

Beitner #9

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

EMPLOYER

-and

UNION

GR: Employee 1

Arbitrator:

ELLIOT I. BEITNER

OPINION

An arbitration hearing was held on December 13, 1982 in City A, Michigan in accordance with the applicable provisions of the collective bargaining agreement in effect between the parties. Selection of the arbitrator was made in accordance with the procedures of the American Arbitration Association. The parties presented testimony, offered exhibits and made opening statements and closing arguments.

Issue:

Did the Employer have proper cause to deny the Grievant a merit pay increase?

Background:

Grievant EMPLOYEE 1, has been employed by the Employer since December of 1979. Initially she worked for the Water Department and was transferred to the Police Department on or about June of 1930. She and others occupied new positions at the Police Department, and when she first came to work in that department eight clerks

shared three desks. The Grievant worked the afternoon shift from 2:00 to 10:30 p.m. and worked Wednesday through Sunday. When she began her shift, the day workers were still working and controlled the assignment of the work.

Lt. PERSON 1 was, at the time in question, supervisor of the Grievant's work area. His office was in a different building, but he would frequently visit the work premises. He worked Monday through Friday and his shift ended at 5:00 p.m.

It was the responsibility of Lt. PERSON 1 and Sgt. Person 2 to rate the Grievant for her merit pay review. Employees are rated every six months, and the Grievant's prior rating had been satisfactory. The merit pay schedule contains a Scale of Values that reads as follows:

Scale of Values:

1. Does not meet requirements
2. Partially meets requirements
3. Meets requirements
4. Somewhat exceeds requirements
5. Considerably exceeds requirements

Sgt. Person 2 graded the Grievant in every category with "3 – Meets requirements." Lt. PERSON 1 gave her the same rating, "3 - Meets requirements," in all but two categories: Initiative and Work Output. In those two categories he rated her "2 - Partially meets requirements." Her score was 58.22, which was less than the required score of 60 considered a good average score; consequently, she was denied a merit pay increase. PERSON 1's notes attached to the Merit Pay Review Notice read as follows:

Initiative - Noted several incidents where employee "had nothing to do" when in fact work station area and other work could have been in progress. Employee advised of same.

Work Out Put - Review of activity reports indicates low productivity, has allowed another employee to shoulder all work at times. This was approved during new employee training; however, she had been advised that the work load must be shared. Specific output noted and employee advised of same at time of incident.

PERSON 1 testified that he had scheduled a meeting with the clerical employees on December 11, 1982, the major purpose of which was to discuss the cleaning of equipment. This meeting was prompted in part by his observations of the Grievant and another worker. As a consequence of that meeting, he determined to set up a work assignment schedule to rotate the work among the employees. After that, he said, there was no problem relating to the cleaning of equipment.

The Grievant testified that it was impossible for her to clean the equipment while other employees were using it. She was also unable to take work that other employees were working on because they did not wish to share the work. In slack periods she was instructed to clean, and she would clean the files. She denied being specifically told about any problems relating to her having nothing to do or not cleaning equipment. She was also never advised, she said, of any problems with her productivity.

Lt. PERSON 1 stated that he had determined that the Grievant's productivity was low on the basis of his review of activity reports. He acknowledged not having discussed this with her before. His review of the activity reports, he said, showed that the Grievant did approximately 4.4 incident reports a day while the other clerk did 4.8 a day. His review also showed that the Grievant processed 2000 pieces of work per month while other employees processed as much as 6000.

The Grievant testified that a major part of her duties involved processing court dispositions. Initially there was a backlog of several thousand of these court dispositions, but by October 1981 they were current. Thereafter she processed the court dispositions daily. This job necessitated manual work initially, which was what the Grievant did. Then the material had to be programmed into the computer, work a more senior employee performed. Before this merit pay raise review, the Grievant had not been instructed on how to process the information into the computer. The activity reports reflect only work that was processed into the computer and not the manual work that the Grievant did. She testified that she had been instructed to list only work processed into the computer in recording her activity. As a consequence, the productivity figures do not include the manual work that the Grievant did.

After being denied a merit increase, the Grievant filed a timely grievance alleging violations of Article IV and Article XIX, Section 4.c.(3). Management denied the grievance as follows:

This grievance is denied. The grievance alleging a violation of Article IV. Management Rights and Article XIX, Pay Changes, Section 4.c.(3). Management finds no violation of the Articles cited.

The grievant was denied a merit step increase from Step A to Step B on February 24, 1982. The employee failed to get a "good average score" of 60.00. The grievant's shortcomings were noted on the Rating Sheet and the employee advised of same by Lieutenant Person 1.

Article XIX, Pay Changes, Section 4.c.(3), states:

"Pay increases on anniversary dates shall not be based merely on the passage of time, but rather shall be given if the employee's work has been satisfactory relative to the requirements of his/her position." (emphasis added)

For the above stated reason, this grievance is denied.

Contract Provisions:

ARTICLE IV - MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided in this Agreement, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of his or her membership in the Union.

ARTICLE IX - GRIEVANCE PROCEDURE

* * * * *

Step 2.B. Arbitration

- b. ... 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. His/her decision on grievances within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management.
- c. The fee and expenses of the arbitrator shall be paid by the party which loses the appeal to arbitration except as the arbitrator directs otherwise. Each party shall fully bear its costs regarding witnesses and any other persons it requests to attend the arbitration.

ARTICLE XIX - PAY CHANGES

Section 4. Compensation Determination

c. Anniversary Date

* * *

(3). Pay increases on anniversary dates shall not be based merely on the passage of time, but rather shall be given if the employee's work has been satisfactory relative to the requirements of his/her position. Employee's performance shall be evaluated semi-annually; however, performance deficiency shall be brought to the attention of the employee as noted by the supervisor and documented. Merit increases shall not be denied except for proper cause.

Union's Position:

It is the Union's position that the Employer did not have proper cause to deny the Grievant a merit pay increase. The forms used to keep track of employee productivity do not list the manual work that the Grievant performed, listing only computerized productivity. These forms are thus not an accurate reflection of her work output. While the Grievant sometimes did have no work to do, this was not because of a lack of initiative. The system by which work is distributed did not allow the Grievant to have a larger output: more senior employees restrict the flow of work and do not allow the Grievant to take work away from them.

With regard to the cleaning of the machinery, the Grievant could not clean that machinery when other employees were working on it. She did spend a good deal of time cleaning the files, and that work is also not reflected in her output record.

The Grievant, moreover, was never apprised of any problems concerning either initiative or her productivity record. The problem of who would clean equipment was resolved at the meeting on December 1982 when a rotating schedule was instituted.

It should be noted further that, according to the Grievant's testimony, the rotating system worked up until the point when she herself was assigned on the rotating schedule to clean the equipment; thereafter the schedule which was supposed to rotate did not move to the next person in rotation.

The Grievant asks that she be given the merit increase which was denied her on February 24, 1982.

Employer's Position:

It is the Employer's position that evaluating employees is a proper management function and a reserved right under the management rights section of the collective bargaining agreement. The Grievant was rated as less than satisfactory in initiative and productivity. The productivity rating was verified by the monthly computerized activities printout, an objective basis for making that evaluation. Observing the Grievant sitting idly was evidence of lack of productivity and initiative in PERSON 1's mind and prompted his rating in those categories. In conclusion, the Employer asserts that the action of management was not arbitrary or capricious in finding the Grievant less than satisfactory in initiative and productivity and that rating her performance was a reasonable exercise of managerial prerogatives. For these reasons the Employer denied the grievance and asks that the arbitrator sustain management's decision.

Decision:

The function of an arbitrator is generally to act as a reader of the contract, and this contract restricts an arbitrator's powers specifically "to the interpretation and application of the express terms of this Agreement." The provisions in need of interpretation to make

a determination of this dispute are found in Article XIX - Pay Changes, Section 4, subsection c(3), which read:

Pay increases on anniversary dates shall not be based merely on the passage of time, but rather shall be given if the employee's work has been satisfactory relative to the requirements of his/her position. Employee's performance shall be evaluated semi-annually; however, performance deficiency shall be brought to the attention of the employee as noted by the supervisor and documented. Merit increases shall not be denied except for proper cause.

In the ordinary non-disciplinary grievance arbitration the burden of proof rests, of course, with the grieving party to prove a contract violation. This provision, however, contains the imperative that "Merit increases shall not be denied except for proper cause." Because of this express requirement, the Employer must sustain the burden of showing that proper cause existed to deny the Grievant her merit increase. The provision also requires that "performance deficiency shall be brought to the attention of the employee as noted by the supervisor and documented." The Employer must then show that at the time of the Grievant's semi-annual performance evaluation it met these requirements and also show that its denial of a merit increase was for proper cause. The standard of that proof is that generally applied in labor arbitration, a preponderance of the evidence.

It is undisputed that the Grievant's prior evaluation made six months before she was denied her merit increase was satisfactory. Six months earlier then it is assumed that no deficiency in performance was present that needed to be brought to her attention. During the six months preceding the denial, the period prior to February 24, 1982, no testimony was offered to prove the Grievant was ever advised of her alleged deficient performance. In fact, it was undisputed that she was not told that she was deficient in productivity and not given an opportunity to explain the computer printout figures.

With regard to the computer figures, the Grievant's explanation is unrebutted on the factual record before me. She testified that a good deal of her work was performed by hand in the preparation of court dispositions and that the computer figures did not take this manual work into account. The computer printout did not encompass manual work and did not quantify such work as part of production records. By definition, therefore, considering the type of work the Grievant was doing during a good part of her workday, her production figures would be low. With regard to the preparation of incident reports, the Grievant's production was in a range comparable to the other worker doing the same work on the afternoon shift: 4.4 per day compared with 4.8 per day.

Also undisputed on the record is the fact that the assignment of work was controlled to a large extent by senior day clerks whose shift overlapped the Grievant's shift. Lt. PERSON 1 acknowledged that some of these day clerks had favorite documents that they liked to spend their working hours doing and that they did not wish to share this work with other clerks. The Grievant's assignment was then to a great extent out of her hands. She did nevertheless complain to PERSON 1 that she had nothing to do, but rather than tell other employees to assign work to her, he told the Grievant to clean. The Grievant was caught in a bind since it was impossible to clean equipment upon which other employees were working, and yet her requests for work to do led to the cleaning assignment. It should also be added that any observations Lt. PERSON 1 made of the Grievant were made during the period from 2:00 p.m. when she came to work and 5:00 p.m. when PERSON 1 left work and only on Wednesday, Thursday and Friday. The Grievant also worked Saturdays and Sundays, which days PERSON 1 did not work. His observations were then based on that period of time when the day shift workers were

working, their shift overlapping the Grievant's. Insofar as productivity is concerned, therefore, PERSON 1 had a limited view of the Grievant from her personal observations.

Clearly, the purpose of the requirement in the contract that any performance deficiency be brought to the attention of an employee and documented is meant to allow an employee to be apprised of that deficiency and to afford her the opportunity to bring her work up to a satisfactory level of performance so as to qualify for merit pay increases. In the case of the Grievant, no specific documentation was revealed relating to productivity, and it is undisputed that no discussions were held to discuss that subject with the Grievant.

With regard to the low grade received by the Grievant from PERSON 1 in initiative, PERSON 1's notes contain only this conclusionary statement: "Noted several incidents where employee 'had nothing to do' when in fact work station area and other work could have been in progress. Employee advised of same." No specific dates or incidents are documented, and Lt. PERSON 1's testimony related only to the December 11th meeting at which all employees were told about the cleaning of equipment. He did testify that he spoke with the Grievant individually when he told her that the December 11th meeting had been called in part because of his observations of her doing nothing. Since he did not record the times and dates upon which he saw her doing nothing, it would be difficult if not impossible for the Grievant to respond to those charges.

No testimony was given to show that Lt. PERSON 1 responded to the Grievant's complaint that work was unavailable to her at times because of the control of work flow exercised by senior employees. Similarly no testimony was given by Lt. PERSON 1 that he attempted to resolve this problem in any fashion by instructing senior employees to

assign work to the Grievant when she ran out of duties. Based on the record it must be found that no performance deficiencies were brought to the Grievant's attention during the six months preceding her evaluation and upon which period of time she was denied her merit increase.

It is concluded that the Employer has not met its burden of showing proper cause for denying a merit increase to the Grievant. The burden has not been met because no performance deficiencies were brought to her attention and because insufficient proof was presented of unsatisfactory performance. The Grievant's lower productivity figures were adequately explained by her, and her testimony was not rebutted by the Employer. The lack of initiative charge was not proven, and the Grievant was, in fact in something of a dilemma; when she ran out of work she was unable to get other work and yet was charged later with low productivity and lack of initiative. Her pointing out, that she needed work to do was in fact an act of initiative. She was in a further bind because she was told to clean when she had no other work and, not being able to clean the equipment, cleaned files, work which did not show up on her productivity record.

The Employer is, of course, correct in asserting that the rating of employees is a proper management function. Ordinarily, it is also true, that employee evaluations will not be set aside by an arbitrator so long as they are in compliance with the contract and are not shown to be arbitrary and capricious. In this instance, however, the rating of the Grievant violated the contractual requirement that any deficiency in performance be brought to the attention of the employee. This is especially important in this case where the Grievant's evaluation made six months earlier was satisfactory, leaving the Grievant to believe that she was performing adequately. The contract also prohibits the Employer

from denying any merit increase except for "proper cause." The Employer has failed to meet its burden of proving proper cause in this case. For these reasons, the grievance is granted.

It is held that the Employer has not proven proper cause for denying the Grievant a merit increase. The grievance is granted, and the Employer is required to grant the increase and reimburse the Grievant for any losses suffered because of this denial.

ELLIOT I. BEITNER

DATED: January 17, 1983