Brooks #3

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

Employer (Michigan)

-and

Union

DECISION AND AWARD

DECISION

ISSUE AND BACKGROUND:

Employee 1 filed a grievance on January 4, 1983, claiming that the Employer violated Article XIX, Section 3.a of the July 1, 1982 -December 31, 1983 Collective Bargaining Agreement between it and Union by "arbitrarily" assigning a new anniversary date for pay increase purposes to her after she was restored to her former position from a position to which she had been demoted. The issue in this case is whether the method the Employer used to compute her anniversary date in the restored position was correct. Not having settled the grievance at its earlier stages, the parties brought the matter before the undersigned, who had been selected by the mutual direct appointment of the parties to hear it. A hearing on the matter was conducted by the undersigned at the Employer Hall on September 27, 1983.

At the hearing, the parties were given full opportunity to call, examine, and cross-examine witnesses under oath and to place relevant documentary evidence into the record. On the basis of his study of his notes of the hearing, of the documents received into evidence, the

Union's oral argument at the conclusion of the hearing, and the Employer's post-hearing brief, the undersigned issues this Decision and Award. According to Article IX, Section 3, Step 3.B.(c) of the Agreement, the undersigned's Award "shall be final and binding on the employee or employees involved, the Union, and Management."

FACTS:

The salient facts in the case are undisputed. During the period of October 17, 1977 to September 27, 1981, Grievant was a Neighborhood Service Agent at Pay Range 15A. On September 27, 1981, to avoid a layoff, she accepted a demotion to the Public Accounts Collector classification at Pay Range 14A.

The parties agree that her anniversary date for pay change purposes thereby properly was changed from April 17 to six months after September 27, 1981 and the corresponding date each year thereafter. Article XIX, Section 3 states in this respect:

> Anniversary Dates for Pay Change Purposes.
>
> a. Establishment
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> * * *
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> (4) Demotion. The date six (6) months after the effective date thereof and the corresponding date each year thereafter.

The September 27, 1981demotion reduced Grievant's annual pay rate from $18,066.00 (Range 15A, Step D) to $17,379.00 (Range 14A, Step D). Six months later, she was placed at the Range 14A, Step E rate of $18,066.00.

If Grievant had remained in her demoted Public Accounts Collector position, she would have received a merit increase to the F step ($18,719.00) on March 28, 1983, one year later. On

December 19, 1982, Grievant was restored to her former Neighborhood Service Agent position at the Range 15A, Step D rate of $18,066.00.

When Grievant was demoted on September 27, 1981, she had approximately five months of credit toward the E step of Range 15A. The Employer credited her with this approximately five months toward her anniversary date upon her restoration to the Neighborhood Service Agent classification, thus requiring her to serve approximately seven more months at that level before going to the E step. The Union contends that the March 28th anniversary date for her demoted Public Accounts Collector Range 14A position should have been retained after she was restored to the Neighborhood Service Agent classification.

DISCUSSION:

Grievant would have achieved eligibility for a pay increase to the next higher step at an earlier date if her demoted position's anniversary date had been retained after she was restored to her former position. Depending upon the anniversary dates involved, retention of the demoted position's anniversary date advocated here by the Union could delay rather than accelerate an employee's eligibility date for a step increase. If an employee is demoted from position A to position B on July 1, when s/he has eleven months at the position A pay step and is restored to position A seven months after being demoted, the employee would be required to wait eleven months if s/he retained the demoted position B's anniversary date but only one month if s/he reverted to the original position A's anniversary date upon restoration to that position.

The undersigned's duty here is to ascertain the intent of the Agreement relative to the anniversary date to apply to demoted employees once they have been restored to their former positions. Both parties recognize that this intent must be derived primarily from reading the Agreement as a whole, because none of its individual parts specifically addresses the problem.

After reaching this juncture in the analysis of the question, the parties take separate roads: The Union argues principally that the doctrine of "*expressio unius est exclusio alterius*" applies - to expressly include one or more of a class of a written instrument must be taken to exclude all others; the Employer argues principally that the Maintenance of Standards clause of the Agreement, Article XXXIV, and past practice compel the adoption of its position in the case.

Article XIX, PAY CHANGES, Section 3. of the Agreement, entitled "Anniversary Dates for Pay Change Purposes", deals with the establishment and postponement of such dates. In Section 3.a.(1), for original employment and re-employment, and in Section 3.a.(2), for promotion, the Agreement establishes an anniversary date "one (1) year after completion of the probation period and the corresponding date each year thereafter." In Section 3.a (4), for demotions, and Section 3.a (5) for reclassifications, an anniversary date "six (6) months after the effective date thereof and the corresponding date each year thereafter" is established. The remaining circumstance in Section 3.a. concerns transfers. In the case of a transfer, Section 3.a.(3) provides that [t]he anniversary date remains unchanged."

Section 3.b., entitled "Postponement of Anniversary Date" states:

> Layoff, formal leave of absence or other separations from the payroll in excess of sixty (60) days shall postpone the anniversary date for the total period of separation, but time previously served toward the next anniversary date shall be credited when employees return to the payroll.

The Union argues that a new date for pay change purposes is to be established only when the Agreement specifically so provides, and the Agreement does so only in respect to original employment and re-employment, promotion, demotion, and reclassification. This is consistent with the approach in Section 3.b., whereby the anniversary date is postponed only in the circumstances enumerated therein. On the basis of this approach, the Union concludes that, by

not specifically providing in the Agreement for the establishment of a new anniversary date when a demoted employee is restored to his/her former position, the parties intended to retain the anniversary date for the employee to which Section 3.a.(4) makes specific reference in cases of demotion. If the parties had intended otherwise, the Union argues, the parties would have specified in Section 3.a. that restoration to the former position is one of the circumstances in which a new anniversary date is to be established.

The parties did deal in the Agreement with demoted employees who subsequently are restored to their former positions, but only in respect to the salary step at which they return. Article XIX, Section 4.d.(3) provides that such an employee "shall be paid at the same salary step from which demoted unless the employee has already attained a salary step with a higher rate of pay in which case he/she shall be paid at the first salary step which is the same as his (sic) present rate of pay." It is noted in this respect that the grievance was filed on January 4, 1983 and the Agreement was not signed until March 15, 1983. The parties, however, chose not to address the Agreement directly to the question raised by the grievance.

In the opinion of the undersigned, the *expressio unius est exclusio alterius* doctrine is inapplicable to the instant case. Article XIX, Section 3.a., reasonably read, does not, in the opinion of the undersigned purport to cover every contingency which might arise. Further, the existence of a dispute between the parties when the Agreement was signed, in the form of the unresolved grievance, reveals there was no mutual agreement that, except to the extent that Section 3.a. expressly establishes new anniversary dates, none are to be changed. Finally in this respect, Section 3.a.(3) provides that the anniversary date remains unchanged in the case of transfers. It can equally be argued that the parties would have specified in Section 3.a. that

restoration to the position from which demoted was to be treated in the same manner as that Section treats transfers if the parties had intended that both circumstances be treated alike.

Neither does the Employer's Maintenance of Standards and past practice arguments dispose of the issue here, in the undersigned's opinion. Article XXXIV, MAINTENANCE OF STANDARDS, Section 1., provides that "all conditions of employment not otherwise provided for herein relating to wages . . . shall be maintained at the standards in effect at the time of the signing of this Agreement . . . ." The Employer's argument is premised upon its claim that, when the Agreement was signed, a wage standard existed in respect to "restored" employees.

According to the Employer, the standard existed as the result of the consistent manner in which the Employer has always determined, under the Agreement, the anniversary date of restored employees. This has created both a standard which must be maintained under Article XXXIV, Section 1., and a binding past practice which must continue to be observed because it is not in direct conflict with any of the terms of the Agreement, the Employer argues.

The Employer relies on the testimony of its Personnel Director, Person 1 that, since the inception of the collective bargaining relationship with Union in 1956, it has always determined the anniversary date for restored employees in the manner it did so in Grievant's case. A list of 33 restorations was placed into evidence, covering the period of August, 1981 through August, 1983. Thirteen of these experiences occurred prior to the filing of the January 4, 1983 grievance, and one or more of these involved transfers, rather than demotions, in which the anniversary date remained unchanged pursuant to the terms of Section 3.a.(3). In all of these experiences, neither the employee nor the Union was informed at the time the city recomputed the anniversary date after restoration that this had been done. Presumably, the employee became aware of the re-computation when his/her next step increase was reflected in the paycheck. However, the record

evidence establishes that the Union was neither aware nor reasonably should have been aware of the Employer's practice until the instant grievance was filed.[1]The Union cannot be held responsible for having acquiesced in a practice about which it had no knowledge. For the same reason, it cannot be concluded that a standard exists here within the meaning of Article XXXIV.

Appendix C of the Agreement provides for six periodic salary step increases and Article XIX, Section 4.c.(1) provides for annual consideration for a salary step increase of each employee not already at the top step. These step increases presumably are granted in recognition that an employee's services to the Employer in the position s/he holds become more valuable with the passage of time and the gaining of additional job experience. Section 4.c.(3) provides that

> 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.

Under this sub-section, step increases are not automatic; rather, the employee's "work" must have been evaluated as satisfactory. What is the "work" to which Section 4.c.(3) refers? Not only logic but practical considerations compel the conclusion that "work" refers to the employee's performance in the position to which the step increase is applicable.

Under Section 3.a., when an employee is employed or re-employed or placed into a position with duties different from her/his former position, s/he is given an anniversary date for step increase purposes which provides either six months or one year to establish satisfactory

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[1] The record does not reveal how many of the thirteen employees gained step increases earlier than they would have if, after restoration, they had retained the anniversary dates of their demoted positions.

work performance. Under Section 3.b., if the employee is off the payroll for over sixty days, the anniversary date is extended for an equal period of time. The employee must actively perform her/his job for an entire six months/one year period before being eligible for a step increase. This enables the Employer intelligently to evaluate whether the employee's work has been satisfactory.

Article XIX, Section 2.c. defines "transfer" as "a change in employment to another position in any classification which has the same maximum salary and similar duties and qualifications." Thus, where similar duties and qualifications exist in the new position, the anniversary date remains unchanged after "transfer", pursuant to Section 3.a.(3). The ability of the employee to perform in the job to which s/he is transferred can be determined at once on the basis of her/his performance in the old job, because the duties of both are similar.

A demotion "shall mean a change in employment to a classification which has a lower maximum salary . . . .", according to Article XIX, Section 2.b. A reclassification "shall mean the changing of a position from one classification to another based on the duties involved." That is, a demotion involves a reclassification which, in turn, involves a change of duties. The undersigned believes that it is more consistent and in keeping with Article XIX with respect to an employee who is restored to the position from which s/he was demoted to credit the employee, when s/he returns to that position, with time for step increase purposes in the manner advocated by the Employer, rather than by the Union. This allows, in all instances, the determination contemplated by Section 4.c.(3) whether the employee has satisfactorily performed the duties of the position for which a step increase is being considered. If an employee accumulates almost a whole year's credit in one position toward a step increase and then is demoted and later restored to the first position, the Employer will have had ample opportunity before the demotion to evaluate if the

employee's work in the restored position is satisfactory. If an employee accumulates a negligible part of a year's credit toward a step increase and then is demoted and later restored, the Employer will have ample time after restoration to determine if the employee's work in the restored position is satisfactory.

As the Employer's brief observes, to use an extreme example, an employee might spend as little as one day of the year preceding the anniversary date in the original position and might spend one year minus one day toward the anniversary date in the demoted position when restored to the original position. Under the Union's theory, it would appear impossible for the Employer intelligently to determine without further delay whether the employee was capable of performing satisfactorily in the restored position. Further, as observed by the Employer, in such a situation, the employee would not have received the semi-annual evaluation contemplated by Section 4.c.(3) in respect to the duties of the restored position before the determination had to be made whether his/her "work [was] satisfactory relative to the requirements of his/her position", which the undersigned has interpreted to mean the restored position.

For the reasons explicated above, the undersigned concludes that the Employer's method of computing the anniversary date for salary step increases for restored employees is more consistent with the terms of the Agreement, especially those in Article XIX, Sections 3 and 4, than the method proposed by the Union.

AWARD

Employee 1's January 4, 1983 grievance claiming the Employer "arbitrarily changed [her] anniversary date from 03/26 to date seven months after grievant's restoration from a demoted state" is without merit and is denied.

The July 1, 1982 - December 31, 1983 Collective Bargaining Agreement between the Employer and Union, and especially Article XIX, Sections 3 and 4, require, where a demoted employee is restored to the position from which the employee earlier was demoted, that, thereafter, the anniversary date for salary step increase purposes shall be determined upon the basis of the time previously served in the position from which demoted, rather than in the demoted position.

The Employer correctly assigned an anniversary date of July 18, 1983 to Grievant for salary step increase purposes when she was restored to the Neighborhood Service Agent classification on December 19, 1982.

Pursuant to Article IX, Section 3, Step 3.B (d) of the Agreement, the fee and expenses of the arbitrator in this matter shall be paid by the Union, it being the losing party.

Jerome H. Brooks Arbitrator.

Dated: October 27, 1983.