**Chiesa #7**

## VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

-and-

UNION

Gr. (Seasonal Employees)

## OPINION AND AWARD

## THE CASE

The grievance in this matter is dated June 11, 1998. It arises out of the Parks and Recreation Department and in part reads as follows:

> "Date of Occurrence: June 15, 1998 and continuing and ongoing."
>
> "Statement of Facts: The Parks Department continues to utilize a rotation of seasonals performing what is clearly bargaining unit work on an ongoing basis in the counter area of the Parks and Recreation Department. This situation continues to be a point of contention to the Union. By Management's refusal to request a full-time bargaining unit person to perform the functions of an Office Assistant I they are in clear violation of the current agreement.
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> "Articles Violated: II; IV; V"
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> "Suggested Adjustment: Cease and desist from hiring a rotation of seasonals and replace with a full-time permanent Office Assistant I and any and all things to make the Union whole."

The second step reply issued by Person 1, who was the Labor Relations Manager at the time, in part reads as follows:

> "REPLY: This union initiated grievance alleges that the Employer is using a rotation of seasonal employees to do bargaining unit work in the clerical section of Parks and

> Recreation. The union claims that the Employer's failure to request a full-time bargaining unit person to do the work is a clear violation of the current agreement. The union alleges violations of Articles II, IV and V."
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> "The contract clearly recognizes the Employer's ability to use temporary employees (Article II, §4). That language states: It is expressly understood that nothing contained in this Agreement will limit the right of Management to hire seasonal employees..."
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> (Art. II, §4a). The parties arbitrated this issue on March 3, 1998 in grievance 61-97. Despite having the opportunity to present testimony, cross-examine Employer witnesses, and offer documentary exhibits, the union failed to show that the long time use of seasonal employees in the clerical area of Parks and Recreation violated the contract.
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> "While the situation may continue to be a 'point of contention' with the union, such does not rise to the level of a contractual violation. The grievance sets forth no information or facts to support the allegations made. Since contractual authority exists to use seasonal employees, the Employer can discern no contractual violation. The grievance is denied."

As can be seen from the above, this dispute arises out of the Employer's Parks and Recreation Department. In essence, the allegations are that the Employer has been utilizing a permanent rotation of seasonal, also known as temporary employees, who have been performing bargaining unit work in a manner to avoid hiring a full-time bargaining unit person. The seasonal/temporary employees are not represented by the Union, are neither covered by the health insurance or pension provisions, and receive a lower hourly rate.

Person 2, who has been with the Employer for 22 years and was the previous first Vice President of the Union, related that several years ago, before 1990, there was a separate Recreation Department which was managed by the Employer and the public school system. In the early 1990's, perhaps 1993, the Recreation Department was merged into the existing Employer's Parks Department and, according to his testimony, the total complement of full-time bargaining unit employees rose from two to four.

Just subsequent to that time a dispute arose between the parties which led to the Union filing grievance #00-00. In essence, the Union was alleging that the Parks Department had

employed a seasonal employee for approximately two years performing functions in the OA-II (Office Aide II) classification. The Union went on to allege that the seasonal in question was scheduled 30 and 35 hours per week and occasionally 40 hours per week.

The above dispute was settled by the parties via a resolution dated April 16, 1996. In part that resolution reads as follows:

> "In order to provide resolution to the above referenced grievance matter the parties stipulate and mutually agree to the following:
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> > "1. The Director of Human Resources shall advise the Director of Parks and Recreation by memorandum that continued utilization of a part-time employee in her current capacity (making Special Events reservations) within the Parks and Recreation Department is in violation of the provisions of the Agreement between the Employer and the Union. The Director of Parks and Recreation shall be directed to establish a full-time position to perform the clerical support work for the Special Events Division if that work is to be continued.
> >
> > "2. If a full time position is not established through the budgetary process by July 1, 1996, it is understood that at the time the final decision is made (if prior to July 1, 1996) the work of making Special Events reservations shall be assigned to permanent staff within the Union bargaining unit. Utilization of part-time, seasonal or temporary employee in making Special Events reservations beyond July 1, 1996, shall be in compliance with Article II, Section 4(a) of the Agreement.
> >
> > “3. The above terms constitute full and complete settlement of all issues raised in this grievance matter.
> >
> > "4. The parties agree that the cancellation fee (if any) for the arbitration hearing scheduled before Mark J. Glazer through the American Arbitration Association for April 18, 1996, shall be equally split between the parties."

The Union was still concerned about the operations in Parks and Recreation. This led to the filing of Grievance #00-00. The Union's contention was that the Employer continued to use temporary employees to fill a valid full-time bargaining unit position in the clerical section of Parks and Recreation. The Union maintained that the Employer's actions violated the settlement in #00-00.

The above grievance was submitted to arbitration and heard by Arbitrator Elliot Beitner. The hearing was held on March 3, 1998 and the decision is dated May 11, 1998. Arbitrator Beitner denied the Union's grievance. Portions of the Opinion read as follows:

> "The next issue to be decided is whether the Employer's conduct violates the written settlement of Grievance #00-00. The settlement resolution was directed at resolving the claim that one seasonal employee, Person 3, had been working almost full time for two years performing bargaining unit work for the Special Events Division. The settlement required the Director to establish or seek to establish a full-time bargaining unit position to perform that clerical support work. The Director of Parks and Recreation requested a full-time position in the budgeting process but her request was denied. The settlement contemplated that a full-time position would not be established in the budgeting process. Paragraph 2 of that settlement states:
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> > 'If a full time position is not established through the budgetary process by July 1, 1996, it is understood that at the time the final decision is made (if prior to July 1, 1996) the work of making Special Events reservations shall be assigned to permanent staff within the Union bargaining unit. Utilization of part-time, seasonal or temporary employee in making Special Events reservations beyond July 1, 1996, shall be in compliance with Article II, Section 4(a) of the Agreement.'
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> "There has been no evidence that: 'Utilization of part-time, seasonal or temporary employee in making Special Events . . . .' has not been in compliance with Article II, Section 4(a). Furthermore, paragraph 3 of the settlement agreement states: 'The above terms constitute full and complete settlement of all issues raised in this grievance matter.' I conclude that the settlement agreement was directed at the work performed by Person 3 in making Special Events reservations and has not been violated.
>
> "The final issue to be decided is whether the Employer has violated Article II, Section 4(a). There is no claim that the Department used seasonal hires for the purpose of filling a permanent bargaining unit position. It is the second part of the first sentence of Article II, Section 4(a) that the Union alleges was violated: 'or for the purpose of avoiding the filling of a position on a permanent basis that would otherwise result in a position in the bargaining unit.'
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> "At issue is not whether the Department could benefit from another full-time aide. It probably could. At issue is whether the Union has met its burden of proving a contract violation. I conclude the Union has not proven the alleged violation. Even Union Exhibit #20 establishes that for a significant number of weeks in a year, the total amount of time worked by seasonal aides was 35 hours or less. This exhibit also shows that there were many weeks when more than one aide was working the same hours and days. This lends credence to the Employer's argument that there are peak times when more 'bodies' are needed.

> "In conclusion, the grievance is denied. The Union failed to meet its burden of proving a violation of the grievance settlement or of the grievance. The denial of this grievance is not intended to preclude the Union from raising the issue in the future under different facts or with new evidence."

It is noted that the current grievance was filed on July 11, 1998, approximately one month after Arbitrator Beitner's decision.

The evidence established that the workload in Parks and Recreation has continued to increase because of added programs and classes. It also establishes that seasonal/temporary employees perform two general types of work, program work which is non- bargaining unit work, and clerical work which is considered bargaining unit work. One of the witnesses, Person 4, who is a seasonal/temporary employee, indicated that about 90 percent of her work was clerical; that is, bargaining unit work, and that oftentimes her supervisor has told her to help clerical employees. She indicated that on many occasions she would do bargaining unit clerical work while charging the cost to the program codes.

The reference to codes relates to the accounts or codes to which various work activities are charged. For instance, work on programs, which is non-bargaining unit work, is charged to a different code and arguably budget in order to keep track of the allocation of funds and expenses. Supervisors Person 5 and Person 6 related that neither of them ever instructed employees to use a program code when performing bargaining unit work. It was explained that they would not use their program budgets to pay for other work. Person 6 explained that the seasonal/temporary employees do program work and will, in the office and the front, help clerical staff.

The record also establishes that in the early 1990's the Department had four full-time bargaining unit employees, three OA IIs and one OA-IV. There is no doubt that since 1995 the workload in the Department has increased. Tammy Pittman related that when she took an acting

assignment as an Office Assistant IV in October of 1998, she was assigning work to various seasonal employees.

The evidence also establishes that two permanent employees, Person 7 and Person 8 were absent and ultimately resigned during various times in 1998. The evidence establishes that Person 7 began working reduced hours during the week of 7/12/98. She took an FMLA on 9/13/98 and resigned on 12/13/98. It appears at Person 8 became ill on 12/27/98, utilized vacation, and then retired or resigned on 2/21/99.

According to Person 9, the current Director of Parks and Recreation, the OA-IV position has been offered to an individual and has been accepted and the OA-II vacancy is in the process of being filled. He related that in the fall of 1998 he reviewed staffing levels with his team and it was determined that at that point there was no need to create an additional permanent position. He related that he has no opposition to creating a full-time position if after the two permanent positions, i.e., OA-IV and OA- II, are filled and there is a need by the Department for a full- time position.

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 comprehensive and 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 II. UNION SECURITY AND CHECKOFF

"Section 4.

"a. Management agrees that it will not make a series of seasonal hires for the purpose of filling a permanent bargaining unit position provided for in the Employer Budget or for the purpose of avoiding the filling of a position on a permanent basis which would otherwise result in a position in the bargaining unit. It is expressly understood that nothing contained in this Agreement will limit the right of Management to hire seasonal employees nor limit the right of Management to make seasonal hires to fill positions temporarily open as a result of leave of absence, sick leave, vacation, or similar reasons.

"Similarly, the Employer agrees that it will not utilize temporary service contract personnel to avoid filling a permanent bargaining unit position provided for in the Employer budget or for the purpose of avoiding the creation of a full-time permanent position. However, it is expressly understood that nothing contained herein shall apply to the operations of the Grand Center or existing parking facilities of the Employer. It is further understood that the above provision shall have no application to situations wherein the Employer elects to exercise its right to subcontract bargaining unit work as provided in Article V.

"Definitions:

1. Seasonal hire shall mean the appointment of a person to a position limited by seasonal conditions or special projects.

2. Seasonal conditions shall mean those conditions which are peculiar to the four seasons of the year.

3. Special project shall mean any temporary project such as elections or pilot projects of limited duration; however, if such project results in the hire of permanent personnel, hires shall be made in accordance with the provisions of this Agreement.

   "b. Before seasonal employees are hired in any department or division where bargaining unit employees are currently laid off, representatives of the Labor Relations Office and the Union will meet for the purpose of reviewing possible alternatives, such as transfer of other permanent employees or recalling laid off employees. The intent of this provision is to seek alternatives which are more economical and reduce or eliminate the expense of utilizing seasonal employees. It is expressly understood that this provision shall not be interpreted to prevent the Employer from utilizing seasonal employees in the event a more economical arrangement cannot be identified."

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, 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 V. SUBCONTRACTING OF BARGAINING UNIT WORK

"Section 1. Management shall have the right to contract and subcontract work when it is not feasible or economical for the Employer employees to perform such work. Such right shall not be exercised for the purpose or intention of undermining the Union nor for the purpose or intention of discriminating against any bargaining unit member.

"Section 2.

a. No permanent position will be abolished through subcontracting without giving the Union thirty (30) days advance notice. During the 30 day notice period, representatives of the Employer and the Union will meet for the purpose of reviewing the Employer's analysis of the supporting feasibility or economic necessity as required. This provision is intended to afford the parties an opportunity to review the conditional requisites to subcontracting and to afford the Union an opportunity to make a proposal or adjustments which would eliminate the need to subcontract.

b. The Employer will provide the Union with the bid specifications at least ten (10) days prior to the time the specifications are released to potential contractors for any subcontracting which would result in the elimination of a permanent position within the bargaining unit. If requested by the Union, the Employer will meet pursuant to the Special Meetings provisions of Article VII regarding the contemplated subcontracting.

"Section 3. Upon exercise of the right to subcontract as identified in this Article and when bid specifications are drawn up, the Union shall be furnished with copies of same as soon as such information is available but, in any event, no later than the time the specifications are released to the contractors. The Union shall also be provided with the results of the bidding process. The Union shall receive copies of any rebid or contract extension or modification of identified bargaining unit work. The Employer will provide the Union with any cost projections and comparisons developed in any contract rebid,

modification or extension. The Union will be notified in the event of any change in contractors."

ARTICLE IX. GRIEVANCE PROCEDURE

"Section 3. Grievances will be processed in the following manner and within the stated time limits.

Step 3.B. Arbitration

c. . . . . Decisions on grievances within his/her jurisdiction shall be final and binding on the employee or employees involved, the Union, and Management."

The Union argues that *res judicata* does not apply, as suggested by the Employer, because the use of seasonals constitutes an ongoing dispute and the Union is not precluded from raising a related grievance with different facts and/or new evidence. It maintains that the prior arbitration award was not final and the arbitrator left the door open for future consideration. The Union further argues that it presented new evidence, different facts and new testimony at the arbitration held on March 16, 1999. It maintains that the new evidence demonstrates that even after the Beitner award, the Employer continued to employ seasonals on a year- round basis to perform bargaining unit work. The Union argues that it presented testimony of seasonal employees in the current case which Arbitrator Beitner says was a failing in the prior case. Further, it points out many aspects of the prior arbitration decision which it considers to be incorrect. The Union argues that the Employer violated Article II because it employed seasonal employees in the Parks and Recreation Department on a regular and consistent basis to avoid filling a bargaining unit position. It argues that the use of seasonals in the Parks and Recreation Department was not limited to seasonal conditions, but they have been employed to perform bargaining unit work in an attempt to avoid hiring a full- time bargaining unit employee. It argues that the Employer has employed seasonals to avoid filling and/or hiring a full-time employee to perform the bargaining unit work. It argues that the peak period runs from early

spring to the end of the fall and while it acknowledges the Employer can employ seasonals on a temporary basis during this period, it has been abusing its right by utilizing seasonals to perform bargaining unit work on a regular and consistent basis throughout the year. It points out that in January of 1999, a non-peak month, four seasonals worked a total of 52.25 to 83.75 hours per week. It maintains this was bargaining unit work. It argues that the same happened in February of 1999. It argues that the Employer did not sincerely evaluate and/or assess the staffing concerns of the Department. It argues that the Employer's contention that seasonals were needed to fill vacancies doesn't hold any water, for in October of 1998 the OA-IV position became vacant and on February 14, 1999, the OA-II position became vacant. It points out that these positions had not been filled as of the date of the arbitration. It argues that it should be made whole for the Employer's breach of the labor contract. It maintains that the Employer should be ordered to establish a fourth full-time position in the Department.

The Employer argues that the grievance should be denied on the basis of res judicata. It argues that just four weeks prior to the Union's filing the instant grievance the parties received an arbitration ruling from Arbitrator Beitner denying the very grievance issue asserted here. It argues that the prior grievance was based upon almost identical facts and issues regarding the same department and the same group of employees. It argues that Union witnesses Person 2 and Pittman admitted on cross-examination that the grievance was the same as in the prior case and the evidence has existed since 1990. It maintains that the Union's purpose of re-litigating the issue was its displeasure with Arbitrator Beitner's award. It argues that the only difference between this case and the prior one is that now the Union was able to get a seasonal employee to testify. The Employer argues that there was no evidence offered, either at the prior arbitration or at this one, to show that employees were prevented from testifying on the Union's behalf.

Further, it argues that the work of the seasonal Payroll Aide is not bargaining unit work, hasn't been, and that Employer witness Person 10 testified about the nature of the work and affirmed that such work had never been bargaining unit work. It maintains there were no new facts presented in this case. It argues that the parties have expressly agreed that an arbitrator's decision will be final and binding. The Employer goes on to argue that the only evidence submitted by the Union which should be deemed relevant and material should be the factual information existing after Arbitrator Beitner's May 14, 1998 decision and prior to the filing of this grievance on June 16, 1998. It maintains that if the dispute is based on the circumstances existing in that four-week period, it is clear that the Union has not established that a budgeted permanent position should be filled because of the seasonal usage or whether the use of seasonals was enough justification to warrant the creation of a full-time year-round position. Furthermore, the Employer argues that the overall record does not substantiate a violation of the contract. It maintains that the language in the contract recognizes the Employer's right to utilize seasonals before, inter alia, covering absences by permanent employees. Further, seasonals can be used to handle the increased workload during peak times. It maintains that the evidence shows that the clerical division was subject to a major amount of absences by permanent employees. The use of seasonals to assist during the busy season and address the ongoing fluctuation of staffing caused by permanent employee absences is exactly the type of situations contemplated in the contract. Further, it argues that testimony suggesting that seasonals were told to miscode their time sheets was overwhelmingly refuted by the testimony given by Supervisors Person 6 and Person 5. These individuals testified that they never instructed employees to miscode their time sheets. The Employer goes on to argue that Person 9, the Parks and Recreation Director, clearly testified that after meeting with his team in the fall of 1998, the conclusion was reached that there was no

need at that time for another full-time position. He explained that once the two permanent positions were filled and the situation stabilized, the staffing needs would be reviewed.

There had been a suggestion throughout the hearing and, in fact, it was mentioned by Arbitrator Beitner in the prior arbitration decision, that in cases of this nature the burden of proof is on the Union because the Union has alleged a violation of the Collective Bargaining Agreement. Certainly in a technical sense that's an appropriate conclusion and I have no quarrel with the principle. However, I would like to think that in cases of this nature both parties have the burden of bringing forward enough evidence to create an adequate and complete record, thus, increasing the probability that the arbitrator's decision will be appropriate. So while the Union may carry the burden of proof, both parties have the obligation of creating an adequate and complete record.

The concept of res judicata is a product of our legal system and has existed for decades. In essence, it means that the res (the thing or matter) has been adjudged, i.e., judicata. It is the rule that the final judgment or decree on the merits by a court of competent jurisdiction is conclusive. While the principle exists at law, it is oftentimes referenced in arbitrations even though it may not be contractually memorialized. The common-sense reason is that once a matter has been adjudicated by the proper authority, parties shouldn't continually have another bite of the apple and keep the dispute alive.

Indeed, the grievance procedure adopted by the parties contains a provision which, for collective bargaining purposes, is the equivalent of the principle res judicata. Article IX - Grievance Procedure, Step 3.B. Arbitration, paragraph c, contains a provision that decisions on grievances within the arbitrator's jurisdiction shall be "final and binding . . ."

However, neither the principle, nor the contract language, acts to prevent a grievance being filed and arbitrated even though a similar or identical dispute had previously been decided by an arbitrator. In some instances it may, but not in all. If the dispute is fact-driven and the factual scenario changes, then of course it is, in essence, a different dispute. Furthermore, while in the vast majority of cases an arbitration decision interpreting language is final and binding, if a subsequent arbitrator is convinced that the prior arbitrator's decision cannot stand, and that means more than disagreement, and there is no contractual prohibition to revisit the issue, an arbitrator may do so. However, those cases are very few and far between.

In the current case I am convinced that Arbitrator Beitner's 411 decision is final and binding as to the facts and circumstances which he heard on March 3, 1998. I recognize that in his decision he stated that the denial of the grievance is not intended to preclude the Union from raising the issue in the future under different facts or with new evidence. However, I interpret that language to mean that the issue may very well be raised in the future when there are different facts which may be grieved pursuant to the contract language or new evidence relating to periods other than what Arbitrator Beitner referenced in his decision and which can be grieved pursuant to the contract language. If the term "new evidence" were interpreted to mean that any new evidence related to the time period Arbitrator Beitner examined could lead to new grievances, then arguably a grievance could be filed five years from now relating to the events examined by Arbitrator Beitner and the dispute could be resurrected. I have difficulty adopting that meaning.

Given the language adopted by the parties that arbitration decisions shall be final and binding and the fact that arbitrators cannot alter that language, I do not conclude that Arbitrator Beitner's reference to raising the issue in the future under different facts or with new evidence

relates to raising the issues presented by the facts he heard at the March 3, 1998 hearing in the future. He decided the case and his decision is final and binding.

Furthermore, there is no interpretation by Arbitrator Beitner regarding contract language which may be at issue in the current case which I find to be totally unacceptable. In fact, I don't think there were any that were incorrect. As a result, I will not revisit those issues.

Having stated the above, however, doesn't mean that I find that the current grievance is not arbitrable or should be denied because of the principle of res judicata and the language in the Collective Bargaining Agreement. As I indicated, Arbitrator Beitner dealt with facts which existed on March 3, 1998. Subsequent to that date the facts may very well have changed and even if they haven't, they were not considered by Arbitrator Beitner because he had no knowledge of them. Thus, I am convinced that the current grievance is valid as to facts and circumstances which existed after March 3, 1998. So certainly to that extent, the grievance is viable and it is my responsibility to evaluate the record and make a decision.

In examining the contract language, specifically Article II, it is clear that the parties have recognized that management is prohibited from making a series of seasonal hires for the purpose of filling a permanent bargaining unit position provided for in the Employer budget, or for the purpose of avoiding the filling of a position on a permanent basis which would otherwise result in a position in the bargaining unit. Hand in hand with that provision, however, is the express understanding that nothing limits management from hiring seasonal employees, nor limits the right of management to make seasonal hires to fill positions temporarily open as a result of leave of absence, sick leave, vacation or similar reasons. So while seasonal hires can be utilized during the so-called peak periods, which the evidence in this case establishes as being from early spring to the end of fall, those same employees can be utilized to fill temporary openings.

In examining the circumstances and the actions taken by management, we must understand that management has the initial responsibility to make the decisions in question. If those decisions are based upon reasonable facts and circumstances and are motivated by business reasons, they should not be disturbed. Only where management's actions are arbitrary, capricious, or just plain wrong, should an arbitrator interfere. In other words, management has the right to manage, but when it crosses that line and makes decisions regarding the application of the contract language which are clearly wrong or arbitrary or capricious, then an arbitrator must find a violation of the Collective Bargaining Agreement.

To recall, the Director of the Department, Person 9, took the position that in the fall of 1998 he examined his scheduling needs and decided that additional full-time employees were not needed. He did relate that once the two vacant positions referenced in the record were filled, and the situation stabilized, the issue would be revisited and appropriate positions created if necessary. So certainly management's initial decision has been to not create a new permanent full-time position.

When examining the evidence related to the period after March 8 and up to the current arbitration, I am not persuaded that the evidence shows that the Employer has violated the Collective Bargaining Agreement. It is clear that seasonal employees can be utilized to perform so-called program work which is non-bargaining unit work, and also bargaining unit work as long as it is within the constraints established by the Collective Bargaining Agreement. The issue, of course, is whether the hiring and use of seasonals violates the constraints in Article II of the Collective Bargaining Agreement. In relation to this question, there is the issue of whether the Payroll Aide is performing bargaining unit work. Frankly, I am not sure. The evidence on this point is rather vague and I am not prepared to conclude that the Payroll Aide is performing

bargaining unit work. However, even if he did, there are considerations which convince me that there has been no showing that the contract has been violated.

According to the Union's testimony, the peak periods begin in early spring. If we examine the evidence, it is clear that there has been an extensive use of seasonals from early spring through the late fall and beyond. However, the evidence can just as easily lead to the conclusion that the use of seasonals during the early spring, summer and late fall periods was motivated by the workload generated during the so-called peak period. This seems to be substantiated by the fact that the Payroll Aide worked extensively from at least 5/31/98 through 8/16/98 and then no longer worked in the Department. Furthermore, there was a substantial amount of hours worked by seasonals during this period. However, as I said, this could just as easily have been justified by the work during the peak periods.

As indicated, for the most part the extensive number of hours worked, with certain weeks being under 40 hours, continued until February 28, 1999. Yet, in examining this evidence we must keep in mind the provision in the contract which allows management to hire seasonal employees to fill positions temporarily "open as a result of leaves of absence, sick leave, vacation or similar reasons." In this regard I note that a full-time employee, Person 7, began working less hours during the week 7/12/98, taking an FMLA on 9/13/98, and then resigning on 12/13/98. Apparently this created a temporary opening, for the evidence indicates that it will or has been filled. On 12/27/98 Person 8 took sick time and then during the week of 1/3/99 was gone two days, took vacation subsequently, and then retired on February 21, 1999. Her leaving the Department also created a vacancy. So, arguably, the use of seasonals could have continued in light of the temporary opening that was created by Person 7 and Person 8 leaving the Department.

I recognize that the Employer could be criticized for reacting slowly because the testimony given by Person 9 does establish that one of the vacancies, the OA-IV level, had been offered and has been accepted, and the other, the OA-II vacancy, is in the process of being filled. So while perhaps the Employer could have moved more quickly, I note that those actions testified to by Person 9 took place in March of 1999.

There was also testimony given by Union witnesses indicating that bargaining unit work being performed by a seasonal, in this case Person 4, was being coded to program work. If this were the case, then of course it would appear that the individual was working on program work rather than bargaining unit work because program work is non-bargaining unit work. However, as pointed out, the supervisors in question said that the employee was never instructed to do so and certainly it doesn't make very good sense for a supervisor to utilize budget hours given for a project to perform other work when they are responsible for bringing in the project under the hours budgeted. As a result, I don't find that this evidence has a substantial impact on the resolution of this dispute.

I note that these types of disputes can be very frustrating for the Union and are often very difficult to prove, but nonetheless, I am forced to come to the conclusion that the evidence in this case does not support the grievance and, as a result, I have no alternative but to deny it.

**AWARD**

The grievance is denied.

Mario Chiesa

Dated: September 17, 1999