

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5, LOCAL 34**

and

HENNEPIN COUNTY – NORTH POINT HEALTH AND WELLNESS CENTER (NPHWC)

**DECISION AND AWARD OF ARBITRATOR
BMS 10-PA-0170**

JEFFREY W. JACOBS

ARBITRATOR

March 15, 2010

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 34,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 10-PA-0170

Hennepin County, North Point Health and Wellness Center, NPHWC.

APPEARANCES:

FOR THE UNION:

Matt Nelson, Business Representative
Dr. Steven Nelson, Dentist NPHWC
Susan Sanches, grievant
Valerie George, grievant
Linda Ireland, Dental Hygienist
Mary McClintock, Dental Hygienist
Liana Ravkin, Sr. Dental Assistant
Steve Marincel, Field Representative
Eric Lehto, Organizing Director
Ryan Hanson, Union Organizer
Wes Volkenant, VP AFSCME Local 34

FOR THE COUNTY:

Christine Yates, Labor Relations Specialist
Lori Olsen, Sr. HR Generalist
Dr. Rochelle Avent Hassan, DDS, Director of Dental Clinic
Angelique Brown, COO NPHWC
Brian Bergs, Financial Director
Bill Peters Labor Relations Director
Stella Whitney West CEO NPHWC
Linda Miller, Manager Dental Clinic
Norine Jaros, Asst. HR Director

PRELIMINARY STATEMENT

The hearing in the above matter was held on February 11, 2010 at the North Pointe Wellness Center, 1313 Penn Ave, N., Minneapolis, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated February 26, 2010 at which point the record was closed.

ISSUE PRESENTED

Did the County violate the collective bargaining agreement when it laid off grievants Valerie George and Susan Sanches? If so, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2009. Article 7 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

UNION'S POSITION:

The Union's position was that the County violated the contract when it laid off the grievants and retained junior employees. In support of this position the Union made the following contentions:

1. The Union cited Article 6, Section 4 of the contract, which states in relevant part as follows: "Except in those instances where senior employees are not qualified to perform remaining work duties, seniority shall determine the order of: Layoff which shall be in inverse order of seniority within each work classification and department provided that any employee who is to be laid off and has previously served in a lower work classification or its designated equivalent."

2. The Union noted that the parties stipulated that the grievants were more senior to the employees who were retained as the result of the layoff that occurred on March 20, 2009. The seniority date for grievant Susan Sanches is December 4, 2000; the seniority date for grievant Valerie George is July 8, 1996. The other dental hygienist seniority dates for Ms. Yao is April 16, 2007 and the seniority date for Ms. Koenig is May 14, 2007. See, Joint Exhibit 3.

3. The Union asserted that the County's claim that the hygienists needed the REF, Restorative Expanded Function; certification was a sham to retain junior staff while laying off senior people. The Union noted that the Employer stipulated that the job classification specifications for Dental Hygienist did not specify the REF as a job function under the listed job duties and responsibilities, employment standards; education and experience; or licensing and certificates. The Employer also stipulated it was not in the job posting when the two junior hygienists were hired. Thus, the Union asserted, the County simply added REF as a "required" job duty only days before it laid off senior people. This, the Union argued most strenuously amounts to nothing more than a thinly veiled way to skirt the clear requirement of seniority in layoff.

4. The Union further noted that the stated reason for the layoff was due to budget shortfalls and that the provision cited above was placed in the contract to cover this precise situation. The Union acknowledged that there might well have been valid business reasons for requiring some hygienists to have REF certification for the reasons stated by the County – it allows greater flexibility for the dentists to see more patients and allows for additional billings where the REF certified employees perform work. That however does not justify violation of the clear provisions of the labor agreement that the senior employees be retained where they are able to perform the functions of the job. Neither does it justify the failure of the County to provide the training required to get REF certification, especially where it was suddenly required of the hygienists and then used as the basis for a layoff in contravention of the seniority clause.

5. The Union further pointed out that the grievants were quite capable of performing their jobs. Their evaluations all show excellent performance and nowhere were they required to have REF certification. See Union exhibits 10 & 23. The Union argued that these evaluations show definitively that the grievants were able to perform the job and that the clause in Article 6, section 4 reading “except in those instances where senior employees are not qualified to perform remaining work duties” simply does not apply – the grievants are qualified.

6. The Union noted that while there was vague discussion in the past about requiring REF certification there was no notice to the employees or to the Union that it would form the basis of a layoff or that the hygienists would have to have it to avoid a layoff until days before the layoff in question. The Union again noted that this could easily be used as a ploy to circumvent a seniority clause by simply adding an arbitrary requirement to the job that only junior employees had – even though there was no such requirement in the posting for that position – and then use the lack of that skill to end-run the seniority clause.

7. The Union further asserted that the County was unable to provide any sound policy or process for the so-called, knowledge, skills and ability, KSA, exemptions to the seniority requirements in the collective bargaining contract. Moreover, the County has generally a requirement that seniority is to be applied if the KSA can be obtained within a reasonable period; here that is approximately 6 months. The Union argued that the REF certification can be obtained usually within a few months at most and that in one case a junior employee who was retained was allowed to complete the clinical portion of the REF certification after she was hired at the Clinic. The grievants have also taken steps to get their own REF certification and clearly have the ability to do the REF work.

8. The Union further asserted that the County failed to even investigate the true cost or the time necessary to complete the REF training. Several employees requested REF training but were denied by the County, citing cost issues.

9. The Union then pointed to the Educational Assistance Article of the contract, Article 29 section 2, which reads in relevant part as follows: “Where courses are required and certified by the appointing authority as essential to current job performance, such appointing authority shall grant 100% reimbursement for tuition, required fees and required study materials.”

10. The Union asserted that it gave the County more than 6 weeks notice that it intended to rely upon this Article as well as part of the claim that the contract was violated. The Union also countered the claim that it should be barred from bringing this up by noting that the grievance itself cited Article 6 section 4 but also, any “other applicable clauses.” The Union asserted that it is not limited to only the cited provisions in the grievance and that it should be allowed to bring the training Article up as well, especially since it formally notified the County of its intent to do so in December 2009. The Union further claimed that this does not set forth a new claim but rather an additional ground for the existing claim of a violation of the seniority Article.

11. The Union asserted that the training issue is part and parcel of this grievance since the grievants were denied the opportunity to get the REF training, partially because they never knew they needed it but also because the County decided only days before the layoff that the grievants were required to have it. At the same time the County denied others the chance to get it, which understandably deterred the grievants from asking for it since they believed they too would be denied.

12. The Union asserted as a third part of its case that the County discriminated against these two grievants based on their Union activity. There were problems with vacation requests and Ms. George particularly was designated as the person on behalf of the other hygienists to take the lead in contacting the Human Resources department to raise this issue. She set up meetings with HR but asked for anonymity with HR so that her immediate supervisors would not know who was raising the issue. She specifically told the person at HR that she feared possible reprisals by her supervisors, especially since she was not yet in the Union. This occurred in December 2008 and there was no apparent plan to implement the REF program at that time.

13. Later, her identity was revealed against her wishes at a meeting with the supervisory staff and shortly thereafter the layoff ensued. It was also during this whole time frame that the other hygienists contacted the Union since their concerns were not being adequately addressed. Shortly thereafter, the unit was certified by the BMS. See Union Exhibits 14, 16, 17 and 18.

14. The Union notified the County that it had enough signed cards to have the Unit certified as late as February 20, 2009; when there was still no plan to implement the REF program yet within a month of that the County sent the two main protagonists in the organizing effort a layoff notice. The Union claimed that this highly suspicious scenario smacks of anti-Union animus and retaliation against the grievants since they were active in both the vacation issue as well as in contacting the Union to have the unit certified.

15. The Union asserted that despite the claim by the County that it was “sound business reasons” that led to the decision to implement the REF program, the County increased the hours of the remaining assistant and hygienists after the layoff. The Union asserted rhetorically that if the hygienists’ work is not profitable, why then would the County add more hours to them if not to hide the fact that they got rid of the two employees who brought the Union onto the scene.

16. Finally, the Union pointed to a prior award by Arbitrator Richard Miller in support of its claim that the language and the general policy at the County strongly favors seniority in layoff decisions and that it can be ignored only where there is clear evidence that the senior workers are not qualified to perform the essential duties of the remaining jobs. Here the Union asserted that the evidence showed just the opposite. The grievants were eminently qualified to perform the remaining jobs and were entitled to receive training to get REF certification and could quite easily have performed those functions as well.

17. The essence of the Union’s claim is that the clear contract language provides for layoffs in reverse order of seniority where the senior workers are qualified to perform the job and that here they were. Further, that the County denied the training to get the REF certification and that the County did not adequately justify the KSA exemption in this instance nor did it provide adequate explanation for not allowing these grievants to get the training. Finally, that the County engaged in a highly suspect effort to retaliate against these grievants while they were engaged in protected concerted activity and to contact the Union for representation under PELRA.

Accordingly the Union seeks an award of the arbitrator reinstating the grievants to their former position with full back pay and all accrued contractual benefits.

COUNTY'S POSITION

The County's position was that there was no contract violation here and no evidence of retaliation against the grievants for their Union activity. In support of this position the Union made the following contentions:

1. North Point Health and Wellness Center, NPHWC, is a medical and dental facility providing low cost services to underserved populations. Over 40% of NPHWC Dental Clinic patients are covered by Medical Assistance, MA. In 2007, NPHWC management learned that dental services provided to MA patients must include a face-to-face dental examination with a dentist for the services to be reimbursable by Minnesota Department of Human Services. Conversely, services provided to MA patients by Dental Hygienists only are not reimbursable to the clinic.

2. The Clinic also determined that Hygienists certified in what is known as Restorative Expanded Function, REF, are authorized to perform various restorative dental procedures including placement of fillings and stainless steel crowns. A Dentist prepares the patients and a REF-certified Hygienist places the filling or crown as the case may be. This procedure is considered a face-to-face examination by a Dentist and is therefore fully reimbursable by MA.

3. Based on this the Clinic determined that that to best use limited financial resources and staff, the number of Dental Hygienists not certified in REF would be reduced by two. The two most junior Dental Hygienists were REF-certified. The third and fourth least senior Dental Hygienists were the two grievants involved in this case. There was no dispute that the grievants are more senior to the two hygienists that were retained. The County asserted that the grievants were not qualified to perform the remaining work because they were not REF certified.

4. The County asserted that the decision to retain junior employees was based on sound business reasons and to deal with the budget shortfall facing the facility. It also allowed greater flexibility for the hygienists to see patients and allows the dentists to see more patients as well. This cuts wait times for the patients and provides more revenue for the facility. The junior employees already had REF certification as of the date the facility determined to lay off these employees. While the senior employees may or may not have been able to obtain the REF certification, they did not have it as of the date of the layoff and would therefore not have been able to perform those services as of the time it was needed.

5. The grievants were notified of the layoff on March 20, 2009, effective April 17, 2009. This time gave them additional time to find substitute jobs or to exercise any bumping rights to which they may have been entitled to under the labor agreement.

6. The County raised a procedural issue with respect to the claims made by the Union and noted that the original grievance claimed a violation of Article 6 Sections 3A and 4 and to Article 34, non-discrimination. Much later however the Union claimed a violation of Article 29, section 2, which the County asserted was a new claim added months after the original grievance. The County argued that this should be disallowed since it had little opportunity to defend this part of the grievance.

7. The County further countered the Union's claim that this article was included due to the pre-printed portion of the grievance form that adds "other applicable articles" by noting that the County cannot be expected to defend literally every article in the contract. The County asserted that this general statement at the end form is overly broad and does not encompass the specific claim of a violation of the education assistance article. Here the grievance was about seniority and the Union cannot be allowed to change that at the 11th hour by adding an additional unrelated claim.

8. On the question of the seniority article, the County asserted that the preamble to Article 6 requires that the senior employees be "qualified to perform the remaining work duties." Here the County asserted that it had an inherent managerial right to establish the requirements of the job and that nothing in the collective bargaining agreement limited the right to establish REF certification as a requirement of the hygienists. The grievants were not "qualified to perform the remaining work duties" since they did not have REF certification.

9. The County further asserted that the decision to require REF certification was not "done at the last minute" as alleged by the Union but was rather discussed for many months. It was the subject of a training session, which the grievants attended. Thus the employees were well aware of the possibility that REF certification might be required yet neither of the grievants ever requested training for this.

10. It was not until December 2008 that the County Administrator gave authorization to lay off two hygienists and to require that the two REF-certified hygienists be retained instead of the more senior grievants thus this was not a “last minute decision” at all.

11. The County further noted that it reviewed the KSA exemptions very carefully in this case and determined that the junior employees would be retained because of their REF certification and because at least one of the junior employees was bilingual in English and Spanish. Since many of the patients are Spanish speaking this too was a valuable skill that aided the facility in serving its patients and freed up other employees to perform other tasks. The County noted that since 2008 there have been some 10 other KSA exemptions that have been studied and granted and that several of them worked to the benefits of Local 34 members. No grievance was filed by the Union when it benefited their members and the County argued that this tacit agreement with the process shows that the way in which these matters are determined is considered valid and should not be overturned in this case merely because the Union does not like the result here.

12. The County argued strenuously that the grievants were not qualified to perform the work since neither were REF certified at the time of the layoff. The County further asserted that the fact that they have undertaken to get some portion of the REF certification is not relevant. The County needed REF certified hygienists in April 2009 and was not required to wait until the senior employees had that skill. The County already had two qualified employees to perform the work as of that time and the KSA exemption under these circumstances was appropriately used and should be left in place.

13. The County next dealt with the 2003 Miller award relied upon so heavily by the Union. The County argued that this was distinguishable on its fact and on the holding itself. There the case dealt with bumping rights and whether the grievant was able to displace a junior employee after the elimination of her position. The arbitrator found that the grievant in that case was qualified to perform the remaining work and entitled to bump whereas that is simply not the case here – the grievants did not have REF certification.

14. The County distinguished the 2003 Miller award case in that it was based on the finding that the County had compared the qualifications of the grievant to the remaining employees. Here there was no such comparison – the County found that the grievants were not at all qualified to perform the work due to their lack of REF certification.

15. The County further vigorously denied that the grievants' Union activity had anything to do with their layoff. The decision to lay them off was based exclusively on whether they had REF certification. Moreover, the fact that the grievants were raising concerns about vacation scheduling in no way placed the County on some sort of phantom notice that they were contemplating going to AFSCME for possible representation under PELRA. In fact, the County was not even aware of the hygienists' desire to organize until *after* the decision to lay off the grievants had been made

16. The County further asserted that there was nothing suspect about the timing of the petition and the provision of certain requested information to the Union and to BMS regarding that petition and that there was no undue delay in providing anything. In fact the County cooperated fully with the petition and works with multiple Unions, including this one, throughout County operations. The County is proud of its relationship with its various labor organizations and works with them in a cooperative model designed to reduce industrial friction and to foster good working relationships.

17. Finally, with regard to the merits of the claimed violation of the educational reimbursement provision, the County asserted that there was no violation of this language either. The County notes that the language of Article 29 must be read in its entirety and does not require that the County solicit the employees to see if they want additional training under these circumstances.

18. The full provision of Article 29 reads as follows:

Section 1. At the discretion of the EMPLOYER financial assistance may be provided toward the cost of tuition and lab fees which an employee pays for instruction and associated administration expenses in conjunction with educational courses approved by the EMPLOYER in advance, subject to the following conditions:

A. Tuition Aid Request must be submitted to the EMPLOYER for approval at least sixty (60) days prior to registration for the educational course, provided that the EMPLOYER may waive this requirement when the EMPLOYER determines circumstances warrant such action.

B. The EMPLOYER shall, within thirty (30) days after receipt of the tuition aid request, give the requesting employee written notice of whether the proposed educational course is, or is not, approved for tuition assistance.

C. If the proposed educational course is not approved, no educational assistance will be provided by the EMPLOYER. If the proposed educational course is approved, up to one hundred percent (100%) financial assistance may be provided for tuition and registration fees upon completion of the course and submission by the employee of (1) evidence of tuition paid (receipt), and (2) proof of satisfactory completion (a grade report indicating a "C," satisfactory or better).

D. To assist employees in planning and selecting educational alternatives, the EMPLOYER shall make available to employees information on such guidelines and/or criteria as the EMPLOYER may use in determining which educational courses will be approved for reimbursement.

Section 2. Where courses are required and certified by the appointing authority as essential to current job performance, such appointing authority shall grant 100% reimbursement for tuition, required fees and required study materials.

Section 3. At the request of an employee, an Individual Development Plan shall be established. Any employee making the request shall be provided with paid time to work with their Supervisor or Human Resources to develop a training plan for career development within Hennepin County. Human Resources will be a source of career information, and postings, in which the employee may have an interest. Time allotted for this activity and the training plan adopted shall be subject to mutual agreement of the Employee and Supervisor.

19. The Union conveniently uses only Section 2 but fails to note that Section 1 requires that the employee request the training. No such request was made here by either of these grievants. Moreover, even if they had, the result would have been the same since neither had the REF certification at the time of the layoff. The County asserted that the fact that they have taken some of the course work necessary to get it after that time is irrelevant to the current discussion.

20. The County asserted that REF certification was not a requirement of the job of the remaining hygienists. Rather, it is a special knowledge, skill or ability that formed the basis for retaining the two REF-certified hygienists. It is well-established that the job description may not list every single requirement of a particular job, nor does it limit the ability of management to add job requirements to positions as business needs, technology and/or other matters make that necessary.

21. Management decided that REF certification for some hygienists would be required and retained those who had that certification. No violation of any portion of the contract occurred as the result and there is no evidence whatsoever of any discrimination or anti-Union animus on this record.

The County seeks an award of the arbitrator denying the grievances in their entirety.

DISCUSSION

The Clinic is a Federally Qualified Health Center providing essential medical services to low income and underserved populations providing health care to patients regardless of ability to pay. The Clinic is reimbursed for medical and dental services for patients covered by, Medical Assistance, MA, which is a program administered by the State of Minnesota Department of Human Services, MN DHS, at rates established by MN DHS. Over 40% of the Clinic's dental patients are covered by MA.

In 2007, clinic management learned that dental services provided to MA patients must include a face-to-face dental examination with a dentist for the services to be reimbursable by MN DHS. Conversely, services provided to MA patients by dental hygienists *only* are not reimbursable.

The parties stipulated that the grievants are more senior to two other dental hygienists employed at the Clinic, and who are the subject of this matter. Ms. Sanches was hired December 4, 2000 and Ms. George was hired July 8, 1996. Two dental hygienists were hired later and are more junior to the grievants. Their hires dates are May 7, 2004 and April 16, 2007 respectively.

Restorative Expanded Function, REF, is a recently enacted special licensure that enables Dental Hygienists to perform certain dental procedures, such as placement of fillings or crowns, after the dentist prepares the tooth. It was clear that REF certified hygienists can do this work thus freeing up time for dentists to do other work. Clinic management decided that the best use of financial resources and staff was to reduce the total complement of seven Dental Hygienists not certified in REF by two positions. The two most junior hygienists are REF-certified. The third and fourth least senior hygienists were the two grievants in this matter; see Joint Exhibit 1, seniority list of the dental hygienists. The grievants were not REF certified as of the time of the layoff notice in this matter.

There was some dispute about the extent to which the Union and the affected employees were told of the impending proposal to use REF hygienists. There was a meeting at some point in 2007 where REF was discussed with the staff. The evidence showed that there was a demonstration of sorts where the REF process was shown to the employees. There was not however any evidence to suggest that the employees or the Union were told that REF would be coming or that it would one day be a requirement of some of the hygienists.

By late 2008 or early 2009 however given the severe budget cuts that had already happened, and more appeared to be imminent, the facility decided to implement REF for some hygienists. It was undisputed that the two junior hygienists were hired with REF certificates and skills.¹ It was also undisputed that the job description does not contain REF as a requirement nor did the postings contain a REF requirement anywhere. The County acknowledged that REF is not a job requirement for all of the hygienists. See page 11 of the County's Brief.

The evidence further showed that the grievants are excellent at their jobs and that they are qualified to perform the duties of a dental hygienist, see Union exhibits 10 & 23 but that neither of them possessed REF licensure/certificates as of the time of the layoff in March 2009. They could not therefore have performed REF function as of that time. There was evidence to show that they have since taken some of the coursework necessary to obtain that licensure on their own. It was also shown that the County did not investigate whether there were training opportunities throughout the Twin Cities area to get REF certification and that several schools in the area offered courses in REF. See Union exhibits 11, 26, 27, 28 & 29.

¹ One of the junior hygienists was fully qualified to perform REF work when she was hired whereas the other one had apparently completed the coursework but was allowed to complete the clinic portion of the certification process while she worked at this Clinic.

At about this same time, the hygienists, who were not in the Union until March 31, 2009, see BMS Unit Clarification Order date March 31, 2009, were experiencing some difficulties with vacation pay and other employment issues. In late 2008 Ms. George contacted County HR personnel to see if they could assist the hygienists in resolving these outstanding issues. A meeting was set up for December 18, 2008 and a tentative agreement appeared to have been reached, See Union Exhibit 21. The Union alleged that Ms. George expressed a very clear desire to remain anonymous and that she was concerned about possible retaliation if management found out she was the “point person” who was taking the lead in starting these discussions and raising these issue.

The Union assailed the layoff and the process used to determine which of the 7 hygienists would be laid off on three separate grounds. First, that Article 6, section 4 was violated since it calls for the layoff in inverse order of seniority, except where the senior employees are not qualified to perform the remaining job duties. There is also the assertion that the County violated the Article 29 section 2 by its failure to provide the training necessary to get REF certification. Finally, that the County discriminated against the employees for Union activity in violation of Article 34. These claims are interrelated but the best way to approach the analysis is to deal with each individually.

CLAIM OF VIOLATION OF ARTICLE 6, SECTION 4.

Initially there is the question of whether there was a violation of the seniority article. As with all contract interpretation matters, the first place to look is the contract language itself. Article 6, section 4, provides in relevant part as follows:

Except in those instances where senior employees are not qualified to perform remaining work duties, seniority shall determine the order of:

A. Layoff which shall be in inverse order of seniority within each work classification and department, provided that any employee who is laid off and has previously served in a lower work classification covered this Agreement may request to exercise seniority rights in such lower classification or its designated equivalent.

The question is thus whether the grievants were “qualified to perform the remaining work duties.”

There is no question that the grievants are more than capable of performing the duties of a dental hygienist. Their evaluations show excellent work performance and both are experienced, very competent hygienists. However, neither are REF certified and REF certification is not a posted job duty of the hygienist position.

That however is not the question in this case. The undisputed evidence showed that they were not REF certified and that they were not therefore “qualified to perform the remaining work duties *as of the time of the layoff*.” That is the critical point under the terms of this language.

The County argued that it was within its managerial right to change the requirements of certain jobs and that adding REF certification was in no way a violation of the labor agreement. The County further argued that if employees are allowed to obtain necessary skills and training *after* a layoff and then be allowed to return to work then, the layoff provisions of the labor agreement will be severely undermined and rendered meaningless. An employee could get the training months or years afterward and assert a right to replace the person in the job and seek back pay for a job they were not qualified for when the employer deemed it necessary to lay off people due to budget constraints.²

The Union on the other hand asserted that the County’s position allows it to skirt the seniority provisions of the labor agreement and “create” a new job duty tailored to the skills of junior workers using “management rights” as the basis for such action. It can then lay off senior workers and retain junior workers.

² Article 6 Section 2 provides that “seniority rights under this agreement shall terminate under the following conditions ... B. Layoff in excess of a period equal to an employee’s length of employment but not more than three years.” Thus, the County asserted, an employee could theoretically come back up to three years later if the Union’s position is adopted.

Frankly, both are valid points here and these arguments gave the arbitrator considerable pause to consider the correct course of action under the language and the facts of this case. Had there been any evidence or an inference to be reasonably drawn from the evidence that the County's action was what the Union had described, i.e. a subterfuge to terminate these two grievants individually or to skirt the requirements of the seniority clause by adding a job requirement at the last minute that was tailored to the junior individuals, the result would have been very different.

Obviously, adding a "requirement" to a job that has little to do with the relevant duties and responsibilities of a position and then laying off senior people who do not possess that qualification could well provide grounds to overturn the action, even in the face of a management rights argument. Here though the evidence did not support any such finding. Clearly too, the REF certification was relevant to the job and was relevant to the question of dealing with the budget constraints facing the facility in order to maintain financial viability.

Seniority is, under the clear terms of this agreement, the main governing factor to be considered in determining the order of layoff. It is only where the remaining employees are not qualified to perform the remaining job duties that an exemption can be made. Here while the Union pointed out that the grievants could have obtained REF certification, and in fact are well on their way to doing so in a very short period of time.

Much of the County's argument is based on the sound financial and business reasons for the decision to require two hygienists to have REF certification. The County spent considerable time at the hearing and in its post hearing Brief discussing the new dental model and the reasons why this would save the Clinic money and provide better service to the patients. There was little doubt on this record that all this was true.

Having REF certified hygienists provides greater flexibility and better access to the dentists and provides additional funding because the hygienists can perform functions previously only performed by licensed dentists. Under the reimbursement rules the REF certified hygienists work constitutes a face-to-face interaction and is thus fully reimbursable to the Clinic under MSA rules.

Whether it was sound business decision is not the question either however. The question is whether there is a violation of the language of the contract – sound business decision or not

The County pointed out that it could have simply laid off the hygienists earlier. This too misses the point. Had the County decided to cut staff based solely on financial reasons alone the clear language would have compelled the layoff of the two most junior employees and these grievants would have been spared the layoff.

The salient facts here were that the County had an inherent managerial right to determine to proceed with a different model for delivery of dental services that included having REF hygienists perform some of the work. This was not seriously challenged on this record – it was clear that the County retained the right to require this certification of some of its hygienists whether REF was in the job posting or not.³

As noted above, the County's argument that the grievants were not qualified to perform the remaining work had merit on this record. The County had the right to determine that REF certification would be required of some of its hygienists. Further, the County had the right to determine to reduce its staff in order to meet its budget constraints. The County appropriately determined that the two least senior hygienists without REF certification were these grievants and that the requirements of the job for at least 2 of the remaining hygienists required REF certification.

³ It should be noted however that the County was careful not to require REF certification of all of the hygienists as doing that would quite likely have been construed as a job requirement of the overall hygienist position. Under those circumstances, adding that requirement to the position would have triggered the training requirements found in Article 29, discussed below, and would have required the County to provide REF training to all the hygienists and the layoff of the junior 2 employees.

Finally, the fact that the grievants may have been able to get REF certification later is not strictly determinative on this record and on this language. The question from the language is whether the senior employees are qualified to perform the remaining work at the time of the layoff.

To be sure the timing of all this appears somewhat suspicious. This could have and should have been done better. At the very least more and better communication about the progress of the new dental model might well have headed this entire matter off had Clinic management been more forthcoming about what they had in mind. On these facts though, while this scenario left something of a bad taste in the arbitrator's mouth, it was not sufficient to overturn the County's action.

The Union cited a prior award that deserves some discussion here as well. In the Miller award between these parties, the County's action to disallow a grievant to bump into another position was overturned. The arbitrator was faced with the identical language of Article 6 section 4 found here.

There however it was clear that the County had inappropriately compared the qualifications of competing individuals. Under this language the arbitrator correctly found that such comparisons are not called for. The question is strictly whether the senior employee is qualified to perform the remaining work duties. It is a so-called sufficient ability clause and requires only a determination of whether the senior can do the job – not whether the senior employee can do the job better than a junior employee or whether the junior employee can do the job better than the senior employee.

Here as the County correctly points out, the non-REF certified hygienists are prohibited by licensure from performing REF certified work. Under the terms of the contract language they were therefore not qualified to perform the remaining work duties.

VIOLATION OF ARTICLE 29, SECTION 2

Initially, there was a procedural question of whether the arbitrator should even deal with this issue on the merits. The County argued that it was not part of the original grievance and that the grievance specifically dealt with only the seniority language of Article 6.

Moreover, the pre-printed portion of the grievance form that adds all “other applicable article” is insufficient to place the County on notice of the nature and extent of the grievance nor of what it must then defend. The County acknowledged that the Union amended its grievance some 6 weeks prior to the hearing but further alleged that the matter cannot be heard now on its merits since it amounted to an entirely new claim.

The Union argued that it provided ample notice to the County of its intent to bring this. There was even an allusion to the fact that the training issue was brought up during the grievance steps and that the County therefore knew all along that the Union was claiming a violation of the training article. Moreover, the training issue is indeed part and parcel of this grievance. If the County had provided REF training to the grievants they would have been retained.

On this record the matter will proceed on the merits. The County had ample notice of the Union’s intentions to raise this issue and this specific contract language and could have been prepared for it in arbitration. The County did not seek to raise this procedural issue until the hearing itself and could have brought this to the attention of the arbitrator well before the hearing itself and asked for a continuance of the hearing to prepare. No such request was made.

Further, the issue of training does not on this record constitute a “new” claim by the Union. It was rather an additional argument in support of the main claim that the seniority provisions of the labor agreement were violated.

If a party adds a truly new claim to the case most arbitrators will decline to hear it on the merits. If the new issue is merely an additional basis for the original remedy sought and assertions made then these additional claims should be considered if, as here, there is adequate notice to the other party that the first party intends to raise it. Thus, on this record it is clear that the issue of whether there was a violation of the training article should be determined on the merits.

The basis of the Union's claim is that the County violated the training article by failing to provide the REF training to the grievants, who, if they had been provided this training, would have been retained instead of the junior employees. The training article provides in relevant part as follows:

Section 2. Where courses are required and certified by the appointing authority as essential to current job performance, such appointing authority shall grant 100% reimbursement for tuition, required fees and required study materials.

The Union claimed that REF certification is a "course required and certified by the appointing authority as essential to current job performance" and as such should have been provided to the grievants. The Union further demonstrated that several employees tried to get this training, especially after there was mention of it at in-service sessions in 2006 and 2007, but were refused. Some of these individuals were senior to the grievants so they naturally assumed that they would also have been refused if they had requested it. Further, the grievants never knew that they needed the REF training as a condition of their jobs or they would have gotten it.

The County asserted that the REF training is not a required part of the hygienists' job. Earlier however the County asserted that it was frankly because of the lack of REF certification that these grievants were laid off and that they were "not qualified to perform the remaining work duties" when the County made its argument about the seniority article.

This apparent inconsistency took some sorting out. The essence of the County's argument here is that while the REF training formed the basis of the layoff, it was not required of the remaining hygienists, therefore was not essential to current job performance for the remaining non-REF certified hygienists.

This again was something of a close call since there was some evidence to suggest that the County either did not know of or did not adequately investigate the REF training and where it could be obtained. The union witnesses testified credibly that several facilities in the Twin Cities area offer this training and that it can be obtained by an already certified dental hygienist in a matter of a few weeks at a cost of around \$2,250.00 to \$3,000.00.

Here though the strict wording of the language applies and requires that the County provide 100% reimbursement for tuition and fees etc. only for those courses required and certified by the appointing authority as essential to current job performance. The County correctly points out that REF training is not currently a requirement for current job performance for the remaining dental hygienists – only for the REF certified hygienists. While that may seem a play on words or a semantic difference there was considerable evidence to show that the three most senior hygienists do not have REF certification and are of course still working for the Clinic performing the same jobs they were doing prior to the layoff of the grievants in April 2009.

Those individual testified quite credibly that they are understandably concerned that the Clinic might one day suddenly and without much warning require more hygienists to be REF certified and essentially do the same thing to them that was done to the grievants. As noted above though, once the County makes REF certification a requirement of the hygienist position that language of Article 29 would seem to apply to require the training. That however must await a future set of facts so no definitive ruling can be made on that question now as it is not strictly before me. The question that is at stake is whether there was a violation of the terms of article 29 on these unique facts. As noted herein there was not.

Finally, the County provided evidence of the Knowledge, Skills and Abilities, KSA, analysis it went through to determine if an exemption to the general seniority rule was appropriate here. Without belaboring the point, the County's witnesses testified credibly that they followed the well-established process and found that the non-REF certified hygienists were, not surprisingly, not certified or licensed to perform REF work. Once again better and more timely communication might well have provided a better understanding by the Union and the affected employees as to what was going on here. On these facts however, there was insufficient evidence to establish that there was a fatal flaw in the County's analysis that warrants overturning its decision here.

CLAIM OF DISCRIMINATION VIOLATION OF ARTICLE 34

The Union claimed that the County's actions were tainted with discrimination against these individual grievants because of their concerted activity in regard to raising some employment related issues with management at the Clinic and with County HR. There was also an allegation that the action to lay them off was motivated by a desire to terminate them in response to their actions in contacting the Union to discuss representation of the hygienists at the Clinic pursuant to MN PELRA. Union witnesses who were dealing with the County on the representation petition felt "hoodwinked" when they learned that the grievants had been laid off and they felt as though this was retaliatory on some level because these employees had contacted the Union for help in dealing with the multiple issues that were afoot in the Clinic.

Article 34 reads in pertinent part as follows:

"In accordance with applicable city, state, federal law, all provisions of this AGREEMENT shall be applied equally by the EMPLOYER and the UNION without discrimination based on color, creed, religion, sex, disability, marital status, affectional preference, public assistance status, criminal record or national origin. In the event that any of the pertinent antidiscrimination laws are changed during the term of the AGREEMENT to include or exclude a protected class or classes this AGREEMENT will be applied so as to include or exclude that class within the provisions of this section. In addition, all provisions of this AGREEMENT shall be applied equally by the EMPLOYER and the UNION to all employees without discrimination as to political or organizational affiliation or membership in the UNION.

As noted above, there was a meeting at some point in 2007 where REF was discussed with staff and that there was a demonstration where the REF process was shown to the employees and several people "role played" the procedure. There was however no evidence to suggest that the employees or the Union were told that REF definitely would be coming or that it would one day be a requirement of some hygienists.

By late 2008 or early 2009, given the severe budget cuts that had already happened, and more that appeared imminent, the facility decided to implement REF for some hygienists. It was undisputed that the two most junior hygienists were hired with REF certificates and skills.

It was also undisputed that the job description does not contain REF as a requirement nor did the postings contain a REF requirement anywhere. The County acknowledged that REF is not a job requirement for all of the hygienists. See page 11 of the County's Brief.

The evidence further showed that the grievants are excellent at their jobs and that they are qualified to perform the duties of a dental hygienist, see Union exhibits 10 & 23 but that neither of them possessed REF licensure/certificates as of the time of the layoff in March 2009. They could not therefore have performed REF function as of that time. There was evidence to show that they have since taken some of the coursework necessary to obtain that licensure on their own. It was also shown that the County did not investigate whether there were training opportunities throughout the Twin Cities area to get REF certification and that several schools in the area offered courses in REF. See Union exhibits 11, 26, 27, 28 & 29.

At about this same time, the hygienists, who were not then in the Union, were experiencing some difficulties with vacation pay and other employment issues. In late 2008 Ms. George contacted County HR personnel to see if HR could assist the hygienists in resolving these outstanding issues. A meeting was set up for December 18, 2008 and a tentative agreement appeared to have been reached, See Union Exhibit 21. The Union alleged that Ms. George expressed a very clear desire to remain anonymous and that she was concerned about possible retaliation if management found out she was the "point person" who took the lead in starting these discussions and raising these issue.

The Union further alleged that Ms. Lori Olsen, of County HR, breached that tacit agreement with Ms. George and revealed her identity during the meetings. The Union alleged that while there is no true "smoking gun" it can be inferred that management at the facility immediately began a scheme to get rid of these grievants since they were the ones who were now known to be the people behind the vacation issue.

It was also at about this same time that the hygienists began to contact AFSCME for possible representation as their exclusive bargaining representatives under PELRA. There was no evidence however that the two issues were tied together or that the County knew that the hygienists were talking to the Union before the decision was made to implement REF.

Eventually the Union filed a petition with BMS to represent the hygienists employed at the Clinic. The BMS certified the unit on March 31, 2009. The Union alleged that the County delayed this and that it failed to timely produce certain information needed to properly process the petition. The evidence failed to support this allegation however. The evidence showed that the County cooperated with the Union and that there was not unreasonable resistance to the petition. Indeed, the County works with this and several other labor organizations and has for years. Further, the petition was granted by BMS without apparent difficulty or undue opposition from the County. On these facts, there was insufficient evidence of anti-Union behavior in this regard.

There was also insufficient evidence to support the claim of discrimination by the County or by management at the Clinic against these grievants based on this record. The timing is somewhat suspect to be sure and it was clear that at the same time the Clinic was deciding what to do with the implementation of REF the hygienists were raising various employment issues on vacation time scheduling as well as other issues. It was also of some concern that the anonymity of at least one of the grievants was divulged even though she clearly asked to keep her identity confidential.

The fact that Clinic management may have known who the point person was does not equate with a showing of discrimination in violation of the collective bargaining agreement or of PELRA however. It was clear that the discussions about REF were taking place well before the grievants raised their issues with the Clinic and with HR. Had there been evidence to suggest that the grievants actions actually gave rise to the REF discussions the result might well have been different but on this record there was insufficient evidence to support that claim.

Based on the record as a whole it is determined that there was no violation of the strict terms of the Agreement and that the grievances must therefore be denied.

AWARD

The grievance is DENIED.

Dated: March 15, 2010

AFSCME and Hennepin County.doc

Jeffrey W. Jacobs, arbitrator