

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

Grievance Arbitration

**THE MINNESOTA ASSOCIATION
of PROFESSIONAL EMPLOYEES**

Re: Layoff / Recall

-and-

**THE STATE OF MINNESOTA
DEPARTMENT of TRANSPORTATION**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Association: Tom Dougherty, Sr. Bus. Agent
Joe McMahon, Bus. Agent

For the State: James Jorstad, Principal Labor Relations Representative

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides in Article 9 for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial two steps of the grievance procedure. A complaint was submitted by the Association on behalf of the Grievant on December 6, 2007, and thereafter appealed to binding arbitration when the parties were unable to resolve the dispute to their mutual satisfaction. The undersigned was then selected as the Neutral

Arbitrator to hear evidence and render a decision, from the permanent panel set forth in the parties' Master Agreement. A hearing was convened in Shoreview, Minnesota, on November 4, 2008. At that time, each side was afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, the parties agreed to submit written summary arguments in lieu of closing comments. These briefs were received on or before December 6, 2008, at which time the hearing was deemed officially closed. At the commencement of the proceedings, the parties stipulated that all matters in dispute are properly before the Arbitrator for resolution on their merits, and while they were unable to agree upon a precise statement of the issue(s), the following is believed to fairly describe the essence of the dispute

The Issue-

Did the Employer violate applicable provisions of the parties' Labor Agreement when it did not recall the Grievant to his former position of Information Technology Specialist 3 - Systems Software option - in the fall of last year? If so, then what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The evidence indicates that the Grievant, Dave Stefaniak, worked for the Minnesota Department of Transportation (hereafter "Employer", "Agency" or "Department") as an Information Technology Specialist ("ITS"). In that capacity he was a member of a bargaining unit represented by the Minnesota Association of Professional Employees ("MAPE," or "Union") who together with the State, have negotiated and executed a collective bargaining agreement covering terms and conditions of employment (Joint Ex. 1). Mr. Stefaniak was hired in June of 2003 to work in tech support in the Office of Program Management within the Department. In July of 2004 he was classified as an ITS 3, while holding an "option" in System Software¹. At that time, the Department instituted a reduction in its work force which lead to the Grievant (along with approximately 200 other employees in the Department of Transportation) being laid off.

Pursuant to the terms of the Master Contract Mr. Stefaniak exercised his seniority rights and "bumped" into a classification he had formerly occupied. Shortly thereafter, the Employer conducted a position study and he was bumped downward to the position of ITS 2 – a title he held at the time he filed

1. The evidence demonstrates that the Commissioner of Transportation may, at his/her discretion, append a "class option" to a position if it is deemed appropriate for the position to include a specific skill set within the description.

his grievance.

In August of 2007, the Agency posted a vacancy notice for another ITS 3 position with a Systems Software option (Union's Ex. 1). The following month, Mr. Stefaniak expressed his interest in the position in an e-mail to Management (Union's Ex. 2). However, he was neither appointed to nor interviewed for the position.²

Believing that the Agency's failure to award him the posted position violated the terms of the parties Master Agreement based upon his seniority and recall rights, MAPE filed a formal grievance on Mr. Stefaniak's behalf on December 6, 2007, alleging a violation of applicable language in Articles 4, 16, 17 & 28, and seeking the Grievant's return to his former ITS 3 position as a remedy (Union's Ex. 5). On June 20, 2008, the Agency denied the grievance and thereafter it was appealed to binding arbitration for resolution.

Relevant Contractual Provisions & Policy Guidelines-

Article 15 Seniority

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Section 3. Seniority Rosters. No later than November 30 and May 31 of each year, the Appointing Authority shall prepare and post

² Eventually the vacancy was awarded to a less-senior employee classified as an ITS 2 at the time of his promotion.

seniority rosters on official bulletin boards for each of its seniority units and two (2) copies shall be furnished to the Association Executive Director. Such rosters shall be based on transactions occurring up to and through the pay period closest to October 31 and April 30 respectively of each year. The rosters shall list each employee in the order of Classification Seniority; and reflect each employee's date of Classification Seniority date of State Seniority, and class title and date for all classes in which the employee previously served. The rosters shall also identify the type of appointment if other than full-time unlimited, and shall include the class option, if any.

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Article 16
Vacancies, Filling of Positions

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Section 4. Filling of Positions. All eligible employees under Section 3 who have made timely Interest bid, shall be given consideration and may be appointed to the opening prior to the consideration of other non-interest bidding applicants and prior to filling the vacancy through other means, The Appointing Authority shall not be arbitrary, capricious, Of discriminatory and must have a legitimate business reason to reject all of the interest bidders. Seniority of the interest bidders shall not be a factor in appointing employees from among the Interest bidders. All interest bidders shall be notified orally or in writing as to the acceptance or rejection of their interest bid in a timely manner prior to the Appointing Authority using any other means of selection.

If the vacancy is not filled by an employee under this Section, then it shall be filled in the following order;

A. Seniority Unit Layoff List, Selection shall be made from employees on the Seniority Unit Layoff List, if such a list exists, in order of Classification Seniority pursuant to Article

17, Layoff and Recall, Employees shall be recalled to a vacancy in the same class (and same option or another option for which the employee is determined to be qualified by the Employer). No new appointments shall be made in a seniority unit in a class, geographic location, and employment condition for which a Seniority Unit Layoff List exists until all qualified employees on such list have been offered the opportunity to accept the position, except that the Appointing Authority may offer the vacancy to a seniority unit employee who has received notice of permanent layoff from the same or a transferable or higher classification.

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Article 17
Layoff and Recall

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Section 3. Permanent Layoff

A. Layoff Procedures

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5. Claiming

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E. Layoff List

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4. Bargaining Unit Layoff List/Other Job Classifications. An employee who is laid off or demoted in lieu of layoff may also designate in writing other transferable or lower bargaining unit classification(s)/class option(s) in which he/she previously served and shall then be placed on the

bargaining unit layoff list/other job classifications in order of classification seniority in each classification. The names shall remain on the list for a minimum of one (1) year or for a period of time equal to the employee's State Seniority to a maximum of four (4) years.

* * *

F. Recall. Employees shall be recalled from layoff in the order in which their names appear on the layoff list(s) as provided in Section 3(E) of this Article and provided that the employee being recalled is capable of performing the duties of the position. for recall from the Seniority Unit Layoff List, also see Article 16, Section 4A.

Position of the Parties-

The **ASSOCIATION** takes the position in this matter that the State violated the terms and conditions of the parties' Labor Agreement when it failed to recall the Grievant to his former position of ITS 3, Systems Software option, in the fall of last year. In support of their claim, the Union contends that while Mr. Stefaniak clearly expressed interest in the vacancy that had been posted in August of 2007, he was not even interviewed for the position. Further, they maintain that the Department unilaterally determined that they had no obligation to consider him for the opening, believing that he was not qualified, when in fact he was. It is uncontested that the Grievant had worked as an ITS 3 prior to being laid off and bumping to a lower classification

consistent with his seniority. MAPE argues that Mr. Stefaniak's qualifications are not the issue here, rather it is whether the applicable contract language relative to layoff, the filling of vacancies, and recall mandates the Employer to award the posted position to the Grievant. The Union believes that the recall language found in Article 17 is critical to the outcome of this dispute as it clearly gives an employee who has been laid off, or demoted in lieu of layoff, the right to recall in the order in which their names appear on the layoff list. Should the State prevail in this matter, they assert that the layoff/recall language found in the Master Contract will become essentially meaningless. In this instance Mr. Stefaniak held the same classification and option as the position that was posted. Yet the Employer sought to introduce new criteria that was never agreed to at the bargaining table, and eventually promoted someone from a lower classification (ITS 2) to fill the vacancy. Essentially the Agency is attempting here to gain something through the arbitration process which they were unable to obtain in negotiations. Accordingly, they ask that the grievance be sustained and that Mr. Stefaniak be awarded the posted position and given back pay to the date that the lower classified employee was awarded the position.

Conversely, the **EMPLOYER** takes the position that choosing not to recall the Grievant to his former position which he held prior to being laid off (and

bumping to a lower classification) did not result in a violation of Articles 16 and/or 17 of the Labor Agreement. In support, they maintain that in addition to meeting the class and class option requirements in the recall section of Article 17, the successful individual must also demonstrate that he/she is capable of performing the duties of the specific position; i.e. that they be qualified for the job. Further, they argue that the concept of position qualifications is vitally important to the Department, as some assignments may be in the same class or class option, yet the skill set required for the particular job can vary considerably. In this instance, the hiring supervisor, Karen Duden, determined that the Grievant did not meet eight of the ten minimum qualifications for the job as specified in the posting. While Mr. Stefaniak was on the applicable seniority unit layoff list, and was given consideration for the position, this alone does not guarantee him entitlement to being recalled to the ITS 3 assignment.³ Further, they note that in a prior grievance arbitration involving a very similar issue and the same language in the Agreement, both sides acknowledged that an employee seeking a vacant position must be capable of performing the duties attendant to it. For all these reasons then, they ask that the grievance be denied in its entirety.

³ The Employer acknowledged that they have an obligation to notify those employees who have expressed interest in the posted vacancy, but failed to send notice to all unsuccessful

Analysis of the Evidence-

Pared to its essence, this dispute centers on the question of whether Mr. Stefaniak should have been recalled to the ITS 3, System Software position within the Department of Transportation from the layoff/recall list in the fall of last year based upon his classification, option and prior satisfactory and performance reviews (Union's position), or whether it was necessary that he also be capable of performing the duties of the specific position posted (Employer's view).

In a contract interpretation dispute such as this, the initial burden of proof lies with the Association to demonstrate via a preponderance of the evidence that the Administration violated the relative terms and conditions of the Master Agreement when it did not award the vacancy to Mr. Stefaniak.

The parties agree that the layoff and recall language found in Article 17, which has remained essentially unchanged since its inception some twenty-six years ago, is of paramount importance to the resolution of this matter. Initially, M.A.P.E.'s Assistant Executive Director, Robert Haag testified concerning the history of the "classification option system" and the more

applicants, as the Department was extraordinarily busy at the time.

recent addition to Article 16 ("Vacancies, Filling of Positions") following negotiations with the State in 2004. Specifically Section 4(A), *supra*, included new language that provided for recall from the same class "and same option" from which an employee was laid off. It also provided for a recall from the same class "or another option" provided the applicant was deemed "qualified." Haag noted that in this instance, the Grievant possessed the same option as the vacancy posting called for, thus the match-up of his layoff was the same as the match-up for the position and he should have been given the assignment.

Section 3(F) in Article 17 ("Recall"), *supra*, makes reference to Article 16, Section 4(A) when speaking to those who have been laid off or demoted in lieu of layoff, or as a result of reallocation (Section 3(E) in the same article). Pairing the two sections, in the Union's view, supports Mr. Stefaniak's complaint. The position title and option he held when he was placed on layoff in 2003 is the very same position title with option that was referenced in the August 2007 posting (Union's Ex. 1). The Association charges that the Employer is effectively massaging the position description in order to avoid awarding the vacancy to Mr. Stefaniak.

The logic of the Union's argument would be compelling but for the proviso that is appended to the critical language in Section 3(F) which

conditions the recall in part on the employee being “....capable of performing the duties of the position.” As the critical language is written in the conjunctive, both elements of the provision must be satisfied. To be capable of performing the duties of the position necessarily means that the person selected must be qualified. The evidence demonstrates that the Association has essentially acknowledged this requirement in the past. In a previous arbitration involving the same language and a grievant who was a member of the bargaining unit, the Union and the arbitrator alike acknowledged that the term “capable of performing the duties of the position,” were relevant and needed to be considered (State’s Ex. 2). Moreover, beyond the clear wording of 17.3(F), Article 5 (“Employer’s Rights”) specifies a reserved management prerogative of selecting employees for positions, absent language in the Agreement modifying the right. In short, the additional recall condition concerning capabilities – which necessarily includes the skills, abilities, experience, and fitness of the candidate - specified in Article 17, Section 3(F) cannot be ignored, as to do so would essentially result in the evisceration of the applicable language.

While the capabilities and qualifications of the successful candidate for recall under Article 17 are subject to the Administration’s determination of same, the right to make such decisions is not free from challenge. Although

there is no method specified in the Labor Agreement explaining how a candidate's credentials are to be considered, it does not follow that the Employer is immune from review of their selection process. As I have noted in a previous decision involving these same parties, a demonstration by the Union that management's actions were arbitrary, capricious or otherwise discriminatory, can constitute grounds for reversal where challenged pursuant to the negotiated grievance process. That however, did not occur in this instance.

The Union has argued that through the testimony of Mr. Stefaniak, it was established that he did in fact possess the qualifications necessary to fill the vacant position. A review of the record however, does not support this argument. At no time did the witness assert that he actually had the requisite knowledge skills and experience necessary for the particular job that was posted.

Unquestionably, members of this bargaining unit are professional employees with relatively complex responsibilities. Particularly in the field of information technology, and the challenges involving systems hardware and software applications, the concept of position qualifications is vitally important. In this regard, I have been persuaded in no small measure by the testimony of the hiring supervisor, Karen Duden. She stated without

contradiction, that following the posting the resumes of the individuals on the Seniority Unit Layoff List were reviewed along with Barb Kochevar, MnDOT's Human Resources Staffing Representative, to determine initial qualifications. Each resume, including the Grievant's, was first analyzed and compared against the minimum qualifications that were specified on the notice of vacancy (State's Exs. 3, 4, & 6). She called this aspect of the review "critical" to the process as it served to narrow the search among those expressing interest. The witness repeatedly made reference to the new imaging technology being used in the department, explaining that the successful candidate needed to "hit the ground running," and therefore needed to be able to apply "Universal Imaging Utility by Computer Imaging Technologies" immediately. She called the requirement "huge." Ms. Duden also noted that when reviewing the Grievant's skills, abilities and knowledge with the ten minimum criteria expressed on the posting, he only possessed the requisite capabilities in two of them. In a letter to Ms. Kochevar in early January of this year, the supervisor explained:

"There were 10 required KSA's for this position and out of the 120 required Dave Stefaniak's resume only met 2 of the required KSAs and those 2 were very broad in scope. This position is critical in the ongoing success of imaging computers for the DOT statewide. The requirements for this position listed specific tools and a duration of 2 years experience with these tools due to the negative impact that could result in lack of knowledge or

experience with the tools" (Employer's Ex. 9).

The supervisor added that there were inordinate demands being placed on her department at the time.

On balance then, I am satisfied, based upon the weight of the evidence proffered by the Employer, that MnDOT had a legitimate need to create and fill the position in question with the ten-point skill set referenced in the posting.

Concomitantly, I find little evidence to support the charge that the Administration "hand-crafted" the position to fit a particular applicant's qualifications or that the Grievant was the recipient of desperate treatment in connection with the selection process. The record indicates that the Employer utilized a standardized hiring procedure to seek qualified candidates for the position. While it found no eligible interest bidders, it gave due consideration to the individuals on the seniority unit layoff list who responded to the posting, in a detailed and consistent manner. Per the accepted procedure, they initially reviewed the resumes of the candidates in the "Resumix" system to assess their capabilities.⁴ Moreover, both Supervisor Duden and Staffing Representative Kochevar testified that there are

⁴ Kochevar testified that although Mr. Stefaniak's resume was in the system, it did not initially come up as part of her manual search for candidates.

economic incentives for utilizing the contractual recall procedure as there can be lower charges for insurance, unemployment compensation, etc. Further, the evidence indicates that the Employer gave Tom Girard, one of the individuals on the Seniority Unit Layoff List, the opportunity to take a practicum after it was first determined that he was not qualified based upon his resume, but that he did not demonstrate the necessary capabilities for the position (State's Ex. 6). Duden testified that had he been successful, he would have been awarded the vacancy. It was not until it had been determined that no one on the seniority layoff list was qualified that the Administration proceeded to fill the opening from the multi-source roster.

Finally, it is noted that subsequent to the ITS- 3 posting, an ITS-2 position became available within Ms. Duden's support division in December of 2007, which the Grievant interviewed for, and eventually was the successful candidate. The supervisor added that he received a favorable six month job review in June of this year.

Award-

For the reasons set forth above, I conclude that the Agency did not violate the parties' Labor Agreement when they did not recall Mr. Stefaniak to the posted vacancy, but rather awarded it to another whom

Management determined to be capable of performing the duties necessary to the position. Accordingly, the grievance is denied.

Respectfully submitted this 12th day of December, 2008.

Jay C. Fogelberg, Neutral Arbitrator