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IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

By the terms of the contract between the Employer and the Union there is provided a grievance procedure including arbitration. Hearings were held in August 5 and October 29, 1996. Equal opportunity was given the parties for the preparation and presentation of evidence, examination and cross examination of witnesses, and oral argument.

THE ISSUE

The issue in this case is whether the Employer violated any provision of the contract by considering the Employee to have resigned his position with the Employer for engaging in "gainful employment" while on a leave of absence, and if so, what is the appropriate remedy.

CONTRACT PROVISIONS

Article 10, section (f) of the contract provides:

> Any employee hereunder on personal or medical leave of absence, including occupational leave of absence, or more than seven (7) consecutive calendar days, engaging in gainful employment not provided for in paragraph (C) of this article without written permission from the Employer and the union, or engaging in activities which may bring discredit to the Employer or its employees, shall be deemed to have resigned and his name stricken from the seniority roster.

THE FACTS

The Employee has been an employee of the Employer since 1987. All times relevant to these proceedings, he was in the utility classification. His basic job was cleaning aircraft at Airport 1. The Employee sustained an on the job injury to his lower back in 1993. From that point on, the Employee's work with the Employer became sporadic. He performed some light duty work, but never resumed his regular duties as a utility worker after this injury.

In April 1994 the Employer received a report on the Employee's medical condition from Hospital 1 which severely restricted his activity. Among other things the report prohibited him from doing any overhead work, pushing or pulling. It also prohibited him from doing any lifting or bending of his waist. Upon receiving this report the Employer informed the Employee that it had no light duty work that he could perform within his restrictions. Thus, the Employee did not work at all after this time. During this period the Employee was wearing a back brace. The Employer placed him in leave of absence status.

The Employee submitted a report from his doctor on June 21, 1994. This document stated that the Employee could lift up to ten pounds occasionally, but that he could not bend, squat, crawl or climb. The Employee's supervisor said that he did not have any light duty work that the Employee could perform within these restrictions. The Employee sent the Employer a similar report on July 11, 1994. This report was identical to the June report. The Employee sent a third identical report to the Employer on August 6, 1994. All of these reports were prepared in the office of Doctor 1.

At some point during the spring or summer of 1994, the Employer became suspicious that the Employee could perform light duty work. Accordingly, in mid June it hired an investigating

agency to place the Employee under surveillance. The investigating agency assigned Person 1 to the Employee's case. Person 1 testified that he observed the Employee performing various kinds of work on and before August 4, 1994. He testified that he observed the Employee loading mops and buckets into a van. He testified he saw the Employee at an apartment building performing cleaning work on three different occasions. Person 1 videotaped the Employee performing these kinds of activities at an apartment complex called Apartment Complex 1. Person 1 also learned that the Employee had a contract to clean a doctor's office. Person 1's employer submitted a report to the Employer's insurance carrier which, in turn, transmitted it to the Employer outlining the above described activities.

The Employer also introduced a number of documents which demonstrated that an organization referred to as "Company 1" performed cleaning work for the Apartment Complex 1 throughout much of the period that the Employee was on leave of absence. When the Employer received the information regarding the surveillance from its insurance carrier, as well as the documentary evidence indicating that "Company 1" was performing work on a regular basis at the Apartment Complex 1, it notified the Employee that it was considering him to have resigned under article 10(f) of the contract.

The union produced several witnesses including the Employee, his wife, a psychologist and his treating physician. Their testimony is summarized next. The Employee's wife testified that the Employee once owned a business named Company 1. She said that the Employee entirely turned the business to her in October 1993 and that she was the primary operator of the business and performed most of the work after that time. She testified that she had the business license for Company 1 changed to reflect that she was the owner.

She testified that while she did most of the work, the Employee occasionally helped her with very light duty work such as carrying supplies to the job and other light cleaning work. She also testified that she had other people who normally helped them. The Employee's wife said that she had another full time job. She also testified that the Employee performed some bookkeeping and other paperwork for her. She denied that he did most of the cleaning work. When he went to a job, he was simply helping out. She also testified that the work that the Employee did on August 4 when he was videotaped would have been work performed under a purchase order which was introduced as Employer exhibit 15.

The Employee's sister also said that the Employee's wife ran the business and that she sometimes helped her with cleaning jobs. She denied that the Employee performed any heavy work for Company 1. She said that other employees worked at the Apartment Complex 1.

The Employee also testified that he turned Company 1 over to his wife in October 1993. He said that he helped out from time to time but did not do any heavy work. He said that most of the documentation introduced by the Employer was for work which was performed by others. He said that when he signed some of the documents he was merely assisting his wife in doing the bookkeeping for the operation. He also said that some checks from the Apartment Complex 1 which were made out to him were made out that way because that Employer did not change its bookkeeping system the way it should have. He also testified that the business was not profitable, in fact it lost money. The Employee's income tax records for 1994 indicate that the business actually lost some $72,000. He said that during the summer and fall of 1994 Company 1 only worked two or three days per week.

During the hearing the union introduced union exhibit 4 which appears to be identical to Employer exhibit 12, except that the union's document indicates that the Employee could squat

and bend. The union did not introduce a cover letter with a date on it regarding this document. Employer exhibit 12 has a cover document which is dated August 6, 1994. Additionally, Union Exhibit 3 is a document which was issued from Doctor 1's office which states: "Doctor 1 did correct the 7-11-94 and 8-6-94 functional capabilities form. His assistant filled them out incorrectly. It is to state on 7-11-94 and 8-6-94 that the Employee is allowed to bend and squat as seen on corrected pages." The Employee testified that he sent the corrected copies to the Employer. The Employer has no record of receiving them.

The Employee testified that in the summer of 1994 he was physically able to bend and squat so that he could have done light duty work at the Employer. He said that he sent some of the forms back to Doctor 1 but that he also sent some incorrect forms to the Employer indicating that he could not work. Doctor 1 testified that he did not know why the Employee could not perform light duty work.

POSITIONS OF THE PARTIES

Position of the Employer

Initially the Employer notes that this is not a discharge case and that the issue is not whether the Employer discharged the Employee for just cause. The issue is whether the Employee resigned by engaging in gainful employment under article 10(f) of the contract. The Employer also contends that the issue of the reasonableness of article 10(f) is not before the panel as would be the case with a work rule. Article 10(f) of the contract was negotiated with and agreed to by the union. It is clear and unambiguous.

The Employer also contends that the testimony of Doctor 1 at the hearing, together with Employer exhibit 19 establishes that the Employee could not do bending and squatting during the summer of 1994. The Employer questions the authenticity of union exhibit 4 because it is inconsistent with other documents that were not available to the parties until the day of the hearing.

The Employer also contends that the work that the Employee performed at the Apartment Complex 1 was "gainful employment" as that phrase is used in the contract. One only has to look at the amount of money the Apartment Complex 1 paid to Company 1 to reach the conclusion that there was gainful employment in this situation. The Employer also contends that the Employee personally did this work. The videotape of him shows this. The testimony of the private investigator confirmed that, as does the Employee's testimony.

The Employer also contends that Company 1 was the Employee's business. He drove a truck with the Company 1 logo on it. He actually did work and Apartment Complex 1 issued checks to him for that work. Moreover, the Employee's credibility as a witness is open to question because he clearly furnished misleading information to the Employer. According to the Employer, it is incredible to believe that the Employee got incorrect documents from his doctor, took them home, faxed them to the Employer and then went back and got corrected documents from Doctor 1 but did not send these to the Employer. This testimony is simply not believable.

For these reasons, the Employer requests that the grievance be denied.

Position of the Union

The union contends that the Arbitrators should interpret the phrase "gainful employment" in a way to mean that the Employee must have made a profit in 1994 in order for him to be subject to

resignation under article 10(F) of the contract. To do otherwise is to write the word "gainful" out of the contract. Since the business lost money in 1994, the Employee could not have gainfully employed in some other business in violation of that section of the contract.

Because the Employer failed to prove that the Employee was engaged in gainful employment. It may not consider him as having resigned.

Moreover, the union contends that even though the Employee did assist his wife, he did not do heavy work which would justify the invocation of article 10(F). He was not a full time employee of the business. His work was quite sporadic and occasional.

The union also contends that the Employee did not know that he was doing anything which would put his job in jeopardy. No one specifically brought this article to the Employee's attention and he behaved innocently in helping his wife. There is no evidence from which the Arbitrators can infer that the Employee was aware of the existence of article 10(F) of the contract. Furthermore, there was no prior warning to the Employee. Finally, the union notes that the Employee has always been a conscientious employee and he has not been disciplined previously. In view of the unreasonableness of the application of article 10(F) of the contract in this case, the union requests that the grievance be sustained.

DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing, and the arguments of the representatives of the parties, a majority of the arbitration panel has concluded that the Employee resigned his job with the Employer by engaging in gainful employment while on a leave of absence. For the reasons given in detail below, the grievance is denied.

The panel has great difficulty with the Employee's testimony that he performed only minimal activities with Company 1. He was videotaped doing normal cleaning work. Company 1 received substantial amounts of money for the cleaning of the Apartment Complex 1. During the hearing the Employee said that he normally used individuals from a homeless shelter to help with the cleaning activities in which Company 1 engaged. It is noted that his wife did not say anything about using people from a homeless shelter. She testified at some length about the employees of the business, and the arbitration panel considers this to be a serous weakness in the union's case which adversely affects the believability of other points in the union's case. Neither did the Employee's sister mention getting employees from the homeless shelter. Moreover, on the day that the Employee was followed and ultimately videotaped, he does not appear to have gone to a homeless shelter to get laborers. He appears to have more or less gone straight from his house to the apartment and performed work.

There is considerable documentary evidence in the record that Company 1 performed these activities on a recurring basis throughout the summer of 1994. Checks were made out to the Employee and the Employee repeatedly did bookkeeping work for Company 1. Moreover, the Employee was videotaped engaging in work which documentary evidence that the Employer possessed indicated he could not do. Clearly the Employee was doing some bending and it appears to the panel that he was probably lifting in excess of ten pounds when he was seen by the investigator.

The union's theory that all of this activity was not "gainful employment" strikes the arbitration panel as highly unrealistic. Black's Law Dictionary defines gainful employment as "any calling, occupation, profession or work which one may or is able to profitably pursue." It is noteworthy that this definition clearly suggests that one may lose money in a particular period and be

engaged in “gainful employment” during that same period. None of the cases summarized in Words and Phrases suggests that one must actually make a profit to be gainfully employed. It cannot realistically be said that one is not engaged in gainful employment if one is attempting to make money but who for whatever reason, happens to lose money during a specified period of time. The concept of gainful employment means that one is attempting to earn money. Turning a profit is not a necessary ingredient of the concept of gainful employment. Hence, a majority of the arbitration panel concludes the Employee was engaged in gainful employment.

The basis upon which the union argues that the Employee was not engaged in gainful employment was the fact Company 1 lost money in 1994. The Employer introduced parts of the Employee's income tax return for 1994. One page of Employer exhibit 17 is schedule C, profit and loss from the operation of a business. It must be born in mind that Company 1 was a small cleaning business with few employees, according to union witnesses. Much of the evidence from which the union argues that Company 1 lost money in 1994 make absolutely no sense to the arbitration panel. The business reported an income of $30,000 and expenses of $103,000 for that year. One must ask how does the sort of "mom and pop" apartment cleaning operation that is run by a man and his wife plus a few people from a homeless shelter incurs expenses of $103,000 in a single year. Some of the expenses contained in Employer exhibit 1-7 are-frankly-shocking. For example: why would this operation pay out $12,000 in "fees"? What did the Company 1 have required insurance premiums of nearly $10,000? Where did it spend $5500 advertising? What kinds of legal difficulties did the business get into that would justify the expenditure of $9600 in legal fees? The numbers on the tax return simple do not make good sense and the arbitration panel is unwilling to use this data as a basis for saying that the Company 1 lost $72,000; therefore, the Employee was not engaged in gainful employment.

Because a majority of the panel has concluded that the Employee was engaged in gainful employment he resigned his position with the Employer; therefore, the Employee is denied.

AWARD

The grievance is denied.