

<p style="text-align: center;"><b>In the Matter of Grievance Arbitration</b></p> <p style="text-align: center;">Between</p> <p style="text-align: center;"><b>THE UNIVERSITY OF MINNESOTA (“University”)</b></p> <p style="text-align: center;">and</p> <p style="text-align: center;"><b>THE INTERNATIONAL UNION OF PAINTERS, ALLIED TRADES, DISTRICT COUNCIL 82, LOCAL UNION 61 (“Union”)</b></p>	<p>*</p>	<p>BMS Case No. 13-PA-0846</p> <p>Grievant: _____</p> <p>Issues: Arbitrability and Voluntary Quit</p> <p><b><u>Award and Opinion of:</u></b></p> <p style="text-align: center;">Lon Moeller, Arbitrator</p>
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**Preliminary Statement**

A grievance arbitration hearing was held on August 21, 2013, at the University of Minnesota’s McNamara Alumni Center, located at 200 Oak Street S.E., in Minneapolis, Minnesota. The University and Union appeared by their designated representatives and offered evidence through exhibits and the testimony of witnesses, who were subject to cross-examination. The record was closed upon the Arbitrator’s receipt of the parties’ post-hearing briefs on September 27, 2013.

**Appearances**

**For the Union:**

Timothy W. Andrew, Attorney and Spokesperson  
\_\_\_\_\_, Grievant  
Randy Schroeder, Painter (Retired)

**For the University:**

Shelly Carthen Watson, Associate General Counsel and Spokesperson  
John Sundsmo, Manager, U Construction/Facilities Management  
Bill Paulus, Director of Central Services for Facilities Management

## **I. Background and Facts**

The Grievant started working for the University in May of 1975. During his 37 years employment with the University, Grievant generally worked as a painter doing “maintenance painting” on a “project by project” basis. On January 6, 2006 he was appointed as union steward (Union Exhibit 4).

The University’s building trades unions are covered by a negotiated labor agreement (the “building trades” or “umbrella” agreement) with the Minnesota State Building and Construction Trades Council (Union Exhibit 1; University Exhibit 2). Terms and conditions of employment for the University’s painters are spelled out in an additional agreement (the “painters agreement”) with the International Union of Painters and Allied Trades (University Exhibit 3; Union Exhibit 2). University painters do not receive University-administered fringe benefits or paid leave and are compensated on an hourly basis for their “time worked.”

On September 30, 2011, Grievant filed a first report of injury for “carpal tunnel” [in] both hands” caused as he claimed by “daily painting and computer keyboard” work (Union Exhibit 8).<sup>1</sup> His medical treatment for carpal tunnel syndrome continued in 2012. Grievant received an injection in his wrist, which as he testified “stabilized but didn’t cure” the carpal tunnel. Grievant was “finalized” for carpal tunnel surgery after a pre-operative physical on December 19, 2012, with surgery scheduled for December 26, 2012.

Grievant worked on December 20, 2012 but did not talk to his immediate supervisor, general foreman Mr. Ramerth, about the scheduled carpal tunnel surgery. Grievant received his daily work assignments from Mr. Ramerth. Mr. Ramerth also approved Grievant’s leave of absence requests when he was sick or needed to take time off from work.

Towards the end of his work shift on December 21, 2012, Grievant told Mr. Ramerth he needed to have carpal tunnel surgery and would “be having surgery on the 26<sup>th</sup>.” Mr. Ramerth asked, “Well, how long are you going to be out?” Grievant answered, “Two or three weeks.” Painter Randy Schroeder, who happened to be in Mr. Ramerth’s office at the time, and who previously had carpal tunnel surgery, commented (as Grievant recalls), “You will be out four to six weeks, with your arm in a sling for two weeks.” For his part, Mr. Schroeder remembers telling Mr. Ramerth, “Grievant will be out six weeks.” Grievant recalled that Mr. Ramerth then ended the conversation by saying “okay.” Mr. Ramerth did not testify at the arbitration hearing.

Grievant had carpal tunnel surgery on his right wrist on December 26<sup>th</sup>. He was released to return to work by his doctor as of January 30, 2013 (Union Exhibit 9). Grievant brought his doctor’s release to Mr. Ramerth on January 28<sup>th</sup>. Mr. Ramerth told Grievant, “We are dead in the water, we don’t have any work for you.” The University’s Personnel Action Notice for Grievant indicated his last day of work was December 21, 2012, and listed an action code of “Return to Bench – Ineligible” (Union Exhibit 5; University Exhibit 7). On August 7, 2013, Grievant had carpal tunnel surgery on his left wrist.

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<sup>1</sup> Grievant’s workers’ compensation claim was denied. He is still pursuing that claim.

On February 14, 2013, the Union filed a grievance claiming that the University violated Article VI – **Union Steward** (Union Exhibit 1, p. 5; University Exhibit 2, p. 5) of the building trades/umbrella agreement when Grievant attempted to return to work following his recovery from carpal tunnel surgery “and was told he was being laid off because of lack of work” (Union Exhibit 3; University Exhibit 1). The grievance was denied by the University and appealed by the Union to arbitration.

## **II. Statement of Issues**

- A. Is the grievance arbitrable?
- B. Whether the Grievant voluntarily quit his employment? If not, what should the remedy be?

## **III. Position of the Union**

The Union emphasizes the stipulated issue before the Arbitrator is whether Grievant quit his job. It specifically contends that Grievant never “manifested any intent to resign, much less a clear intent to resign” from his job as a painter (Union Brief, p. 1).

Grievant and Mr. Schroeder, the Union points out, testified that there was no formal leave of absence procedure. When painters were sick or needed to be absent from work, they would generally give one or two days advance notice to their immediate supervisor (general foreman Mark Ramerth) who approved their request. There was no form to fill out nor did they talk to Mr. Ramerth’s supervisor (John Sundsmo) when they needed to take time off from work. Grievant followed this same procedure when he served as general foreman from 2000 to 2005 and painters came to him with their requests for time off from work. No painter, the Union notes “was ever disciplined, much less fired, for a short notice leave request at the University” (Union Brief, p. 3).

The University’s reliance on the leave of absence procedure outlined in the Facilities Maintenance Employee Handbook (University Exhibit 6) is, according to the Union, misplaced. Neither Mr. Schroeder nor Grievant could recall receiving the Employee Handbook. U Construction Manager John Sundsmo testified that three or four years ago the University started giving the Employee Handbook to new hires at their orientation; however, Mr. Sundsmo did not have any first-hand knowledge that Grievant received the Employee Handbook. The University also did not provide a signed acknowledgement page demonstrating Grievant received the Employee Handbook. New hires, Mr. Sundsmo testified, sign the acknowledgement page during their orientation. In any event, the Union claims that the Employee Handbook does not distinguish between “short leaves of absences” (which the University admits could be approved by Mr. Ramerth) and “longer leaves of absence” (which the University maintains required Mr. Sundsmo’s approval).

Mr. Schroeder had carpal tunnel surgery in the fall of 2012. He told Mr. Ramerth in December of 2012<sup>2</sup> that Grievant was “getting checked” for carpal tunnel surgery.” Grievant told Mr. Ramerth on December 21, 2012 that he was scheduled for carpal tunnel surgery on December 26th and would be off of work “two or three weeks.” Based on his own experience with carpal tunnel surgery, Mr. Schroeder told Mr. Ramerth, “[Grievant] will be out six weeks.” Grievant remembered Mr. Ramerth responding at that point of the conversation by saying “okay.” Mr. Schroeder confirmed Grievant’s recollection of this conversation.

Grievant and Mr. Schroeder testified that Mr. Ramerth did not tell Grievant that he was abandoning his job or that he considered Grievant’s actions to be a “voluntary quit.” Mr. Ramerth also did not deny Grievant’s request for time off from work. The Union emphasizes that Grievant left his microwave in the break room and his work clothes in the shop when he finished his shift on December 21<sup>st</sup>.

Article VI – **Union Steward** states “[t]he Steward shall be the last journey person to be laid off in their craft, provided that he or she is qualified to perform the required work” (Union Exhibit 1, p. 5). Although it was admittedly a “slow time of the year” for painting work, Grievant recalled that University painters were working when he returned to work in January 2013. Article VI, according to the Union, gave Grievant “a level of job security” (Union Brief, p. 7). By telling Grievant that “We are dead in the water, we don’t have any work for you,” Mr. Ramerth was laying Grievant off for lack of work. Since he was still the union steward when he returned to work, and other University painters were working, the Union contends the University violated Article VI when it failed to return Grievant to his painter position.

Grievant had a solid work record during his 37 years with the University. He had not been disciplined before being laid off. Grievant received several commendations from University administration for his work performance (Union Exhibit 10).

In conclusion, the Union maintains that the University violated Article VI in laying Grievant off from his painter position and asks that the grievance be sustained. For a remedy, the Union requests that Grievant be reinstated and be made whole “with back pay and benefits paid to him from January 30, 2013...until the date of his reinstatement” (Union Brief, pp. 11-12; Union Exhibits 3 and 6).

#### **IV. Position of the University**

As an initial matter, the University contends that the grievance is not arbitrable.<sup>3</sup> The University has broad contractual rights under the umbrella agreement with the Minnesota State Building and Construction Trades Council (University Exhibit 2) to manage and direct the workforce. It claims that the grievance “does not come within the scope of the arbitration clause” (University Brief, p. 7) because the Union’s primary claim – that the University was

<sup>2</sup> Mr. Schroeder said he told Mr. Ramerth that Grievant was having a physical to determine if he would be able to have the carpal tunnel surgery. He thought this conversation with Mr. Ramerth occurred approximately a week before Grievant’s December 26, 2012 carpal tunnel surgery.

<sup>3</sup> In addition to its substantive arbitrability argument, the University raises the claim in footnote 3 of its post – hearing brief that the grievance is “time-barred” (University Brief, p. 7).

obligated to keep Grievant's position open until he returned to work – is not a contractual right afforded University building trades employees. The University further argues that that the Union's reliance on Article VI – **Union Steward** is misplaced because Grievant was never laid off from his painter position.

Turning to the merits, the University emphasizes that Grievant abandoned his job by advising general foreman Ramerth minutes before the end of his work shift on December 21<sup>st</sup> that he would be off work for several weeks. Since Grievant “did not request or obtain approval to be gone on leave” he abandoned his position, thus “returning himself” to the painters’ referral hall (University Brief, p. 8).

Grievant, the University points out, was a day laborer. University painters are only paid for their actual time worked (University Exhibit 4). Because Grievant was a day laborer, he could be returned to the painters’ referral hall at any time. Since he was unable to work due to his carpal tunnel surgery, Grievant was returned to the “bench” – the referral hall – as of December 21<sup>st</sup> (University Exhibit 7). The University was not obligated to keep Grievant's position open during the time he was recovering from carpal tunnel surgery.

The University claims that Grievant's situation was comparable to other building trades employees who were “returned to the bench” due to job abandonment or extended absences from work. Carpenter Dan Rossiter was absent from work for a year and returned to work when work was available. Painter Pat Bauer was returned to the referral hall after failing to show up for his scheduled work shift. Despite his request for a leave of absence, Pipefitter Kyle Owens' position was not held open when he was unable to work for an extended period of time. Painter Randy Schroeder returned to work following a heart attack when work was available. The Union did not grieve any of these cases.

U Construction Manager John Sundsmo testified that the work of University painters is cyclical, with the “busy time” being mid-May to August/September of every year, and the months of December to mid-May being “extremely slow.” There was no available work for Grievant when he attempted to return to work on January 28<sup>th</sup>. During this time period (December 2012 – January 2013), several painters were sent back to the referral hall due to lack of work (University Exhibits 8 and 9).

Grievant was not protected by the job security provision of Article VI – **Union Steward** because he was not working after abandoning his job on December 21<sup>st</sup>. Article VI provides “[t]he Steward shall be the last journeyperson to be laid off in their craft, provided he or she is qualified to perform the required work” (University Exhibit 2, p. 5). The University asked the Union to appoint a new steward to take Grievant's place. Grievant, according to the University, was not protected by Article VI because he was not “working or qualified to perform work” when he attempted to return to work (University Brief, p. 10).

Grievant additionally did not follow the established leave of absence procedure for extended absences. The Facilities Management Employee Handbook states the following:

For all types of leaves, you must get your supervisor's approval in writing before the leave begins. Please give your supervisor as much prior notice as possible so that he or she may make arrangements to cover your responsibilities while you are gone (University Exhibit 6, p. 11).

As a union steward, Grievant should have known about the leave of absence procedure. He failed to give the University proper notice of his absence or a specific date when he would return to work. Although Grievant knew surgery was scheduled following his December 19<sup>th</sup> pre-operative physical, and worked his shift on December 20<sup>th</sup>, he did not talk to Mr. Ramerth until the end of his shift on December 21<sup>st</sup>. Mr. Sundsmo and Director of Central Services for Facilities Management Bill Paulus additionally testified that the general foreman had the authority to approve short term absences from work (one day up to a week) but that longer absences had to be approved by Mr. Sundsmo. The University does not hold positions for trades employees on extended leaves of absence (unless the employee is on leave due to a workers' compensation injury), and building trades employees only return to work when work is available. In this case, Mr. Sundsmo did not approve Grievant's request for an extended leave of absence, the University was not obligated to hold a position for Grievant, and there was no work available for Grievant when he returned on January 28<sup>th</sup>.

In summary, the University asks that the grievance be denied.<sup>4</sup>

## V. Discussion and Analysis

The parties stipulated at the arbitration hearing that the issue before the Arbitrator was whether or not Grievant voluntarily quit his painter job with the University. In stipulating to that issue, University counsel did, however, reserve the right to argue the arbitrability of the grievance. In its post-hearing brief, the University raised both procedural and substantive arbitrability claims. Those claims must be addressed before the grievance can be reviewed on the merits.

Article V – **Grievance Procedure**, Step 1 of the building trades/umbrella agreement states “[w]hen a dispute or controversy arises over the interpretation of, or adherence to, the terms and provisions of the Agreement between the Employer and the Union, the Union must, within fifteen (15) working days, officially notify in writing the Director of Facilities Management that a dispute exists” (University Exhibit 2, p. 4; Union Exhibit 1, p. 4). The grievance was filed on February 14, 2013 (University Exhibit 1; Union Exhibit 3). The Union claims that the dispute giving rise to the grievance occurred on January 28, 2013, when Grievant returned to work after his carpal tunnel surgery “and was told he was being laid off because of lack of work” (*Id.*).

The University did not send Grievant correspondence denying him a leave of absence or confirming management's conclusion that he abandoned his job. The Personnel Action Notice (PAN) form is an internal University document used for payroll purposes. Grievant did not see

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<sup>4</sup> As an alternative argument, and assuming *arguendo* that the grievance is sustained, the University asks that Grievant be reinstated without back pay as he failed to receive approval from Mr. Sundsmo for a leave of absence as required by the Facilities Management Employee Handbook (University Brief, p. 11).

the PAN form, which indicated that he had been returned to the bench as of December 21, 2012, until after his grievance was filed. There is no indication in the record that the University objected to the timeliness of the grievance at the lower steps of the grievance procedure. The grievance clock did not start to run until Mr. Ramerth told Grievant on January 28, 2013 that “We are dead in the water, we don’t have any work for you.” The dispute giving rise to the grievance thus occurred on January 28<sup>th</sup>. Since the grievance was filed within fifteen working days of January 28<sup>th</sup>, it was timely and procedurally arbitrable.

Substantive arbitrability involves the question of whether the parties to a collective bargaining agreement intended to exclude certain issues from grievance arbitration. State and federal courts have generally recognized a presumption in favor of arbitrability unless, as the United States Supreme Court noted in the *Steelworkers Trilogy*, “it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.”<sup>5</sup>

Article V – **Grievance Procedure** broadly defines a grievance to mean “a dispute or controversy...over the interpretation of, or adherence to, the terms and provisions of the Agreement” (Union Exhibit 1, p. 4; University Exhibit 2, p. 4). The Union’s position is based on its reading of Article VI – **Union Steward**. The University’s position – that Grievant was not on an approved leave of absence, he abandoned his job, and management was not contractually obligated to hold a position for Grievant – is based on its reading of Article XII – **Labor/Management Responsibilities**, Section 12.1 of the building trades/umbrella agreement and Article 7 – **Function of Management** of the painters agreement, as well as on evidence of an asserted past practice. The parties’ arguments demonstrate that this grievance raises questions of contract interpretation covered by Article V which, as a result, are substantively arbitrable.

The merits of the grievance concern the stipulated issue as to whether or not Grievant voluntarily quit his job on December 21, 2012. Prior to December 21, 2012, Grievant worked approximately 15 to 20 years continuously with the University. Although he had been treated for carpal tunnel syndrome in the fall of 2012, Grievant had not apparently missed any extended period of time from work before his December 26<sup>th</sup> surgery.

Mr. Schroeder testified that he told Mr. Ramerth in December that Grievant was being evaluated for carpal tunnel surgery. Grievant testified that he advised Mr. Ramerth prior to December 21<sup>st</sup> that he would likely need carpal tunnel surgery. It should not, therefore, been a surprise to Mr. Ramerth when Grievant told him on December 21<sup>st</sup> that he would need to miss work due to carpal tunnel surgery.

Mr. Sundsmo and Mr. Paulus testified about the leave of absence procedures for building trades employees. There is no specific evidence that Grievant received the Facilities Maintenance Employee Handbook or that he was aware that the University distinguished between short term and extended term absences with respect to who (the general foreman or Mr. Sundsmo) approved leave of absence requests. The Employee Handbook only speaks to the approval of “your supervisor” for “all types of leaves” (University Exhibit 6, p. 11). It does not state that “extended time” leaves must be approved by Mr. Sundsmo.

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<sup>5</sup> *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960).

Mr. Ramerth was Grievant's immediate supervisor. He approved Grievant's requests for time off from work in the past. No written leave request or written approval was required. Mr. Ramerth responded to Grievant's statement that he would have to be off work due to carpal tunnel surgery by saying "okay." He did not tell Grievant that he needed to review the leave of absence request with Mr. Sundsmo or ask Grievant to make his leave of absence request in writing. Given that he had been a general foreman for four to five years at the time, Mr. Ramerth should have known if Mr. Sundsmo's approval was required for Grievant's leave request.

At the end of the shift on December 21, 2012, Mr. Ramerth knew that Grievant would be off of work for six weeks. When Grievant left Mr. Ramerth's office on December 21<sup>st</sup>, he reasonably believed that Mr. Ramerth approved his leave request for time off from work. Grievant fully intended to return to work following his recovery from carpal tunnel surgery. There is no indication based on the testimony concerning the December 21<sup>st</sup> conversation between Mr. Ramerth and Grievant that Grievant said or did anything to suggest that he was quitting his job.

Grievant's situation was different from the building trades employees the University mentioned who were absent from work for extended periods of time. Carpenter Dan Rossiter was off of work for approximately one year as he recovered from injuries suffered in a car accident. Painter Pat Bauer failed to show up for work and was returned to the hall for abandoning his job. Pipefitter Kyle Owens' request of a leave of absence for an indefinite period of time was denied by the University and he was returned to the hall. The University held a position for Mr. Schroeder when he was off work for worker's compensation leave following his carpal tunnel surgery. Mr. Schroeder returned to work following a heart attack because there was available painting work. There is no evidence that Mr. Schroeder had asked for or was on an approved leave of absence after his heart attack. None of these employees were union stewards.

Grievant was "returned to the bench" as of December 21<sup>st</sup> because the University was of the view that he voluntarily quit/abandoned his job. The evidence of this record, as noted above, does not support that conclusion. Grievant was released to return to work starting January 30, 2013 (Union Exhibit 9). Mr. Ramerth told Grievant that there was no work for him to do. The University employed 16 painters in January 2013 (University Exhibit 8). There is no evidence that the work being performed by the University's painters at that time was work that Grievant could not or had not previously done.

When Grievant talked to Mr. Ramerth on January 28<sup>th</sup>, he was on a leave of absence approved by Mr. Ramerth and still held the title of union steward. Grievant was released to return to work by his doctor as of January 30<sup>th</sup>. He had job security protection under Article VI – **Union Steward** from losing his job (being returned to the bench) due to a lack of work. Grievant was not returned to his painter job on January 30<sup>th</sup> because of a lack of work. University painters were, however, working on January 30<sup>th</sup>. The University's failure to return Grievant to his painter job as of January 30, 2013, based on the facts presented by this grievance, thus violated Article VI.

**VI. Award**

For the reasons set forth above, the grievance is sustained. The Grievant is to be reinstated to his painter position and made whole with back pay and contractual benefits.



Lon Moeller, Arbitrator

Dated at Iowa City, Iowa this  
22<sup>nd</sup> day of October, 2013