeding.

POSITION OF THE UNION

The Union contends that the record establishes that the Hospital violated Grievant's rights under Article 29 and Article 64 of the parties' Agreement. As to Article 29, the Union notes that it requires the Hospital to award a position to the "most senior, qualified applicant within the department." Grievant, the Union observes, was the only applicant for the position and, therefore, was the most senior. Thus, the Union puts forth that "the only questions remaining are whether she came from the same department and whether she was qualified." The Union states that it is self-evident Grievant came from the "same department," and, because the Chief CRNA [redacted] determined that Grievant met the qualifications for the position based on her education and experience, Grievant must be found to have been "qualified."

The Union stresses that [redacted]'s determination that Grievant was qualified "ends the inquiry regarding her qualifications since it is the hiring manager who gets to determine if the candidate has a 'combination of education and experience which provides proficiency in the areas of responsibility listed.'" To that end, the Union identifies the posting for the position and the language therein that "an

equivalent combination of education and experience which provides proficiency in the areas of responsibility listed in this description may be substituted for the above requirements." According to the Union, even if someone other than Hiring Manager [redacted] was in a position to substitute their judgment in place of [redacted]'s determination, the record evidence establishes that Grievant met the listed criteria for the position. Thus, the Union notes Grievant met the educational requirements since she had a high school degree and had "additional training" in light of the evidence that she had "college coursework in biology, training in medical terminology and pathology at MGH, and Basic Life Support certification."

Grievant also had the necessary experience/skills for the position, the Union puts forth, because her testimony established, that she had "worked in and around the Operating Room for six years, … [and she] demonstrated a basic knowledge" regarding patient care and anesthesia procedures. As to the required three to twelve months experience, the Union maintains, though the job description does not list the type of experience required, the requirement clearly cannot mean anesthesia experience "since even the more recent hires had no experience in anesthesia." If the "experience" required referred to clinical experience, the Union asserts, then Grievant satisfied "this requirement having worked for almost three years as a Clinical Laboratory Assistant at an exceptional healthcare institution."

The Union thus claims that Grievant met the minimum qualifications for the position and that [redacted], the Hiring Manager, "had appropriately exercised his

discretion to find that [Grievant] [redacted] met the minimum qualifications in his view – i.e., the only view that actually mattered."

The Union also contends the Hospital violated Article 64 when it rescinded Grievant's transfer "after she was found qualified and was selected by the Hiring Manager and after she had already accepted the offer." The Union notes that Article 64 addresses the transfer process and, as relevant to the instant dispute, "there exists no provision for the delay or rescission of a transfer once the offer has been made and accepted." Accordingly, the Union concludes, "once [Grievant] [redacted] was awarded the transfer, the job was hers, and the Hospital thus violated the CBA by later rescinding the transfer."

The Union rejects any claim by the Hospital that Grievant had not been offered and accepted the position at issue. Any claim by the Hospital that Grievant was not actually offered the position because only Talent Acquisition can offer the position, is dispelled by "[redacted] own emails to [Grievant] [redacted]," which made "clear that not only was the job offered to [redacted], but (in [redacted]'s own words), [redacted] 'accepted the tech position.'" Talent Acquisition, in other words, the Union claims, described Grievant as having "accepted" the position, which "acceptance" was initially made by the Hiring Manager and then "confirmed and effectuated by Talent Acquisition." Further, the Union notes that the Hospital did not produce any evidence of the need for any "kind of formal writing" necessary for the transfer to occur. Nor, the Union adds, even if some process existed to allow the Hospital to

rescind a transfer, the Hospital "failed to establish that the appropriate official took such action."

In stating its position, the Union stresses that the Hospital did not call [redacted] as a witness. The Union argues that the Arbitrator should therefore credit Grievant's testimony that [redacted] made a "clear determination that [Grievant] [redacted] was qualified." The Union seeks an Award to sustain the grievance and one that reinstates Grievant's transfer and "a make whole" provision "for any loss of earnings she may have suffered as a result of rescinded transfer."

POSITION OF THE HOSPITAL

The Hospital claims the Union did not sustain its burden of proof in establishing any contractual violation. According to the Hospital, in order to establish a violation of Article 29, the Union needed to show that Grievant was "qualified" for the position. Turning to the job description for the position of anesthesia technician, the Hospital claims that Union did not establish that Grievant had "additional specialized training" and, further, that the Union brought forward no evidence that Grievant possessed any "knowledge of a variety of patient care in anesthesia procedures." The Hospital claims, on cross-examination, Grievant was unable to specify "any patient care procedures and admitted that she had no training for and no experience with being 'hands on' with patients." Nor, the Hospital adds, could Grievant specify "a single anesthesia procedure."

The Hospital contrasts Grievant's testimony with what it claims was the credible testimony of [redacted], the Director of Perioperative Services, to the effect that Grievant did not possess the minimum requirements. The Hospital identifies Ms. [redacted]'s background as an Operating Nurse for 40 years with a Bachelor's Degree Nursing and a Master's Degree in Business Administration who now supervises 160 employees, including Grievant in her current position as Secretary, Operating Room. The Hospital relies on Ms. [redacted]'s testimony that she told Talent Acquisition Manager [redacted] that "Grievant lacked experience with patient care and anesthesia procedures and that she lacked the specialized training, unlike others recently hired into the Anesthesia Technician position who had experiences as PCAs." No evidence was offered by the Union, the Hospital puts forth, that would rebut "Ms. [redacted]'s assessment of Grievant's qualifications."

The Hospital asserts that the Union cannot find support for its position based on the 2016 hiring of an individual who had worked at Dunkin' Donuts. The Hospital notes that this individual held a Bachelor's Degree in Science and also had experience "using lab equipment such as infrared spectroscopy, thin layer chromatography as well as knowledge of aseptic and sterile technique." Grievant, the Hospital notes, did not have a Bachelor's Degree or the experience that this individual had. In addition, the Hospital maintains that the Union produced no evidence to establish "Grievant's experience was comparable to any individual hired into the Anesthesia Technician position."

Thus, the Hospital claims that there is no credible basis in the record to allow for the conclusion "that Grievant's education or experience demonstrated proficiency in any aspect of the position that would allow education of experience to serve as a substitute for the basic qualifications of the position."

The Hospital also argues that the Union did not establish a violation of Article 64. It notes that Article 64 is limited to "qualified" transfer candidates. The Hospital makes specific reference to the language in Article 64 that expressly incorporates by reference Article 29, which compels the conclusion that there is a "threshold requirement that the applicant must be 'qualified' for the position." Because the Union has not established that Grievant was "qualified" for the position, the Hospital argues, the Union has not been able to establish a violation of Article 64.

Additionally, the Hospital claims that Grievant's qualifications "cannot be assumed" on the ground that the Hiring Manager, [redacted], interviewed Grievant for the position and wanted her to occupy it. The "plain language of Article 64," the Hospital emphasizes, requires that "qualifications of transfer candidates will be assessed by a staffing partner, who will then refer 'qualified transfer candidates to the hiring manager.'" What the record establishes, according to the Hospital, is that Hiring Manager [redacted] interviewed Grievant before Talent Acquisition Manager [redacted] reviewed Grievant's qualifications. Moreover, the Hospital claims that Grievant "testified she never discussed her qualifications with Mr. [redacted]," and that clearly is an insufficient basis "to suggest Grievant met the minimum qualifications." The Hospital adds that, even though he interviewed

Grievant, [redacted] "was still in no position to disregard the clear language of the CBA and hire Grievant into a role she was clearly not qualified to hold."

The Hospital also claims that it is not bound by any "offer and acceptance," and that any argument based on this contention by the Union "would require the Arbitrator to consider a purported agreement outside the scope of the Arbitrator's authority." The Hospital also claims it had the right to rescind any alleged job offer because, in the final analysis, "Grievant was not qualified for the position." This observation allows the Hospital to conclude that Grievant had no right to be awarded the position because both Articles 29 and 64 demonstrate the existence of the Hospital's "authority to determine qualifications." Even if there was an offer and acceptance concerning the anesthesia technician position, the Hospital argues, it "did not violate the CBA in rescinding the offer after discovering its mistake and belief regarding Grievant's qualifications."

Therefore, the Hospital maintains that for all the aforesaid reasons, there has been no violation of either Article 29 or 64 and requests that the instant grievance be denied.

OPINION

The key language in the parties' Agreement is found in Article 29 - "[t]he most senior, qualified applicant with the department in which the position is being offered will be awarded the position."[1] According to the Union, the record establishes that Grievant was the "most senior, qualified applicant" for the Anesthesia Tech position. The Hospital resists this conclusion on the ground that Grievant was not qualified.

The contractual language reflects the existence of a "sufficient ability clause." Such a clause "provides in general that the senior employee will be given preference if he or she possess sufficient ability to perform the job." *Elkouri & Elkouri: How Arbitration Works*, 14-48 (8th ed. K. May, 2016). Typically, under a sufficient ability clause, it is "the company's right and responsibility to determine in a rational manner, the qualifications of the position and whether they are met by bidder." Id. at 14-51 (citation omitted). Most arbitrations addressing "sufficient ability clauses" involve situations where management's decision included bypassing the senior employee for a junior employee. In such cases, "arbitrators have placed the burden on the employer to show that the bypassed senior employee is not competent to do the job." Id. The instant case does not involve the Hospital's selection of a junior employee but, nevertheless, the Hospital chose

[1] Articles 29 and 64, as they apply to the instant grievance, are of a piece. That is, if Grievant was entitled to the Anesthesia Tech position under Article 29, she was entitled to be transferred to that position per Article 64.

to not honor Grievant's seniority and claimed that she was not qualified for the position. Based on a *prima facie* showing in the record that Grievant has the requisite seniority and met the stated qualifications, it becomes appropriate, therefore, for the Arbitrator to shift the burden on the Hospital to show that Grievant was not qualified.

Turning to the record evidence, the Arbitrator finds the following facts call into question the credibility of the Hospital's decision that Grievant was not qualified. First, the record is undisputed that [redacted] was the Hiring Manager for the Anesthesia Tech position. As such, [redacted] had significantly relevant information about the subject matter of this grievance. Nevertheless, the Hospital did not produce [redacted] as a witness, which calls into play the rule of evidence that "[t]he failure of a party to call as a witness a person who is available to it and who should be in a position to contribute informed testimony may permit the arbitrator to infer that had the witness been called, the testimony adduced would have been adverse to the position of that party." Id. 8-51. Accordingly, the Arbitrator finds that in the absence of hearing from [redacted], Grievant offered credible testimony that [redacted] found her qualified for the position.

The Arbitrator also finds that the Hospital's position advanced in the arbitration proceeding that Grievant was not qualified for the position must be called into question because of statements made in emails by Talent Acquisition Manager [redacted] and her testimony at the hearing. In email exchanges between [redacted] and [redacted] in October 2021, [redacted] noted to [redacted] that he wanted to

offer Grievant the position and Grievant was "waiting to hear" from [redacted]. (Union Exhibit 11). In this email, [redacted] asked [redacted] if she had "any questions or concerns" and to contact him if she "needed any additional information." (Id.). Five days later, [redacted] replied that Grievant "will not be accepting the position due to pay." (Id.). On January 6, 2022, Grievant in an email asked [redacted] about a "recent pay scale increase for the anesthesia tech position" because she was "still incredibly interested in taking the position." (Union Exhibit 5). Five days later, [redacted] asked Grievant if she was "going to pass on this position, or if you wanted to move forward." (Id.). Grievant replied to [redacted] on the same date that she had spoken to [redacted] and told him that she would "take the position at $20/hr." (Id.). In an email approximately ten minutes later, [redacted] responded to Grievant that she "could confirm the $20/hr" and asked for Grievant's current manager so she could tell that person "you have accepted the tech position." (Id.). Fairly understood, the emails identified above establish a scenario whereby [redacted] wanted to offer Grievant the position, [redacted] confirmed the offer, Grievant finally accepted the position, and [redacted] acknowledged that Grievant had "accepted" the position. Nowhere in these emails are Grievant's qualifications for the position mentioned, no less called into doubt. Clearly, these emails acknowledge that Grievant was offered the position, which was confirmed by [redacted], and that [redacted] had moved on to the next step which was to contact Grievant's current manager to advise that Grievant would be transferring to another position. There can be no other interpretation of these emails other than Grievant had accepted

the position and the transaction process to implement the transfer was placed in motion by [redacted].

The first communication Grievant received from [redacted] that Grievant would not be awarded the position was [redacted]'s voice mail message on January 13, 2022 in which [redacted] referenced a written warning. Again, as with all earlier communications from [redacted], no mention was made of Grievant's lack of qualifications. [redacted] testimony at the hearing that in a phone conversation with Grievant almost immediately after the time of [redacted] voice mail message she informed Grievant that Grievant was not qualified is lacking in credibility. The Arbitrator accepts Grievant's testimony that the only concern that was expressed by [redacted] was the "written warning." Not only was [redacted]'s testimony lacking in credibility, the Arbitrator also finds that the lack of credibility calls into question the credibility of the Hospital's decision, after [redacted] had acknowledged that Grievant had "accepted" the position, to deny Grievant the position based on her lack of qualifications.

The first notice Grievant received that she would not be awarded the Anesthesia Tech position, after [redacted]'s acknowledgment to Grievant on January 11, 2022 that Grievant had "accepted" the position, was the email two days later from Hospital's Talent Acquisition ("Recruiting Team") that it had "carefully reviewed" Grievant's "professional experience and have elected not to pursue your candidacy for the position." (Union Exhibit 6). As noted above, this email was followed on the same day by the voice mail message from [redacted] that

Grievant was not awarded the position "due to a written warning." (Union Exhibit 15).

The "written warning" mentioned in [redacted]'s voice mail turned out to be a contractually bogus reason in view of the fact that Article 64 of the Agreement potentially disqualifies an applicant for a position only if there has been a written warning in the past 12 months. In view of the record evidence that Grievant had no such written warning, the only relevant contractual reason for the Hospital to deny Grievant the application was the reference to "professional experience" set forth in the January 13, 2022 email to Grievant from the Talent Acquisition Team.

The reference to "professional experience" ties in with the testimony of Ms. [redacted], who was not the Hiring Manager for the position, who testified that she had a concern that Grievant did not meet the minimal qualifications for the position. The record does not indicate that Ms. [redacted] had any conversation with Hiring Manager [redacted] as to her concern that Grievant did not meet the minimal qualifications. Apparently, according to Ms. [redacted]'s testimony, she told [redacted] that Grievant, given her position as Operating Room Secretary, did not have knowledge in patient care or anesthesia procedures and did not have three to 12 months of experience. The job posting, however, does not require three to 12 months experience in patient care and anesthesia procedures but only a "knowledge" of patient care and anesthesia procedures. Indeed, before the Hospital rescinded Grievant's acceptance of the position, it had recently hired [redacted] as an Anesthesia Tech, an individual who had laboratory experience in

undergraduate education but never had any medical job. Nor did she have knowledge of or experience with patient care or anesthesia procedures.

Further, the posting for the position states that, absent a requirement of certification, licensure or registration, "an equivalent combination of education and experience which provides proficiency in the areas of responsibility listed in this description may be substituted for the above requirements." Grievant's testimony established that she worked in the healthcare industry for 12 years, had received some general medical training, and, had a broad range of knowledge because she paid attention to her surroundings at work. Here, the Hiring Manager, obviously was aware of such background and found that Grievant was qualified for the position.

Returning to his earlier observation that the burden had shifted to the Hospital to show Grievant was not qualified for the position, the Arbitrator states his finding that the record evidence does not permit the conclusion that the Hospital satisfied its burden. Instead, the record is consistent with the conclusion that Grievant's qualifications became a "moving target" for Hospital's management despite the fact that the Hiring Manager had found her qualified and despite the fact that the Hospital, through [redacted], acknowledged that Grievant had accepted the position and had begun the transfer process. The Arbitrator is mindful of management's right to determine qualifications and fairly apply reasonable criteria in determining whether a candidate is qualified for the position, but, in the final

analysis, the Arbitrator concludes that the Hospital did not meet its burden of showing that it fairly applied the criteria for the position to Grievant.

In summary, the Arbitrator finds that Grievant's rights under Articles 29 and 64 of the Agreement were violated by the Hospital when she was not awarded the Anesthesia Tech position.

For a Remedy, Grievant shall be awarded the position forthwith and made whole for any loss of salary or any other relevant contractual benefit denied her because she was not awarded the position. The Arbitrator will retain jurisdiction solely for addressing any questions that arise in the implementation of Remedy.

Accordingly, and based on the foregoing, I find and make the following:

AWARD

The grievance is sustained.

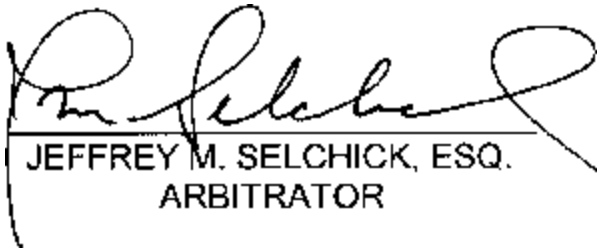
The Hospital violated Articles 29 and 64 of the CBA when it did not place Grievant in the position of Anesthesia Technician. Grievant shall be awarded the position forthwith and made whole for any loss of salary or any other relevant contractual benefit denied her because she was not awarded the position.

The Arbitrator will retain jurisdiction solely for addressing any questions that arise in the implementation of Remedy.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

I, Jeffrey M. Selchick, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Opinion and Award.

Dated: May 16, 2023
Albany, New York



JEFFREY M. SELCHICK, ESQ.
ARBITRATOR