

MINNESOTA BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS 09 PA 0287
CITY OF DULUTH)	
)	
and)	
)	John Remington,
)	Arbitrator
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES)	
COUNCIL 5, LOCAL 66)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the employment rights of Grievant Matthew Dunaisky, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 13, 2009 in Duluth, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties waived the filing of post hearing briefs and made oral closing arguments on the record. The Union requested an additional ten (10) days to submit documentation of Grievant's medical expenses.

The following appearances were entered:

For the Employer:

Lisa D. Wilson

Assistant City Attorney

Stephen Lipinski

Utility Operations Manager

For the Union:

Ken Loeffler-Kemp

Business Representative

Bruce Kellerhuis

Steward

THE ISSUE

DID THE CITY VIOLATE THE PROVISIONS OF THE PARTIES' COLLECTIVE AGREEMENT WHEN IT REFUSED TO RETURN GRIEVANT TO A HEAVY EQUIPMENT OPERATOR POSITION AND, IF SO, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS

ARTICLE 2- DEFINITIONS

- 2.18 Transfer. Directing an employee to perform work in the same job classification and at the same salary range but in a different department of the City than the one the employee had been working in before the transfer.
- 2.19 Voluntary Transfer. A transfer requested and agreed to by the employee transferred.

ARTICLE 34-LEAVES OF ABSENCE

- 34.1 Any employee who is mentally or physically incapacitated to perform his or her duties or who desires to engage in a course of study such as will

increase his or her usefulness on his or her return to the City, or who for any reason considered good by the Appointing Authority desires to secure leave from his or her regular duties, may, on written request approved by the Appointing Authority, be granted special leave of absence without pay for a period not exceeding one (1) year; provided, however, any leave that exceeds thirty (30) calendar days must also be approved by the Chief Administrative Officer or his designee.

ARTICLE 35- ASSIGNMENT, TRANSFERS &
DEMOTIONS OF EMPLOYEES

- 35.1 The transfer of an employee from a position in one class to another position in the same class in the same department shall be called an assignment and may be made by the Appointing Authority; provided, that if change in the rate of compensation is involved, the assignment may be made only if the consent of the Union is obtained.
- 35.2 Departmental Transfers. The transfer of an employee from a position in one job title to another position in the same job title in a different department shall be called a departmental transfer, and may be made only with the consent of the Appointing Authority or authorities concerned and the employee; provided, that if, in the judgment of the Appointing Authority of the department to which the employee is transferred, the services rendered by the employee are not satisfactory, or if the employee feels that the new position is unsatisfactory, such employee shall be returned to his or her original position at any time within (30) calendar days after the department transfer is made.

(The above Article 35 language is identical to the language of the 1991-92 Agreement at Article 34.1 and 34.2)

ARTICLE 36- DISCIPLINE, SUSPENIONS,
REMOVALS

- 36.1 Discipline: Disciplinary action may be imposed upon an employee only for just cause. Disciplinary action may be grieved by the employee through the regular grievance procedure as provided in this agreement. Disciplinary action shall include only the following: 1) written reprimand; 2) suspension; 3) demotion; and 4) removal. Except in the case of a severe breach of discipline any suspension, demotion, or removal action shall be preceded by a written warning. An employee shall be given the opportunity to have a Union representative present at any questioning of the employee during a meeting with a supervisor for the purpose of determining what disciplinary action against the employee will be taken. If the Appointing Authority has reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.
- 36.2
- 36.3 Removals:
- (a) An appointing authority may, except as provided in Article 37, remove any employee who has completed the probation period prescribed in accordance with Section 13-69 of the Civil Service code only for just cause.

ARTICLE 37- RESIGNATIONS

- 37.1 Any employee who wishes to resign in good standing shall give the Appointing Authority written notice of at least two (2) weeks, unless the Appointing Authority consents to his or her leaving on shorter notice. Such notice of resignation shall be forwarded forthwith to the secretary by the Appointing Authority, together with a report as to the character of the employee's service.
- 37.2
- 37.3 Any employee who has resigned after giving proper notice may, within thirty (30) days after termination of employment and with the consent of the Board, withdraw is or her resignation and be restored to the

position vacated if such position is still in the classified service, and if it is still vacant or is filled by a provisional employee; if it is not thus available, he or she may, upon written request to the secretary, have his or her name placed on the re-employment list for the appropriate class.

**ARTICLE 39- LAYOFFS OF CLASSIFIED
EMPLOYEES**

39.1 When, because of lack of work or funds, or to obtain efficiencies, or for other causes for which an employee is not a fault, there is a reduction in the number of employees in a job title within a department, the following procedure shall apply:

(The specific procedures provide for preference for Permanent Classified Employees and Seniority.)

BACKGROUND

The City of Duluth, Minnesota, hereinafter referred to as the “EMPLOYER” or “CITY”, is a municipal corporation and a public employer within the meaning of Minnesota Statutes, Section 179A. The City provides certain public works, utilities, parks and recreational facilities, and police and fire protection through its various “departments.” All classified service employees of the City (“Basic Unit Employees”), excluding police, fire, confidential and supervisory employees are represented by the American Federation of State County and Municipal Employees (AFSCME) District 5 and its local union #66, hereinafter referred to as the “UNION.”

Matthew Dunaisky, the Grievant in this matter, was initially employed by the City as a Heavy Equipment Operator in its Public Works and Utilities Department, Street and Park Maintenance Division, on January 6, 2003. The Employer’s Public Works and Utilities Department, based on the collective agreement, appears to have at least three

separate “divisions” including, but not limited to: a Street and Park Maintenance Division; and a Utility Operations Division (formerly the Department of Water and Gas). It would appear from the record that Grievant’s performance as a Heavy Equipment Operator from January of 2003 through May of 2008 was satisfactory. On May 5, 2006 the City posted a Job Announcement open to “all qualified persons” for a position as “Utility Operator” in its Utility Operations Division. Under the City’s Civil Service Rules, this was an “open” rather than a “promotional” position, and the Utility Operator position was approved by the Civil Service Board as an “Open” position on July 7, 2006. Grievant responded to the above Job Announcement on May 10, 2006. His application indicates that he was “looking for advancement” with the City , and it is undisputed that the Utility Operator position is slightly higher graded and paid than the Heavy Equipment Operator position that Grievant held (Joint Exhibit #5).

Grievant was notified by the Employer on May 1, 2008 that he had been “certified” as eligible for interview for the Utility Operator Position. He interviewed and was subsequently offered the position. Accordingly, on May 30, 2008 Grievant sent the following memorandum to Street Maintenance Supervisor Barbara Kolodge:

Barb, this letter is to inform you that in approximately two weeks I will be leaving Street Maintenance & transferring to Utility Operations at Garfield. I have been offered a position as a Utility Operator and have excepted (sic) the position. I have not been told my exact start date yet, but I will notify you as soon as I am told when that date is.

Grievant was formally offered the Utility Operator position in a letter from Utility Operations Manager Stephen Lipinski on June 5 who advised Grievant that he was required to respond to the position offer in writing and that he would begin work as a Utility Operator in “Utility Operations” on June 10, 2008. The letter also notes that the

Utility Operator position involves a “three year apprenticeship” and is conditional upon a six (6) month probationary period. Grievant accepted this offer in writing on June 10, 2008.

Lipinski determined within a few weeks that Grievant’s performance as a Utility Operator was less than satisfactory. The Arbitrator deems it neither productive nor relevant to the issue in dispute to further comment upon the basis for Lipinski’s determination in this regard. However, Grievant hand delivered the following memorandum to Kolodge, his immediate supervisor in Street Maintenance, on July 9, 2008:

Barb, this letter is to request my return as a Heavy Equipment Operator in the Street Maintenance East Division of Public Works as soon as possible. My position as a Utility Operator in the Utility Operations Division is not working out as I had expected and I am requesting my return at this time. I am requesting this transfer back to my former position as per Article 35 paragraph 35.2 of the basic unit contract.

On July 22, 2008 Lipinski issued an “Inter-Department” memo to Grievant which states, in relevant part:

Subject: Termination from Probation for Utility Operator

This letter is a follow up to our July 8, 2008 meeting during which you were informed that your work performance has not meet (sic) expectations in the Utility Operations Division of Public Works & Utilities.

.....

Because you were a City employee prior to your appointment to Utility Operator I have given you some time to review options, if any, available to you under your labor contract(sic) and civil service.

Therefore your termination date is scheduled for August 1, 2008.

Prior to the above termination date Grievant met informally with Kolodge and Manager of Maintenance Operations John Grandson only to be advised that his former position had been eliminated. In response, the following "Official Grievance Form" was filed on his behalf on July 23, 2008.

Matt Dunaisky met with Barb Kolodge, John Grandson on 7-9-08. Matt Dunaisky at this time presented a letter requesting his position as a H.E.O. (Heavy Equipment Operator) in the Street Department back. He was told at that time his job was eliminated.

This grievance alleges violation of Article 36 and 39 of the collective bargaining agreement and seeks in remedy that Grievant be reinstated to his position in "Streets." Under "Disposition," the form notes that "Matt Dunaisky took a job with Duluth Water and Gas. Now he is requesting his position back. (Joint Exhibit #2) The grievance was denied in a letter from Grandson to Union Representative Ken Loeffler-Kemp on July 29, 2008, as follows:

This letter is in response to the grievance filed by Matthew Dunaisky on 7/23/08 pertaining to his termination on probation.

Mr. Dunaisky's grievance is denied. There is no violation of the contract. Article 36 refers only to removals of employees who have completed probation (36.3). Article 39 does not apply. Mr. Dunaisky is not being laid off from his position.

In addition, this grievance is premature as the termination has not yet occurred.

The grievance is denied. This is our final position and we will not arbitrate it.

The record does not reflect further negotiations between the parties over the grievance. However, there is no contention that it was untimely filed or improperly processed to arbitration. Accordingly, it is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer takes the position that Grievant has no right of return to his prior position either under the collective bargaining agreement or under the City Civil Service Rules. In this connection it notes that Civil Service Rules only provide a right of return to a prior position in promotional situations, and argues that Grievant's movement to the Utility Division was clearly not a promotion but rather a new hire into an open position. The Employer further takes the position that Article 35.2 (Departmental Transfers) is not applicable because Grievant did not move from one department to another nor did he move from a position in one job title to another position in the same job title. The City argues that Grievant effectively abandoned his Heavy Equipment Operator position in Street Maintenance when he began employment in Utility Operations without seeking a leave of absence from Street Maintenance. Accordingly, the City argues that the grievance must be denied.

The Union takes the position that while the language of Article 35.2 may be ambiguous, prior interpretation of that provision by the parties as exemplified by the transfer and subsequent return within thirty days of Robert LeDoux between the Public Works Department and the Water and Gas Department in 1991 established the clear intent of the parties regarding interpretation. In this connection the Union also provided

several witnesses to support its contention that both the City and the Union had accepted such an interpretation in the past. The Union here argues that the City's distinction between promotional and open positions is irrelevant. The Union maintains that Grievant understood his move to the Utility Operator position to be a Departmental Transfer; that his immediate supervisor confirmed this understanding; and that other employees that made similar or identical moves also understood these moves to be Departmental Transfers within the meaning of the collective bargaining agreement. The Union further takes the position that the City's refusal to allow Grievant to return to his prior position must be characterized as either an improper layoff (assuming arguendo that Grievant's Heavy Operator position was properly retrenched) or a constructive discharge. It therefore contends that the grievance must be sustained.

DISCUSSION, OPINION AND AWARD

It is readily apparent that a crucial issue in this dispute is the question of whether or not Grievant's acceptance of the Utility Operator position was a transfer within the meaning of Article 35.2 of the collective agreement. While at first impression it might appear that Grievant's move to the Utility Operations Division from the Street Maintenance Division cannot be deemed a transfer because he never left the Public Works Department, thereby failing to meet the definition of a Transfer at Article 2.18, supra, it cannot be denied that Public Works was a different department from Utility Operations (Water and Gas Department) in 1991 when an identical Article 2.18 (and an identical Article 35.2 –formerly 34.2) appeared in the collective agreement. Indeed, based on the cumulative testimony at the hearing it is likely that Utility Operations is still

treated as a separate “department” even though both Utility Operations and Street Maintenance are now officially “divisions” within the same department. Utility Operations continues to be known as “Water and Gas” and “Comfort Systems” –the name given to the City owned public gas utility, and has the external appearance of a separate entity. Further, there is no contention by either party that Grievant was given an interdepartmental “Assignment” as contemplated by Article 2.3. Accordingly, the Arbitrator must find that Grievant’s movement from Street Maintenance to Utility Operations must be considered a movement from one department to another within the meaning of Article 35.2. However, whether or not he has a thirty day right of return is also conditioned upon whether or not he transferred to a position in the same job title as the one he previously held. Again, the evidence is contradictory. While it is true that the titles Heavy Equipment Operator and Utility Operator are not the same and that the two positions have different Job Class Numbers (Agreement Appendix 1), the credible testimony of Witness Robert LeDoux supported by compelling documentary evidence (Union Exhibits 1-4) reveals that the City, under identical contractual language in 1991, determined that LeDoux’s move from Public Works to Water and Gas was “considered a departmental transfer” within the meaning of Article 34.2 (now 35.2) and that LeDoux had the right to return to his old position in Public Works within thirty days either at his election or because his work in the new position was deemed not satisfactory. (Union Exhibit #1). LeDoux transferred from being a “Traffic Control Tech” in Public Works to the position of “Utility Service Person” in the Water and Gas Department and returned to Public Works within thirty days of his transfer.

Witness testimony provided further support for the Union's contention that Article 35.2 has been loosely interpreted by the parties. Mark Tucker, whose circumstances in moving into a Utility Operator's position from a Heavy Equipment Operator's position in Street Maintenance in 2007 were virtually identical to Grievant's, testified that he was told by Human Resources Specialist Kirk Glass that he would have thirty days to return to his old position if he so requested. Like Grievant, Tucker had applied for an "open" position in Utility Operations. Tucker further testified that his immediate supervisors at the time, Bob Troolin and Barb Kolodge confirmed this understanding of a right to return within thirty days. Jason Smitke, one of Grievant's co-workers in Street Maintenance also moved to a Utility Operator's position in June of 2008. He testified that he had inquired about a leave of absence from his Heavy Equipment Operator's position only to be told by Kolodge that a leave wasn't available and that he only had thirty days to decide on the new position if he wanted to return. Smitke testified that he had discussed this right of return with Grievant prior to their moving to Utility Operations. Finally, Grievant testified that Kolodge had also told him that he would have thirty days to return to his Heavy Equipment Operator's position should his new position in Utility Operations not work out.

The testimony of Grandson and Kolodge was less persuasive with regard to the alleged thirty day return right. Grandson testified that Grievant had no right to transfer back to Street Maintenance because there was no position for him; that Grievant hadn't applied for a leave of absence; and that Article 39 didn't apply because Grievant wasn't laid off. He also testified that he had cut both Grievant and Smitke's positions after they left for budgetary reasons. Kolodge testified that she didn't recall discussing a thirty day

right of return with either Smitke or Grievant but conceded that she may have had such discussions with them. However, she did admit under cross examination that there had been a general understanding that anyone who left for another position with the City had a thirty day right of return and that she had previously concurred with that understanding. Her understanding in this regard is not surprising since both the collective agreement and the Civil Service Rules provide a broad thirty day right of return for permanent employees who leave their positions.¹ Such a right even exists under Article 37.3 for employees who resign their positions and terminate their service with the City if they withdraw their resignation within thirty days. Indeed, if the Employer's position is correct, it would appear that only employees like Grievant who leave their positions to accept an open position with the City in another department or division have no right to return to their old job within thirty days. Such an interpretation of the contractual language is obviously strained because it effectively creates a disincentive whereby an employee would be forced to forfeit his employment and seniority rights in attempting to advance to a better or more desirable position. Such a disincentive would not appear to be in the interest of either the Employer or the employee.

There can be little doubt in consideration of the foregoing discussion that the testimony of the witnesses concerning the intent of Article 35.2 strongly favors the interpretation advanced by the Union. This is particularly true concerning the testimony of LeDoux which the City was unable to rebut or satisfactorily explain. The City's prior interpretation of the transfer clause in this connection provides a compelling guide.

¹ Civil Service Rules provide for a thirty day right of return period for employees who accept promotional vacancies elsewhere in the City. However, the record of the hearing reveals that the City Civil Service Board changed the Utility Operator position from a promotional position application to an open position application within the past two years. Promotional situations are not covered by the collective agreement.

Accordingly, the Arbitrator can only conclude that the term “department” as it is used in Article 35.2 is intended to apply generally to Departments, Divisions or other administrative units within the City, and that the term “job title” is intended to apply generally to positions that have similar duties and responsibilities including positions with different job class numbers.

Finally, it must be noted that even had the Arbitrator found the language of Article 35.2 to be clear and unambiguous, the position taken by the City regarding Grievant’s right to return to his old position could not be sustained under the provisions of the current collective agreement. This is so because the record clearly establishes that Grievant was constructively discharged in violation of Article 36. There is no dispute that Grievant had performed satisfactorily as a Heavy Equipment Operator in Street Maintenance for over five years and was a permanent employee in the Public Works and Utilities Department. If Grandson’s testimony that he abolished Grievant’s position for budgetary reasons is credited, then Grievant should have been returned to Street Maintenance and permitted to bump a junior Heavy Equipment Operator since he was not on probation there and was senior to at least five Heavy Equipment Operators in the Division. Jan Marie Anderson, a Personnel Technician II who has served at various times as Interim or Acting Human Resources Manager with the City, credibly testified concerning the application of the collective bargaining agreement and the City Civil Service Rules to Grievant’s situation. Her testimony clearly established that Grievant was not laid off, that he was not on leave of absence, and that he had not resigned. When pressed to characterize Grievant’s status, she candidly admitted that he had been terminated or “removed” from employment with the City. As Article 36 clearly provides,

removal is a disciplinary action that may only be imposed for just cause, and there was no credible evidence presented by the City to even suggest just cause for Grievant's removal.

The Arbitrator has made a detailed review and analysis of the entire record in this dispute and has carefully considered the closing arguments advanced by the respective parties. Further, he has determined that the crucial issues that arose in these proceedings have been addressed above, and that certain other matters presented by the parties must be deemed irrelevant, immaterial, or side issues at the very most and therefore has not afforded them any significant treatment, if at all, for example: the voluntary demotion of Ken Welty; the promotion of Nicholas Economos; whether or not the City's Human Resource Department deemed Grievant a "New Hire" when he began work as a Utility Operator in 2008; whether or not Grievant had been terminated at the time he filed his grievance; whether or not Kolodge was aware that Grievant's HEO position had been eliminated when Grievant first attempted to return; the reasons that Grievant was terminated from probation in Utility Operations; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective agreement, the evidence is more than sufficient to find that the City violated the collective agreement when it refused to return Grievant to a position of Heavy Equipment Operator in its Department of Public Works and Utilities.

Accordingly, an award will issue, as follows:

AWARD

THE CITY VIOLATED THE PROVISIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT CONSTRUCTIVELY DISCHARGED GRIEVANT MATTHEW DUNAISKY AND REFUSED TO RETURN HIM TO HIS POSITION AS A HEAVY EQUIPMENT OPERATOR. THE GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED FORTHWITH WITH NO LOSS OF SENIORITY OR BENEFITS. GRIEVANT'S REQUEST FOR COMPENSATION FOR MEDICAL EXPENSES DURING THE PERIOD OF HIS UNEMPLOYMENT IS DENIED SINCE THE GRIEVANT REJECTED COBRA BENEFITS OFFERED BY THE EMPLOYER.

John Remington, Arbitrator

February 25, 2009

St. Paul, Minnesota