

**IN THE MATTER OF ARBITRATION
BETWEEN**

AFSCME Council 5,

Union

**BMS Case No. 04-PA-1416
McKenney/Layoff Grievance**

and

OPINION AND AWARD

A. Ray McCoy
Arbitrator

June 25, 2008

University of Minnesota

Employer

For the Union

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JURISDICTION

The parties' relationship is defined by the Agreement Between University of Minnesota and AFSCME Locals 3800 & 3801, Council 6, AFL-CIO, Clerical & Office Unit. (Hereinafter referred to as "Agreement" or "Er. Ex. 1") The Agreement was effective from July 1, 2001 through June 30, 2003. The Union filed the grievance on June 6, 2003. The parties processed the grievance through all steps outlined in Article 21 of the Agreement. The parties agreed to extend the deadline for proceeding to arbitration pending resolution of the Grievant's disability discrimination claim filed with the Minnesota Department of Human Rights. The Minnesota Department of Human Rights issued a "no probable cause" finding on July 29, 2005. (Er. Ex. 18) The undersigned arbitrator was notified of his selection by letter dated April 27, 2006, almost three years after the original grievance was filed, in part, because of the parties' desire to resolve the discrimination issue first.

The parties struggled to reach agreement about an acceptable hearing date and when agreement was reached, one side or the other provided reasons for canceling the date. On January 31, 2008, the parties participated in a teleconference with the arbitrator to resolve the difficulties in scheduling the hearing and securing documents in preparation for the hearing. During the teleconference the parties agreed to a hearing date of March 25, 2008. The hearing was held at the University of Minnesota McNamara Alumni Center commencing at 9:00 a.m. All parties had a full and fair opportunity to present their respective cases. The Employer called the following witnesses Ms. Amanda Prince, AFSCME field representative for Duluth Council 5, Ms.

Nancy Rush, administrative director for the Veterinary Population Medicine, Mary Ann Huml, former human resources director for the College of Veterinary Medicine and Anna Marie Jones, executive secretary for the Veterinary Population Medicine. In addition, the Employer presented eighteen (18) documents in support of its case. The Union called the Grievant and submitted nine (9) documents in support of its case. At the conclusion of the hearing, the parties elected to file post hearing briefs which were properly received on April 11, 2008. The arbitrator closed the record following receipt of the post-hearing briefs.

The Agreement gives the arbitrator authority to resolve the dispute and specifies limits on the scope of arbitral authority. Article 21 (Limits on the Arbitrator's Authority), Section 5 states:

“The arbitrator shall have no power to: A. Rule on an issue excluded by this Agreement from the scope of the grievance procedure; B. Amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement; C. Issue a back pay award for an amount that includes payment prior to the date the grievance was required to be filed under this Article; D. Establish wage schedules..., E. Make decisions contrary to or inconsistent with or modifying or varying in any way from the law or the application of law.” (Id at p. 36)

ISSUE

The parties agreed that the only issue to be decided is whether the Employer laid

the Grievant off in a manner consistent with the collective bargaining agreement.

FINDINGS OF FACT

The Employer hired the Grievant to serve as a “word processing specialist” on August 10, 1998. (Er. Ex. 5) The duties of the word processing specialist were, among other things, using an IBM compatible AT clone Microcomputer to perform repetitive typing of correspondence, manuscripts, grant proposals, exams, and class notes using the software package Word Perfect 6.0 for Windows and Word 6.0. (Id) The Grievant earned a promotion to the position of “senior word processing specialist” approximately one year after her hire date.

The senior word processor was expected to work independently to prioritize the workload, type manuscripts, class notes, exams, grant proposals and prepare slides, review materials for proper format, grammar, punctuation and spelling, locate and maintain website/internet sources and databases for retrieval of various items used by the faculty, keep department forms updated and available, maintain a log of all work assignments and to make sure that all documents were available to faculty and staff as needed. Consistent with that expectation, the Grievant described her duties as typing letters and reports, creating slides and power point presentations, typing syllabi, exams, class notes, manuscripts and grant proposals. The Grievant provided the services listed above to the eight faculty members within Clinical and Population Sciences (CAPS.) The Grievant, however, provided the greatest amount of support to only two of the eight faculty members.

The Employer granted the Grievant a medical leave beginning May 23, 200. The Grievant returned to her position on a part-time basis in September 2001. She resumed full-time work in December 2001. The Grievant took another medical leave beginning sometime around the end of 2002 and returned to work, part-time on February 17, 2003. Following her second medical leave, the Grievant returned to full-time status on March 14, 2003.

During the Grievant's medical leave in late 2002, the Employer hired a temporary worker. The temporary worker performed some of the duties of a senior word processor but actually provided more general office support on tasks not assigned to the senior word processor position. The temporary worker averaged less than twenty-two (22) hours per week. Once the Grievant returned from her medical leave on a part-time basis, the Employer reduced the temporary worker's hours to six (6) hours per week. Prior to the Grievant's return the Employer did give the temporary worker a word processing assignment related to a grant application. The Employer stopped using the temporary worker on February 28, 2003, prior to the time the Grievant returned to full-time status. (Er. Ex. 10)

The Grievant returned to full-time status at about the same time that CAPS was trying to comply with an Employer directive to cut spending in response to a shortfall in expected State funding. CAPS was asked to return \$82,000.00 to the College from its 2002-2003 budget and to cut approximately \$100,000 from its 2003-2004 budget. (Er. Ex. 6) In response to this challenge, the chair of CAPS initiated a review of staff positions with an eye toward identifying the best approach to reducing the budget. The

review revealed that the senior word processing specialist position, held by the Grievant, was the least essential. The word processing position was eliminated in other departments even prior to the budget challenges described above. The reason for the reduction in word processing positions was due in no small part to the decreased cost of providing each faculty member with a personal computer as well as a dramatic improvement in the faculty members' ability to handle their own word processing tasks. A recommendation was made and accepted by the department chair to eliminate the senior word processing position as one way to meet the budget reduction requirement facing the department. Consequently, on May 28, 2003, the Employer notified the Grievant that she would be laid off effective June 30, 2003. (Er. Ex.9) The Employer hired two student workers in CAPS following its decision to lay the Grievant off. The Employer hired one student in July 2003 and the other in September 2003. The tasks assigned to the student workers were not those of a word processing specialist. The Grievant did not qualify for bumping rights and was placed on the layoff list.

On March 17, 2003, the dean of the College of Veterinary Medicine announced a decision to merge CAPS with another department, Veterinary Diagnostic Medicine (VDM.) (Er. Ex. 13) It does not appear that the merger of the two departments was a response to the call for budget cuts across the University. While, it might have assisted with the budget challenges, it actually led to the creation of an additional staff position. One department chair position was eliminated and that cut helped fund the new position which was a senior office assistant position. (Er. Post Hearing Brief at p. 14)

POSITIONS OF THE PARTIES

Union's Position

The Union made the following arguments in support of its position that the Employer violated Article 25 of the Agreement:

1. The employer was required by the Agreement to provide notice to the Union of the possible merger of CAPS and VDM.
2. Failure to provide notice of the merger and an opportunity to discuss the impact of the merger was a violation of Article 25, Section 4 of the Agreement and also a violation of the MOU regarding Alternatives to Layoff.
3. The MOU regarding Alternatives to Layoff required the Employer to meet with the Union and discuss the reasons for the merger, alternatives to the elimination of positions and the number of positions likely affected by the merger.
4. The employer hired student workers to replace the Grievant. The use of student workers in the event of a layoff violates Article 25, Section 1 of the Agreement.
5. The Grievant was never brought back to work even though her name was on the layoff list. This was easy to do because the Employer picked a classification (senior word processing specialist) that was already headed for extinction.
6. Delays in negotiating transition language for employees in the word processing classifications made it possible for the Employer to eliminate positions arbitrarily.
7. The Employer could have given the Grievant a longer layoff notice.
8. The Employer deliberately used classifications other than that of word processing specialist or senior word processing specialist in future job postings to ensure that the Grievant could not return.
9. The work that the Grievant performed did not disappear but remained after

her layoff and was distributed between the remaining employees and the student workers.

10. The burden of proof rest with the employer.

Employer's Position

The Employer made the following arguments in support of its position that it properly applied the provisions of Article 25 of the Agreement:

1. The University had a legitimate business reason for eliminating the CAPS word processing position held by the Grievant.
2. A significant decline in legislative funding for the University led to a financial retrenchment, necessitating the elimination of the Grievant's position. There were significant reductions throughout the university.
3. The Employer did not replace the Grievant with temporary employees or student workers.
4. The Grievant's position was eliminated for strictly financial reasons.
5. There was a declining need for the word processing work assigned to the Grievant.
6. The University was not required by the Agreement to place the Grievant in an open position outside of the word processing classification and the Grievant had no bumping rights.
7. The MOU titled "Alternatives to Layoff" does not apply in this case. It refers to employees in the plural and does not apply to the layoff of one position in a department without major organization change.
8. The new position created as a result of the merger of CAPS and VDM was
different from that of a senior word processing specialist and the work formerly performed by the Grievant was not assigned to that new position.
9. The Employer did not conspire to deprive the Grievant of the opportunity to secure a new position. The Grievant applied for a senior office position, her application was properly forwarded but the search was closed prior to

CAPS receiving her application.

Opinion and Award

The parties' Agreement gives the Employer the right to direct the working forces including the right to determine the size of the work force and to lay off employees. (Agreement, Article 32, Management Rights, at p.50) The Agreement also defines layoffs and provides for an orderly procedure with which the Employer must comply. Specifically, Article 25 of the Agreement permits the Employer to lay off an employee because of "abolition of the position or involuntary reduction of an employee's appointment due to shortage of work or funds, or for other reasons beyond the employee's control which do not reflect discredit on the employee . . ." (Agreement, Article 25, Layoff and Recall at p. 40) The Agreement also gives the Employer the right to "offer alternatives to layoff as provided in the Memorandum of Understanding, Alternatives to Layoff." (Id.)

The Agreement, therefore, according to the plain meaning quoted above, gave the Employer the discretion to either follow the layoff and recall procedures outlined in Article 25 or offer an alternative as described in the MOU. "The Employer may lay off . . . or offer alternatives . . ." (Id.) Therefore, contrary to the Union claim, there is nothing in the Agreement that requires the Employer to offer alternatives to a layoff to each individual assigned to a position it intends to abolish or for which there is a shortage of work or a budget deficit forcing the Employer to downsize.

The terms of the MOU appear to refer to large scale changes such that numerous employees might be affected, thereby making it practical to engage the

employees in the planning process, initiate meet and confer to consider alternatives or otherwise bring the human and financial resources to bear on the impact of a significant reduction in the work force. It would not make practical sense to argue that the process outlined in the MOU should be applied when a small number of employees are to be laid off. This is even more true when only one employee is facing a layoff. In this case, the Employer chose layoff rather than offer alternatives and did so properly in accordance with the discretion granted it.

The Union relies upon the language of the MOU to the effect that “. . . the parties agree it is desirable to minimize employee disruption by considering alternatives to layoff . . . ” (Agreement at p. 85) That language contains the parties’ *desire* but does not contain a directive to the Employer or a limitation upon its discretion with regard to layoffs. Moreover, the parties made clear their intent to exclude complaints regarding the provisions and therefore the meaning of the MOU from the grievance/arbitration process. “The provisions set forth in this MOU are not subject to the grievance procedure in Article 21.” (Id at p. 86)

As required by the Agreement and quoted above, the Employer determined that it was necessary to abolish a position and that the abolition of the senior word processing position was the most logical choice given the dwindling need for them across the University. Further, the Employer made these choices because it was faced with a significant financial challenge brought about by a reduction in financial support from the State of Minnesota. None of these reasons reflect discredit on the Grievant and all of them represent reasons beyond the Grievant’s control. The testimony

provided suggests that the Grievant loved her job, was good at what she did on behalf of the faculty and that the decision to abolish her position had nothing to do with her performance.

The arbitrator recognizes that the testimony also suggests that there was a great deal of tension in the CAPS work place between the Grievant and others. However, the arbitrator concludes that that tension was unconnected to the decision to abolish the senior word processing position which the Grievant held. It is common that employment decisions are made more complicated by the fact that there are other workplace environment issues at play. Often those workplace environment issues are characterized by disagreements between supervisors and those supervised or even between co-workers. Here, the Union was unable to provide any reliable evidence in support of its contention that the Employer laid off the Grievant in order to address such workplace tensions.

The evidence does support the conclusion that the Employer fully complied with the Agreement in making its decision its decision to layoff the Grievant. The Union did not dispute the fact that the Employer was faced with significant financial challenges brought about by a reduction in state support which necessitated programming cuts as well retrenchment of positions. Nor did the Union challenge the Employer's explanation that a centralized word processing position was less and less necessary given faculty members' ability to do their own word processing tasks. The word processing positions were being eliminated across the University as a relic of days gone by. Those days were characterized by a lack of personal computers on every desk and therefore a need for a centralized pool of assistants who could provide that service to a number of faculty

members.

The Union did not dispute that reason either. In fact, the Union in its post hearing brief acknowledged that the word processing specialist positions are a dying breed. “The Employer could have laid off an employee with more ability to move around the University. Instead, it chose to pick a classification that was already heading into extinction.” (Union Brief at p. 4) The Union’s characterization makes clear that the Employer’s choice of positions to eliminate was quite logical and hardly arbitrary.

The next portion of the layoff article that requires examination is the notice provision. Article 25, Section 4 requires the Employer to give the Union and employee at least twenty-eight (28) calendar days notice before the effective date of the layoff. (Er. Ex. 1, p. 41) By letter dated May 28, 2003, the Employer notified the Union and Grievant of the layoff and its effective date of June 30, 2003. (Er. Ex. 9) The Union did not request to meet with the Department to discuss alternatives even though it received notice of the layoff. Therefore, it is difficult to imagine how it can claim that the Employer should have simply offered alternatives if the Union did not present its views on the need for the same and examples of available alternatives. The Employer provided proper notice of the layoff and, as indicated in the layoff letter, also provided information to the Grievant regarding her rights in light of her lack of opportunity to bump into another position.

Having given proper notice of the layoff as well as given valid reasons for abolishing the Grievant’s position, the Union contends, nevertheless, that the Employer’s decision was arbitrary and designed to get rid of the Grievant. The Union

attempted to make this point by suggesting that the work of the Grievant did not disappear but was given to others and specifically to student workers following the layoff. The Agreement does provide protection to bargaining unit members from arbitrary layoff decisions, in part by prohibiting the Employer from assigning the majority of the work of the abolished position to students or supplemental employees. “The Employer shall not layoff a bargaining unit employee and subsequently assign the majority of the work to students or supplemental employees.” (Agreement, Article 25, Section 2 at p. 40) The Union failed to show that the two student workers hired did any word processing tasks. The student workers were employed between July 1 and November 30, 2003. One student worker averaged approximately eleven (11) hours per week and was employed between June 30 and September 7, 2003. The other student worker averaged approximately six (6) hours per week and was employed during September, October and November of 2003. (Er. Ex. 11) Consequently, there is no practical way that either student worker could be said to have taken on a “majority” of the Grievant’s work since they were not working even remotely close to full-time as was the Grievant. More important, the tasks assigned to the student workers were not those described in the senior word processing specialist position but were more akin to packing financial records, photocopying, filing, delivering mail etc. (Er. Post Hearing Brief at p. 8)

The Employer did hire a temporary worker or supplemental employee to work in the CAPS area during the Grievant’s second medical leave. The temporary employee worked from December 2002 to February 28, 2003. The Employer had terminated the

temporary employee's assignment in CAPS, therefore, prior to the effective date of the Grievant's layoff. There is simply no evidence that the layoff was a pretext to get rid of the Grievant and to transfer still needed word processing work elsewhere.

In considering the Union's position on this point, it is important to note that the Grievant primarily served two faculty members. Testimony revealed that almost 80 percent of the Grievant's time was devoted to the two faculty members. In addition, it is important to keep in mind that the Union acknowledged the position held by the Grievant was headed for extinction. With that background in mind, it is clear that there was not a great deal of work to replace which is why the senior word processing specialist position was the prime candidate for retrenchment.

Testimony revealed that during the two medical leaves taken by the Grievant that the Employer was able to meet the demands of the position in one instance without a temporary worker and during the second medical leave with a part-time temporary worker. The temp hired during the Grievant's second medical leave performed other duties as well as word processing and did so while working part-time. Therefore, the Department was able to meet the word processing demands with a part-time worker giving part-time attention to word processing. The importance of this fact is that it gives additional credibility to the Employer's position that the senior word processing position had outlived its usefulness.

In short, each claim of the Union that the layoff was defective in its implementation is unsupported by the weight of the record evidence. In fact, the Union's initial position as stated in the original grievance form was that it believed the layoff was

“motivated based on the Grievant’s disability status.” (Union Ex. 4) Having failed to prove that claim, the Union nevertheless pursued a variety of arguments regarding the layoff provisions of the Agreement even though it had no evidence to support those arguments.

In doing so, the arbitrator can only conclude that the Union’s true goal was unrelated to the layoff but more connected to the idea the Grievant advanced at the hearing of this matter. Namely, the Grievant repeatedly stated her concern that she was treated in a hostile manner by her supervisor and treated differently following her return from her medical leaves. During the hearing, it was obvious that the Grievant’s testimony was designed to make the point that there were managers and even some co-workers out to get her, that her supervisor diverted work away from her to others and generally showed less interest in her needs for training, for example, as compared to certain of her co-workers. When asked what protocols the Employer failed to follow with regard to her layoff, bumping rights, recall, ability to apply for open positions and the like, the Grievant responded with a variety of statements clearly indicating that she “believed” certain things were true but had no evidence to support those beliefs. The Grievant would say, for example, “I believe in my heart . . .” Her concerns then migrated away from the decision to layoff to how she believed she was treated prior to and following the layoff as she sought other positions at the University. Here again, the purpose of the testimony was to try to demonstrate that personal animosity toward her was the driving force behind the layoff decision and her inability to get another job with the Employer afterwards. The weight of the evidence, however, supports the conclusion

that the Employer followed its protocols precisely. Given the fact that most work places can be said to have some contentious relationships between co-workers or between supervisors and those supervised, it is critical for all parties to be absolutely clear that their decisions and practices strictly comply with the terms of the Agreement. In this case, the Employer has met that burden.

Award

Based on the foregoing and the record as a whole the grievance is denied.

Respectfully submitted

Arthur Ray McCoy
Arbitrator

June 25, 2008
Date