

Chiesa #8

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

-and-

UNION

Gr. (Employee 1)/Layoff/Recall

OPINION AND AWARD

THE CASE

The grievance in this matter is dated September 9, 1998. In part it reads as follows:

"Statement of Facts: Grievant was in a vacant position and asserts that he should not be required to return to his regular position. Grievant was also given a directive to test for CDL license within the next six (6) months while other employees were required to obtain their licenses immediately.

"Articles Violated: XIII, Sec. 6d; XXXIII, Sec. 2.

"Suggested Adjustment: Remain in Storekeeper I position and any and all things to make grievant whole."

A portion of the Step Two answer, which was authored by Person 1, reads as follows:

"The facts in this case show that Employee 1 lost his drivers license in February 1994. The Employer, under the provisions of Article XIII, moved to lay him off because he could not meet the requirements of the classification of Groundskeeper II. Employee 1 exercised his right to qualify for a position not requiring a driver's license in lieu of layoff. This resulted in Employee 1 bumping Person 2 from her position/classification of Storekeeper I that same month (February 1994). Under the express terms of the Agreement (Article XIII, Section 3[c]):

...The transferred or demoted employee shall replace the least senior employee in the position to which assigned. If an employee is demoted or transferred in lieu of layoff and his/her regular position subsequently becomes available, he/she shall thereupon be promoted or transferred back to his/her regular position...

"An exception to those provisions is found in Article XIII, Section 4(d). Those provisions state:

Employees who fill any vacant position in lieu of layoff subsequent to layoff shall not be required to return to his/her regular position in the event the regular position is reestablished.

"The facts clearly show that Employee 1 was transferred in lieu of layoff subsequent to being notified of layoff. He did not fill a vacant position. Therefore, the exception in Article XIII, Section 4(d) does not apply. Employee 1 has now notified the Employer that he has a driver's license on a work restricted basis. The contract provides that he be transferred back to his regular position which has become available (because he now has a drivers license).

"There has been no showing that Employee 1 has been discriminated against in violation of Article XXXIII, Section 2 based upon the Employer allowing a reasonable period of time for him to acquire a CDL. However, as offered at Step 1, if requiring him to obtain one 'immediately' would resolve this matter, the Employer would agree to such without precedent for any future cases.

"Finding no violation of the cited provisions, this grievance and its required remedy of allowing Employee 1 to remain in the Storekeeper I position is denied at Step 2."

The grievant has been employed by the Employer for over 14 years. At the time the events which ultimately led to this grievance began, the grievant was working in the

Parks Department in the classification of Groundskeeper II. The classification description contains many examples of work and requirements an employee must possess, but in addition, lists as a special requirement the need for an employee to possess a valid Michigan commercial driver's license. It is noted that the description is dated February, 1992, and there have been some changes in the law regarding commercial driver's licenses, but the requirement is nonetheless necessary in order to hold the classification. The grievant had lost his driver's license. As a result, he was laid off.

On January 24, 1994, the Employer became aware that he was laid off from his position. The letter explaining the Employer's actions was authored by Person 3, the Human Resources Director, and in part reads as follows:

"On January 24, 1994, during a disciplinary investigation you admitted that your driver's license has been revoked by the State of Michigan since 1992 due to alcohol-related driving convictions. You stated that you do not currently possess a valid driver's license or commercial driver's license. These licenses are required for the Groundskeeper II job position you presently hold.

"Since you no longer possess the requisite licenses for your job position, we must inform you that your current circumstances require the Employer to notify you of the need for layoff under Article XIII of the Labor Agreement.

"Be advised that under Article XIII-Layoff and Recall, Section 4:

The Employer Manager may approve deviations from seniority in layoffs or demotions in lieu of layoff when seniority alone would result in retaining employees unable to maintain a satisfactory level of performance. In such cases, the affected employees shall be given written notice of the determinations and reasons therefor.

"The Employer is invoking the above provisions in your case. Under Article XIII, Section 5, employees to be laid off indefinitely shall be given at least seven (7) calendar days prior notice. As a result of your current suspension, your layoff will be effective Friday, February 18, 1994, at 4:00 PM.

"You should be aware that Article XIII, Section 3 provides in part:
an employee subject to layoff who so requests within three (3) days after receipt of notice of layoff, shall in lieu of layoff... be demoted or

transferred by Management in accordance with his/her seniority to an equal or lower paying position in the bargaining unit which he/she is able to perform and qualified to fill.

"If you wish to utilize demotion or transfer options in lieu of layoff, please advise Person 4 in the Human Resources Department (456-3176) within three (3) days of receipt of this letter.

"We would advise you to contact your Union representative or call the Labor Relations Department if further clarification is necessary."

The evidence establishes that prior to 1998 the parties would have dealt with such a circumstance by giving the grievant the opportunity to sign a sudden death agreement. However, since that time the procedure has been to allow the layoff as outlined in Person 3's February 11, 1994 correspondence.

As a result, the grievant exercised his rights and bumped into a position in the Wastewater Treatment Plant. The position was occupied by an employee named Person 2. Person 2 was displaced and went into a Groundskeeper II position. Shortly thereafter she tested for the Storekeeper II position in the Wastewater Plant and was promoted to that position.

According to the grievant, his driver's license was reinstated in April of 1998. When the Employer became aware of the reinstatement, it investigated the matter and then gave the grievant six months to secure a CDL. The letter so notifying the grievant was authored by Person 3 and is dated August 10, 1998. In part it reads as follows:

"As a result of your losing your driver's license in 1994, you were placed on layoff status from the Groundskeeper I classification in the Parks and Recreation Department. You were allowed to exercise bumping rights pursuant to the layoff provisions of the contract. Your exercising such rights resulted in the layoff of other employees from their permanent positions. Last month we received confirmation that your driver's license has been restored on a work restriction basis. It is our understanding that this makes you eligible to secure a commercial driver's license. I am directing you to obtain a commercial driver's license which

will restore your full qualifications for your previously held Groundskeeper II position. The maximum time frame you are given to obtain this required designation is six (6) months. Therefore, it is recommended that you do not wait to take the written and driving portions of this test in the event that your first attempt is unsuccessful. You must have completed the required testing and obtain the appropriate designation by February 10, 1999 (six months from the date of this letter).

"If you have any questions concerning the above, please contact me at extension 3176."

The evidence establishes that when the law regarding CDL's changed, employees holding classifications requiring one were given six months to secure it. Hence, when the grievant's driver's license was reinstated, the Employer gave the grievant six months to secure a CDL.

In a letter dated August 19, 1998, Person 3 notified the grievant that he was to return to the position from which he was laid off. In part the letter reads as follows:

"In accordance with Article XII-Layoff and Recall, Section 3, you are being provided notice of your transfer back to your former position of Groundskeeper II in the Parks and Recreation Department.

"As advised in my letter of August 10, 1998, this action has been prompted by the fact that you now have your driver's license restored on a work restriction basis. Under the above provisions and those of Article XIII, Section 6, an employee is transferred back to his/her regular position if they were previously transferred in lieu of layoff into a non-vacant position and his/her regular position subsequently becomes available. Therefore, you are directed to report to Person 5 or Person 6 in the Parks and Recreation offices at 7:30 AM on Monday, August 31, 1998.

"Please contact Person 1 at 616/456-3113 if you have any questions regarding this action."

The grievant related that he didn't want to go back to his old position and there was no need to return because Person 2 had been promoted to a higher position than she

held when she was laid off and, thus, she wouldn't be returning to the position the grievant had bumped her out of.

Also introduced into the record were two letters of understanding, one dated 6/10/93 and the other dated 10/11/94. In part the 6/10/93 document reads as follows:

LETTER OF UNDERSTANDING

"On March 3, 1993, Person 7 was transferred from his position as Water Plant Operator II (Code No. 403; Pay Range 16A) at the Lake Michigan Filtration Plant to the position of Laboratory Technician II (Code No. 926; Pay Range 16A) at the Wastewater Treatment Plant under the provisions of Article XIII-Layoff And Recall. That transfer displaced the occupant of the Laboratory Technician II position at Wastewater Treatment, namely Person 8. Subsequent to that time, Person 7 has been offered restoration to his former position as Water Plant Operator II at the Lake Filtration Plant.

"In light of the provisions of Article XIII, Section 3, which in part state:

If an employee is ... transferred in lieu of layoff and his/her regular position subsequently becomes available, he/she shall thereupon be ... transferred back to his/her regular position...

and, Article XIII, Section 6(d), which states:

Employees who fill any vacant position in lieu of layoff subsequent to layoff shall not be required to return to his/her regular position in the event the regular position is reestablished,

the parties acknowledge that the normal application of the above would require Person 7 to now return to his original position of Water Plant Operator II at the Lake Michigan Filtration Plant. However, in light of the fact that Person 8 has been restored to a position classified as Laboratory Technician II, and Person 7 now has requested to remain/return as Laboratory Technician II at the Wastewater Treatment Plant, the parties by this document hereby mutually agree and stipulate to the following:

1. "Person 7 shall be allowed to remain/return as Laboratory Technician II at the Wastewater Treatment Plant as though he had originally filled a vacant position. For layoff purposes, Person 7 shall be considered as restored to his original position and shall have his name removed from any and all preferred eligible lists.
2. "Person 8 shall also be considered as being restored to his original position as Laboratory Technician II and shall have his name removed from any and all preferred eligible lists.

3. "This understanding is being made on a non- precedent setting basis and shall not be used by either party to assert that such agreement must be entered into in any future similar or dissimilar case.

"By our signature below, the parties hereby agree to the above conditions for Person 7 and Person 8."

Likewise, the 10/11/94 document in part reads as follows:

SUPPLEMENTAL AGREEMENT BETWEEN THE EMPLOYER AND THE UNION

"In July, 1993, Person 9 (currently classified as an Income Tax Field Auditor and assigned to the Income Tax Department) and Person 10 (currently classified as Office Assistant IV and assigned to Customer Services in the Utilities Department) were involved in a series of lateral transfers in lieu of layoff which displaced them from their prior positions. In accordance with Article XXXVI-Supplemental Agreements, Section 1, the parties mutually agree and stipulate to the following terms and conditions in order to allow Person 9 and Person 10 to remain in their respective positions even though they may now return to their former positions via preferred eligible list for the classifications from which displaced.

"1. It is acknowledged that Article XIII-Layoff And Recall, Section 6(d) would in the absence of this supplemental agreement require each to return to her former position because she did not fill a vacant position in lieu of layoff.

"2. Person 10 has indicated she wishes to remain in her current position in lieu of returning to her former position currently occupied by Person 9. The parties acknowledge she by the terms of this supplemental agreement may do so because the employee which Person 10 displaced (Person 11) has declined recall to her original position as Administrative Secretary in the Employer Clerk's Office and has been removed from all preferred eligible lists in accordance with Article XIII, Section 7(b). Person 10 shall be allowed to remain in her current position and shall be removed from all preferred eligible lists she currently occupies.

"3. As Person 10 has indicated a desire to remain in her current position, Person 9 therefor has no displaced employee relying on her vacating her current position and there are currently no other employees on the preferred eligible list for her current classification. She as well has indicated her desire to remain in her current position. Person 9 shall be allowed to remain in her current position and shall be removed from all preferred eligible lists she currently occupies.

"4. This agreement shall be considered to be without prejudice or precedent to either party in any future similar or dissimilar case."

The grievance in the instant matter was filed, processed through the grievance procedure and presented to me for resolution. Additional aspects of the record will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have carefully analyzed the entire record even though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE IX GRIEVANCE PROCEDURE

"Step 3.B. Arbitration

"c. . . . The power of the arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. Decisions on grievances within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management."

ARTICLE XIII LAYOFF AND RECALL

"Section 3. Demotion or Transfer in Lieu of Layoff

"Except as otherwise provided below, an employee subject to layoff who so requests within three (3) days after receipt of notice of layoff, shall in lieu of layoff or transfer under Section 2 be demoted or transferred by Management in accordance with his/her seniority to an equal or lower paying position in the bargaining unit which he/she is able to perform and qualified to fill.

"c. If the employee is unable to obtain a position in lieu of layoff under 3.a. or 3.b., then he/she shall be demoted or transferred by Management in accordance with his/her seniority to another position in the bargaining unit as close to his/her present classification and wage level as possible which he/she is able to perform and qualified to fill.

"Management shall have the exclusive right to determine such person's ability and qualifications to fill a position, provided, however, that an employee shall be deemed qualified for all classifications in a series (e.g., Office Assistant I, II, III, IV are a series) which are below or equal to his/her present classification without qualifying through the process specified in the Layoff Letter of Understanding. The transferred or demoted employee shall replace the least senior employee in the position to which assigned. If an employee is demoted or transferred in lieu of layoff and his/her regular position subsequently becomes available, he/she shall thereupon be promoted or transferred back to his/her regular position (See Layoff Letter of Understanding) except as provided in Section 6.d.

"Section 4. Exceptions to Seniority

"The Employer Manager may approve deviations from seniority in layoffs or demotions in lieu of layoff when seniority alone would result in retaining employees unable to maintain a satisfactory level of performance. In such cases, the affected employees shall be given written notice of the determination and the reasons therefore.

"Section 6. Preferred Eligible Lists

"d. Employees who fill any vacant position in lieu of layoff subsequent to layoff shall not be required to return to his/her regular position in the event the regular position is reestablished."

The Union argues that the Employer breached Article XIII by directing the grievant to return to the Groundskeeper II position even though he did not want the position and even though there were no employees who had any claim or right to the Storekeeper I position that he transferred into and held for four and one-half years. It argues that the Employer's interpretation of Article XIII is contrary to the clear intent of the Layoff and Recall language. The Union argues that it presented clear and convincing proof that the Employer had defied the clear intent of Article XIII by directing the grievant to return to the Groundskeeper II position four and one-half years after he was laid off from that position. It argues that the language is not so clear and unambiguous so

as to disregard testimony concerning the intent of the parties who drafted the provision. It maintains that the testimony from the Union President establishes that the language was designed to extend job security and at the same time provide a fair and reasonable method to deal with layoffs and recalls. It argues that the evidence shows that the existence of Section 6.d. was intended to make the application of Article XIII less rigid and more reasonable. It argues that the application of Article XIII to employees who are not longer qualified for the position shows the parties' intent and practice must be considered in giving meaning to the language in the article. It goes on to argue that the normal application of Article XIII has been to permit employees to remain in their positions even when their former positions are reestablished where there are no employees who would be adversely impacted.

The Employer argues that the language in the two letters of understanding establishes that Section 6.d. is not as absolute or clear as the Employer suggests. It maintains that the letters of understanding codifies the actual practice of the parties. It maintains that the Employer's interpretation of Article XIII is unreasonable. It submits that the Employer's interpretation leads to an illogical result, is contrary to the intent, and conflicts with reason. It maintains the Employer breached the contract when it directed the grievant to return to a position that included qualifications that the grievant did not possess.

The Employer argues that the issue is whether it violated the contract when the grievant, who transferred to a Storekeeper I position in lieu of a layoff because he lost his driver's license, was transferred back to his regular position as Groundskeeper II when that position became available (by the reinstatement of his driver's license). The

Employer argues that the Layoff and Recall article in the contract provides that when an employee transfers in lieu of layoff and his/her former position subsequently becomes available, he/she shall be transferred back to his/her regular position. The Employer argues that notwithstanding the fact that Article XIII deals with the typical separation caused by lack of work, funds or elimination of a position, the parties have participated in a practice of "laying off" an employee who loses a license required for the regular position instead of terminating the employee. The Employer argues that the language in Sections 3 and 6.d. of Article XIII is clear and unambiguous. It maintains that an employee who is transferred in lieu of a layoff shall be transferred back to his/her regular position when it becomes available, except as provided in Section 6.d., which allows an employee who transfers into a "vacant position" in lieu of layoff to remain in that position. It maintains that the words must be given their plain and ordinary meaning. It argues that its evidence shows that the Employer has always required employees who are transferred in lieu of layoff to return to their regular position as provided by Section 3.c. when that position becomes available. It argues that since the Storekeeper I position was occupied by Person 2 when the grievant transferred, the position did not qualify as a "vacant position" and, hence, the Section 6.d. exception did not apply. It argues that the fact that the 6.d. exception was expressed in the language clearly means that there are no other exceptions allowing an employee not to transfer back to his/her original position. It argues that the language is clear and both parties know exactly what it means because they had specifically entered into letters of agreement when a different action was contemplated. It argues that the 6.d. exception does not apply to the grievant because the position he transferred into was not vacant at the time of the transfer. It maintains that the

status of the displaced employee when the transferred employee's regular position becomes available or reestablished is irrelevant. The Employer goes on to argue that the two supplemental agreements entered into by the parties provided the only exception to Article XIII, Section 3.c. It argues that the provisions in the letters of understanding clearly show that the parties' mutual intent was that individuals who were transferred in lieu of layoff into a position that was not vacant shall return to their original position when it became available. The Employer argues that while it could have entered into another agreement with the Union in this matter, there was no compulsion for it to do so, and after discussing it with the appropriate supervisors and Labor Relations staff, it decided to follow the contract language. Further, it argues that the Union bears the burden of proof in this matter and has failed to show that the Employer violated the Collective Bargaining Agreement.

In cases of this nature it is the arbitrator's responsibility, and hence mine, to interpret and apply the language in the Collective Bargaining Agreement. The mutual intent of the parties must be realized for the parties are entitled to the benefit of their bargain.

Many commentators and arbitrators have taken the position that in cases of this nature where the Union is alleging a breach of the contract, it has the burden of proof. Generally, and there are a few exceptions, this means that the Union must first come forward with its proofs, and, in addition, bears the burden of persuasion. Nonetheless, notwithstanding the issue of who carries the technical burden of proof, I would hope that in cases of this nature both parties would present as much evidence as necessary for the arbitrator to make an appropriate decision.

The Employer argues that the language is clear and should be enforced as written. If indeed that's the case, I agree, clear and unambiguous language should be enforced as written. If the language is not subject to patent or latent ambiguities, it clearly expresses the mutual intent of the parties and the arbitrator's responsibility is to enforce the language and, hence, the parties' mutual intent. If arbitrators ignored clear language, they would be ignoring the parties' agreement. Obviously that's inappropriate. While there may be other exceptions to this guiding principle, it has on occasion been found that a clear, concise, unequivocal and convincing practice may establish that the parties have modified clear and unambiguous contract language. This is extremely thin ice for arbitrators to venture out on and these cases are few and far between.

There is one area of the language which has been interpreted and applied by the parties as expressed in a practice rather than written words. To recall, the evidence unequivocally establishes that prior to 1998 an employee who would have been in the grievant's position would have been forced to sign a sudden death agreement. Since that time the parties have engaged in a practice which recognizes the use of the language in Article XIII, Section 3.c., etc., in cases of this nature. Obviously the practice has been important to the Union because it allows employees to maintain their employment. It is also beneficial to the Employer, so clearly the parties have agreed through their actions to utilize the procedures adopted by the language in situations such as the one involved in this dispute.

The Union has raised some very interesting and probative arguments in support of its position. However, the real question is: What does the evidence establish? Given the

record, the Union is presented with a very difficult job in establishing that the language has been violated.

The language in Article XIII, Section 3.c. indicates, inter alia, that if an employee is demoted or transferred into a layoff and his/her regular position subsequently becomes available, he/she shall then be promoted or transferred back to his/her regular position. The only express exception relates directly to Section 6.d. That language provides that if the employee who is transferred in lieu of layoff fills a "vacant" position, then he/she need not return to his/her regular position. The language clearly means that the vacant position must exist at the time the individual fills it. In this case the position was not vacant. The fact that Person 2 may not want to return to the position didn't make it a vacant position as the term is utilized in the Collective Bargaining Agreement. So, clearly, the express exception did not apply.

There is the question, as articulated by the Union, of whether the grievant's return to his prior position as a Groundskeeper II violated the contract because he did not possess a CDL and thus did not have the qualifications.

To recall, the grievant was transferred out of the Groundskeeper II position because he did not have a driver's license. Subsequently employees in the position were given six months to acquire a CDL. The Employer's action in requiring the grievant to return to the Groundskeeper II position and giving him six months to secure a CDL does not in and of itself violate the Collective Bargaining Agreement. The grievant would not have been transferred in lieu of layoff out of the Groundskeeper II position if he had a license at the time he was transferred. He would have been given six months like every other employee. As a result, the fact that he was returned to the position once he acquired

a driver's license and was given six months to secure a CDL put him in the same position that any other qualified employee would have been in at the time the grievant was transferred. Thus, this turn of events does not violate the contract and does not support the Union's arguments.

As I said, the Union presented very interesting arguments. The fact of the matter, however, is that the contract language is clear, and given the fact that it is clear, must be interpreted and applied as written. Indeed, the meaning of the clear language is recognized and fortified by the supplemental agreements entered into by the parties. For instance, in the letter of understanding dated June 10, 1993, the parties specifically acknowledged that the normal application of the language in question would "require" the individual involved be returned to his original position. The same realization is acknowledged in the supplemental agreement dated 10/11/94 when the parties indicated that the language in question would "in the absence of this supplemental agreement" require each of the required individuals to return to their former positions. So, clearly, these two agreements memorialize the parties' understandings as now articulated by the Employer.

I understand that the Union has argued that essentially the language need not be applied because no one is being injured because the grievant chooses to remain in the position he bumped into, and Person 2, who was bumped out of that position, chose to remain in the position she ultimately secured. However, the language doesn't provide for employees to have a choice of whether they wish to return or not. Also, analyzing the language solely from the employees' point of view, may not define all of the interests which must be considered. For instance, the Employer points out that some of the

supervisors involved and Labor Relations did desire that the grievant be returned to the Groundskeeper II position. While there was no explanation as to why this was the case, there is no evidence suggesting that such a consideration was inappropriate.

I cannot find that the normal and intended application of the language was ignored. I recognize that from the Union's point of view it was initiated in order to allow employees to remain employed by transferring rather than being laid off and allowing the individuals subsequently bumped the opportunity to return when the first employee was required to return to his/her original position. However, as I said, the fact that neither employee wished to do so, which would provide a common-sense reason not to require them to return, is irrelevant because the language doesn't give them the choice.

I cannot find that the Employer's insistence on applying the language as written and doing so is unreasonable and would lead to irrational results. If there was a question as to what the language meant, then perhaps the impact of the Union's argument and the evidence directed in support of it would be different. However, that's not the case.

The Union has argued that the letters of understanding contained in the record codified the actual practice. However, given the record, I am not persuaded that I can adopt that position. If there was an established practice, the supplemental agreements would be superfluous and, frankly, a practice as offered by the Union hasn't been established. Furthermore, by their own terms the agreements are non-precedential and thus would not establish a practice or precedent in future cases.

In conclusion, after carefully analyzing the entire record, I am forced to conclude that the language in question is clear and unambiguous and thus must be enforced as written. As a result, I have no alternative but to deny the grievance.

AWARD

The grievance is denied.

MARIO CHIESA

Dated: January 8, 2000