

failing to assign the grievant, Paul R. Petrich, to temporary work in a higher paid position. Post-hearing briefs were received by the arbitrator on November 25, 2010.

FACTS

The Hibbing Public Utilities Commission (the "Employer" or the "Commission") operates public utility systems in the northern Minnesota city of Hibbing, distributing water, gas and electric power to the residents of the city. The Union is the collective bargaining representative of the Employer's non-supervisory employees.

The grievant was first employed by the Employer in 1990. Since then, he has worked in several classifications in several of the Employer's departments. He began working as a Helper and then as a Fireman in the Production Plant, where the Employer burns fuel to produce electric power, and he has also worked in other production jobs.

From January of 2003 until January of 2005, the grievant worked in the Cashier's Department, which is responsible for billing and collection. For those two years, the grievant worked as the Cashier, under the supervision of the Head Cashier. Witnesses for both parties testified that at that time there were only two positions in the Cashier's Department -- the Head Cashier and the Cashier. Those witnesses also testified, however, that some of the billing and collection work is aided by other employees, such as a Receptionist and a Service Clerk. From this testimony, I infer that those employees are part of a different department and not the Cashier's Department.

In January of 2005, the grievant bid on a water crew job in the Water Department, and, when he was awarded that job, he left his previous position as Cashier. In February of 2005, the Employer hired a new employee, Jamie J. Chacich, to fill the Cashier's position thus vacated by the grievant.

In the summer of 2007, when a vacancy occurred in the Receptionist's position. The Employer decided to increase the number of positions in the Cashier's Department, from two to three; it created the new position of Assistant Cashier. The grievant bid on and was awarded the new Assistant Cashier's position, and he began working in that position on July 30, 2007.

Excerpts from the job descriptions for the three positions in the Cashier's Department are set out below:

HEAD CASHIER

Total [job evaluation] points: 83.4

Job Classification: 24

Primary Source of Supervision:
Director of Finance, and Commission Secretary.

Direction Exercise:
Cashier.

Primary Function:
Supervises and coordinates activities of employees engaged in collection and handling of bills, collects delinquent accounts.

CASHIER

Total [job evaluation] points: 51.7

Job Classification: 14

Primary Source of Supervision:
Director of Finance, Commission Secretary and Head Cashier.

CASHIER
(Continued)

Direction Exercise:
None.

Primary Function:
To receive and account for moneys in the collection of all accounts.

ASSISTANT CASHIER

Total [job evaluation] points: 43.1

Job Classification: 11

Primary Source of Supervision:
Director of Finance, Executive Secretary and Head Cashier.

Direction Exercise:
None.

Primary Function:
To receive and account for moneys in the collection of all accounts. Receptionist and general office duties. Responsible for compliance with all OSHA, Utility, and regulatory agency safety regulations and requirements as applicable to the duties of the job.

At the time the present grievance was initiated, on September 16, 2009, the hourly rate of pay for the Head Cashier's position was \$23.42; for the Cashier's position, it was \$19.92; and for the Assistant Cashier's position, it was \$19.07.

Lisa Kniffen has been employed in the Cashier's Department for about twenty-five years, and she has been Head Cashier at least since the time of the grievant's previous employment in the Cashier's Department -- from January of 2003 till January of 2005, when he was the Cashier. During those two years, on occasions when Kniffen was absent for four hours or more, the grievant received a temporary transfer (also described by the parties as an "upgrade") into the Head Cashier's position, and he was paid for the time he worked in the upgraded position at

the hourly rate of the Head Cashier's classification. Hereafter, I may refer to occasions when Kniffen was absent for four hours or more as "upgrade opportunities."

When the grievant returned to the Cashier's Department on July 30, 2007, now as the Assistant Cashier in the newly constituted three-person department, the grievant, rather than Chacich, received most of the upgrades* into the Head Cashier's position until September of 2009, when the Employer began to assign Chacich rather than the grievant to fill in for Kniffen during upgrade opportunities.

On September 16, 2009, the Union, in behalf of the grievant, brought the grievance now before me, presenting it to Kevin M. Gargano, Director of Finance. Parts of the grievance are set out below:

List applicable violation: Kevin Gargano says he is going to upgrade an employee with less seniority than [the grievant] to Head Cashier. Violates the past practice of most senior qualified employee to the upgraded position and any other applicable part of the contract.

Adjustment required: Upgrade [the grievant] to Head Cashier when Head Cashier is gone and pay back pay for any upgraded shifts [the grievant] did not get.

Gargano's denial of the grievance states that the labor agreement does not require upgrades to be made by seniority.

* Below, I describe more fully the number of upgrade opportunities for which the grievant received the assignment and those for which Chacich received the assignment from July 30, 2007, when the grievant became the Assistant Cashier, until September of 2009, when the Employer decided to assign Chacich to all upgrade opportunities into the Head Cashier's position (unless both Kniffen and Chacich were absent).

The Union's primary argument is that seniority controls the right of an employee to be upgraded, provided the person selected is qualified to perform the work. The Employer concedes that the grievant, who has often performed as Head Cashier during previous upgrade opportunities, is qualified to act as Head Cashier.

The Employer argues that it has a management right to upgrade in progression, assigning the occupant of the Cashier's position, which is higher ranked in progression, to Head Cashier ahead of the occupant of the Assistant Cashier's position, which is lower ranked in progression -- notwithstanding that the occupant of the Assistant Cashier's position may have greater seniority. The Employer urges that nothing in the labor agreement states that upgrades are to be made by seniority. It argues that, in the absence of any provision in the labor agreement limiting its right to determine how upgrades are to be made, it has a management right to decide how they will be made.

The parties cite the following provisions of the labor agreement as relevant:

Article II - Management Rights.
Section 1.

(a) The following shall be the exclusive prerogative of Management insofar as they are not exercised in a manner to conflict with the terms and intent of this contract, but Management may within its discretion confer with the Union concerning any circumstance that may arise under these prerogatives.

(b) The Commission retains the right to manage the business and plants and to direct the working forces including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve

employees from duty because of lack of work or other legitimate reasons, subject to the limitations of this contract.

(c) The Commission shall have the sole right to determine the types of services to be rendered; the location of their facilities and the methods and processes and means of production.

(d) The Commission shall have the right to determine the size and composition of the work force and the assignment of work; to establish work and quality standards; to maintain discipline by requiring employees to conform to plant rules and regulations; these rights not to conflict with the terms of this Agreement. . .

(f) It is not intended by the foregoing paragraphs to limit any of the normal or usual functions of Management or to fully define such functions. The Commission shall exercise all rights of Management without interference, subject to the provisions of this Agreement.

Article IX - Seniority.

Seniority status shall be granted to all employees. An employee's position on the seniority list shall be determined on the basis of his continuous length of service for the Commission. . . .

Article XII - General Working Rules.

Section 1. Temporary Transfers.

(a) An employee temporarily transferred to a higher paid classification and who performs the work involved for four (4) consecutive hours or more shall receive the rate of pay of that classification for the entire period of the transfer. All such transfers shall be approved by the General Manager. . . This provision, however, shall not apply to transfer of employees to higher paid classifications for training purposes nor when a leadman, in the absence of the foreman, assumes the duties of the foreman.

(b) Copies of all transfer requests which are approved/disapproved by the Department Head and authorized/not authorized by the General Manager are to be forwarded to the affected employee(s), whenever practicable, prior to the effective date of such approval or non-approval of said transfer. (NOTE: This wording taken from Memo of Agreement of 3/1/78.)

(c) Vacancies within a department may be filled temporarily for a maximum of 30 working days a calendar year, unless an emergency situation deems it necessary to extend the transfer.

(d) Coal and Ash workers and day shift fireman helpers are exempt from the 30 day limitation under Sec. 1(c) of this Article. . . Temporary transfers of Coal and Ash workers shall be in accordance with seniority within a crew. . .

(e) Once an employee is transferred, that employee must remain in that transferred position or returned to his/her original position prior to being transferred again, in accordance with seniority within a crew."

[Sic: Though the original text has only one quotation mark, at the end of the sentence, it appears to be the intended to mark the phrase, "seniority within a crew."

Article XIII - Filling Job Vacancies.

Section 1. Posting Procedure.

Notice of all vacancies and new positions within the bargaining unit shall be posted on the employee's bulletin boards and employees shall have ten (10) working days time within which to make application to fill such vacancy or new position, but this provision shall not apply to Apprenticiable Jobs or to those positions that are to be filled through automatic progression within the job ladder on the "firing line." Procedures in filling "Apprenticiable Jobs" are set forth later in this Section.

(a) In filling job vacancies and new positions, under this Paragraph, preference shall be given to the senior qualified employee. In judging employee's qualifications for the job, the following factors shall be considered: [I omit the seven listed factors for judging qualifications].

(b) All vacancies and new positions within the bargaining unit posted under this Section shall be awarded no later than fifteen (15) calendar days after the next Public Utilities Commission meeting following the posting application period. After this initial fifteen (15) day period, the employee will be awarded the position no later than thirty (30) working days for non-shift employees, and 180 working days for firing line employees.

(c) An employee filling such a position shall be on probation for a period of forty-five (45) days and, if while he/she is on probation, the Commission or the employee determine if he/she is unqualified for that position, he/she shall have the right to return to his/her prior position without posting.

(d) A new employee to the HPUC filling a position within the Firing Line Job Ladder shall not be permitted to bid on a position outside of the department during his/her

first two (2) years of employment with the Public Utilities Commission. In the event that a posted position is unfilled by another employee within the utility, the position will be offered, in order of seniority, to employees with less than two years of employment at the utility. If the position is [sic] accepted by an employee with less than two years of employment, transfer of that employee to the posted position will occur after a replacement has been hired and trained to fill the posting employee's position.

(e) The probation period will be 45 days for current employees and six (6) months for newly hired employees.

(f) An employee, during his/her probationary period, who takes more than five (5) days of vacation, sick leave, or other personal time off, will have his/her probationary period extended by the amount of time over the five (5) allowed.

(g) If Management and the employee determine an employee is qualified for the position before the 45 day probationary period has expired, the employee will be awarded the position at that time.

[The emphasis indicated throughout this reproduction of Article XIII, Section 1, is in the original.]

DECISION

As noted above, the Union's primary argument is that the labor agreement requires the Employer to select the more senior of two qualified employees for an upgrade to work in a higher paid position. The Union also argues that its interpretation of the labor agreement is confirmed by past practice.

The Union makes the additional argument that management's decision in September of 2009 that it would no longer upgrade the grievant but would henceforward upgrade Chacich to temporary vacancies in the Head Cashier's position was retaliatory. It urges that, because the Commission sided with the grievant in a then recent dispute with Gargano over the proper wage to be paid when the grievant was temporarily upgraded to a Service Clerk's position, Gargano and the Employer's General Manager, Jason J.

Fisher, made the decision to upgrade Chacich rather than the grievant to temporary vacancies in the Head Cashier's position. The Union argues that a decision based upon such a retaliatory motive is improper and discriminatory.

The Employer argues that nothing in the labor agreement either requires it to use seniority when making upgrades to temporary vacancies or limits it in any other way when deciding whom to upgrade. It argues that, because the labor agreement does not limit its right to decide how such upgrades will be made, it has a management right to determine who will be upgraded. In addition, the Employer argues that the evidence does not show a consistent practice that supports the Union's interpretation of the labor agreement -- that temporary upgrades must be made by seniority rank.

The Employer denies that the decision in September of 2009 no longer to upgrade the grievant to the Head Cashier's position was made in retaliation against the grievant for his having prevailed in a recent dispute with Gargano about the wage rate to be paid when the grievant was temporarily upgraded to a Service Clerk's position.

I make the following rulings, resolving the parties' arguments. First, I rule on the arguments whether Gargano's decision to upgrade Chacich instead of the grievant was based on a retaliatory motive. The Union argues that an inference should be made that Gargano's decision was retaliatory because the Commission had overruled Gargano in his dispute with the grievant about receiving the Service Clerk's wage rate only

a few weeks before Gargano began to prefer Chacich over the grievant when making an upgrade to the Head Cashier's position.

Both Gargano and Fisher denied that the change was retaliatory. Rather, they testified as follows. Fisher, who had only recently become the Employer's General Manager, found out in July or August of 2009 that Gargano had been upgrading the grievant rather than Chacich. Fisher examined the labor agreement and concluded that it did not require the use of seniority in making upgrades to temporary vacancies. He informed Gargano that the Employer had the management right to make upgrades in progression, i.e., to upgrade the occupant of the higher ranked position of Cashier rather than the occupant of the lower ranked position of Assistant Cashier, notwithstanding the greater seniority of the Assistant Cashier. Fisher testified that in his experience in management positions with other employers, such upgrades were always made in progression and not by seniority.

I rule that the evidence is not sufficient to show a retaliatory motive. The only argument supporting the Union's allegation is that an inference is available from recency -- that, because the Commission's decision overruling Gargano came only weeks before the decision to change how upgrades to Head Cashier would be made -- a retaliatory motive might underlie the change. I find that such a possible inference is not sufficient to rebut the denial of Fisher and Gargano and their contrary and plausible explanation for the change.

Second. The Union argues that Article XIII, Section 1, requires that the Employer give preference to senior qualified employees when filling "all vacancies and new positions." The Union argues that the words "all vacancies" should be read to include those created by short-term absences in a higher paid position, which result in an opportunity for a temporary transfer ("upgrade") as described in Article XII, Section 1.

The Employer argues that, notwithstanding the use of the words "all vacancies" in Article XIII, Section 1, that section of the agreement clearly refers only to vacancies that are to be posted for bidding, i.e., long-term vacancies. The evidence shows that temporary upgrades are not posted for bidding. The Employer argues that temporary transfers occasioned by short-term absences are covered only in Article XII, Section 1, which does not state a general requirement either that the Employer is to use seniority ranking or is to be otherwise restricted in selecting those who receive such a transfer. The Employer notes that the only references to seniority made in Article XII, Section 1, appear in subparagraphs (d) and (e), which establish the use of "seniority within a crew" for particular specialized classifications. The Employer also notes that other parts of the labor agreement specify the use of departmental seniority in special cases -- usually for transfers to production jobs on the "firing line," for moving Leadmen on utility crews or in apprenticeship programs. The Employer argues that the absence of other references to seniority in the temporary transfer section of the contract implies that the

parties intended not to require the use of seniority in making temporary transfer to other jobs.

The Union makes a contrary argument from the same special references to seniority in Article XII, Section 1 -- that the specification of the use of "seniority within a crew" for these specialized classifications, (and the specification of the use of departmental seniority for transfers made to other production crew jobs on the "firing line" or to utility crew jobs) implies that the use of overall seniority, as defined in Article IX, is required for all other temporary transfers. The Union argues that the contract's specification of the use of departmental seniority or seniority within a crew in these special cases implies an intention to require overall, Article IX seniority for all other temporary transfers.

I interpret Article XIII, Section 1, of the labor agreement as follows. Its opening paragraph and all seven of its lettered subparagraphs are consistent with the title of the section, "Posting Procedure." The language throughout clearly shows that the drafters of this section intended it to establish procedures related to posting and bidding for long-term vacancies and not for temporary transfers to fill short-term vacancies caused by absences. The evidence shows that temporary transfers are not posted and bid for. Even the opening sentence of the opening paragraph -- the sentence that contains the words "all vacancies" -- clearly applies to posting and bidding. Subparagraph (a), which states that "preference shall be given to the senior qualified employee," makes it clear that the

preference is to be given "in filling vacancies and new positions, under this Paragraph." Subparagraph (b) opens with the phrase, "all vacancies and new positions within the bargaining unit posted under this Section . . ." Subparagraphs (c), (e), (f) and (g) relate to the probation period, which at 45 days or longer, clearly is not required for temporary transfers to a short-term vacancy. Subparagraph (d) expressly refers to posting and bidding for Firing Line jobs.

Thus, as I interpret Article XIII, Section 1, it applies only to posting and bidding for long-term vacancies, and the use of the words "all vacancies" in Subparagraph (a) and elsewhere in the section is intended to refer to long-term vacancies that are subject to the posting and bidding procedures established by the section.

Correspondingly, because the seniority ranking language in Subparagraph (a), is expressly made a component of the process of bidding for posted vacancies, it does not apply to temporary transfers to short-term vacancies, which are not posted and bid for -- either under Article XIII, Section 1, or under Article XII, Section 1. Because nothing in the latter section expressly states that seniority is to be used in selecting for temporary transfers, I rule that the labor agreement does not limit the Employer's management right to select for upgrades by using progression rather than seniority, except, as I have noted above in the specific circumstances listed in Article XIII -- where departmental seniority may be used.

Third. The Union argues that the parties have established a past practice, binding on the Employer, to make temporary transfers by overall, Article IX seniority. An exhibit presented by the Employer shows the dates when the grievant received upgrades into the Head Cashier's position, notwithstanding the availability of Chacich, from the time he became the Assistant Cashier, on July 30, 2007. Between September 11, 2007, and June 18, 2009, he was upgraded to Head Cashier, even though Chacich was available to work the upgrade, on all or part of eighty-three days for a total of 622 hours. On some other dates, the grievant received an upgrade to Head Cashier when Chacich was not available, but those upgrades are not relevant here because the Employer concedes that, as the only other employee in the Cashier's Department, his upgrade was appropriate as one made in progression.

Chacich was on maternity leave from June of 2009 till she returned in September of 2009. Upon her return, Gargano began to upgrade her to Head Cashier rather than the grievant, who was also available. He did so on September 14 through 16, 2009, and, as I have noted above, the Union grieved that change on September 16, 2009. The evidence shows that, from September 14, 2009, till October 15, 2010 -- the last date before the hearing in this matter for which there is evidence -- Chacich was upgraded to the Head Cashier's position and the grievant to the Cashier's position on all or part of 116 days for a total of 898 hours.

In addition, there were two days, August 17, 2007, and August 27, 2007, just after the grievant became the Assistant

Cashier, when Chacich was upgraded to the Head Cashier's position even though the grievant was available. According to the Union, it did not dispute those preferences to Chacich because the grievant was in his probation period for his recent appointment to the Assistant Cashier's position.

The parties presented no other detailed evidence about practice. Larry L. Claude, President of the Union, testified that he has been employed by the Employer since January of 1985 and has held various positions during that time. He testified that he worked in the Office for two years as a Service Clerk and that during that time seniority was always used to determine temporary transfers. He testified that exceptions to the use of overall, Article IX seniority for temporary transfers are specified in the labor agreement -- usually for transfers to production jobs on the firing line or to utility crews, where progression or departmental seniority is used. Claude testified that management has never challenged the use of overall, Article IX seniority to make temporary transfers, though on two occasions employees who were adversely affected grieved and management denied those grievances.

Gargano testified that he had a conversation with Claude in August of 2007, just after Chacich rather than the grievant received the upgrades to Head Cashier on August 17, 2007, and on August 27, 2007. Gargano testified that Claude came to his office and told him that the labor agreement required that upgrades be made using overall seniority and that, rather than checking the agreement, he accepted what Claude told him and,

thereafter, accepted the upgrade of the grievant over Chacich when both were available -- thus, according to Gargano, explaining the multiple upgrades the grievant received from September of 2007 through June of 2009.

Gargano testified that, in the summer of 2009, after reviewing the labor agreement and conferring with Fisher, he decided that he had mistakenly accepted Claude's earlier representation that the labor agreement required that upgrades to Head Cashier be made by overall seniority rather than by progression.

I make the following ruling with respect to practice. Evidence about practice is usually presented to show that both parties to a contract have, by their conduct, i.e., their practice, shown the same interpretation of ambiguous language. In such a case, arbitrators may use such evidence to resolve the ambiguity.

In rare cases, arbitrators may rule that the parties to a contract have evidenced by their conduct a clear intention to amend contract language that is not ambiguous. To rule that parties to a contract have, by practice, shown a mutual intention to amend clear, unambiguous language, arbitrators require evidence, not only of longstanding and consistent conduct, but some indication that both parties understand and accept that their conduct will act as an implied amendment of that clear language.

As I have ruled above, the contract language at issue in the present case is not ambiguous. It clearly requires the use

of overall seniority in selecting for posted long-term vacancies, but it does not so require in selecting for temporary transfers. The evidence about practice shows that the grievant received many temporary transfers based on his seniority over approximately a two-year period, but that he received them because Gargano accepted Claude's statement that the labor agreement already required selection by seniority. It is doubtful that Gargano alone had authority to agree to amendments of the labor agreement, but, even if it is assumed that he had such authority, his acceptance of Claude's statement that the contract already required selection by seniority does not constitute an agreement to change the contract.

I conclude that the Employer did not violate the labor agreement by basing its selection for temporary transfers in the Cashier's Department on progression rather than overall seniority.

AWARD

The grievance is denied.

February 2, 2011


Thomas P. Gallagher, Arbitrator