

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS# 14-PA-0181
INDEPENDENT SCHOOL DISTRICT #625,)	
St. Paul Public Schools)	
)	
and)	John Remington,
)	Arbitrator
PROFESSIONAL EMPLOYEES)	
ASSOCIATION)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the termination of Grievant H, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on December 10, 2013 in St. Paul, Minnesota at which time the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they subsequently did file in a timely manner on January 10, 2014.

The following appearances were entered:

For the Employer:

Jeffrey G. Lalla, Esq.

General Counsel

Julie Coffey

Assistant Director of Employee and
Labor Relations

For the Union:

Mike Wilde, Esq.

PEA Legal Counsel

Tammy Wilde, Esq.

PEA Legal Counsel

THE ISSUES

The Union asserts that the issues before the Arbitrator are stipulated, as follows:

DID THE EMPLOYER VIOLATE ARTICLE 6 OF THE
PARTIES' COLLECTIVE AGREEMENT WHEN IT
TERMINATED GRIEVANT, AND IF SO, WHAT
SHALL THE REMEDY BE?

DID THE EMPLOYER'S TERMINATION OF
GRIEVANT CONSTITUTE A DISCHARGE WITHOUT
JUST CAUSE WITHIN THE MEANING OF ARTICLE
18.1 OF THE PARTIES' COLLECTIVE AGREEMENT?

The Employer phrases the issues somewhat differently but the Arbitrator is satisfied that the positions of the parties concerning the issues in dispute are sufficiently similar, if not effectively identical. The Employer suggests that the issues are:

IS GRIEVANT ENTITLED TO REINSTATEMENT TO
HIS POSITION AS AN ARCHITECT I?

WHETHER GREIVANT WAS TERMINATED OR LAID
OFF?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. MANAGEMENT RIGHTS

2.1 The Association recognizes the right of the Employer to operate and manage its affairs in all respects in accordance with applicable laws and regulations of appropriate authorities. The rights and authority which the Employer has not officially abridged, delegated or modified by the Agreement are retained by the Employer.

2.2 A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the Employer, its overall budget, utilization of technology, and organizational structure and selection and direction and number of personnel.

ARTICLE 3. MAINTENANCE OF STANDARDS

3.1 The parties agree that all conditions of employment relating to wages, hours of work, vacations, and all other general working conditions except as modified by this Agreement shall be maintained at not less than the highest minimum standard as set forth in the Civil Service Rules of the City of Saint Paul (Resolution No. 3250), and the Saint Paul Salary Plan and Rates of Compensation at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

ARTICLE 6. PROBATION

6.1 The probationary period shall be one (1) year for all original and promotion appointees and employees who have been transferred at their own request or reinstated after resigning in the Professional Employees Unit. In the case of a one (1) year probation, the employee's progress report shall be submitted to the Human Resources Director at the end of the fourth (4th) and eighth (8th) month of employment.

.....

6.2 Time served on probation, whether continuous or not, shall be charged to the period of probation.

6.3 If any probationer on fair test shall be found incompetent or unqualified to perform the duties of the portion to which he/she has been certified or transferred, the appointing officer shall report such fact in writing to the Human Resources Office and may, for reasons specifically stated in writing and filed with the Human Resources Office, discharge, reduce, or in the case of a transferee, return to the former position of said probationer at any time during the probationary period;

6.4 If a promotional or a transferee probationer is found unsatisfactory because he/she is incompetent or unqualified to perform the duties of the certified or transferred position, the probationer shall be reinstated to his/her former position or to a position to which the employee might have been transferred prior to such promotion;

ARTICLE 18. DISCIPLINE

18.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- 18.1.1 Written Reprimand;
- 18.1.2 Suspension;
- 18.1.3 Reduction;
- 18.1.4 Discharge

BACKGROUND

Independent School District #65, hereinafter the “EMPLOYER,” or “DISTRICT” is a public employer within the meaning of Minnesota Statutes. The Employer directs and operates the public schools of St. Paul, Minnesota. Classified and unclassified professional employees of the District including but not limited to Architects I, II and III are represented, for purposes of collective bargaining, by the Professional Employees Association, hereinafter referred to as the “ASSOCIATION” or “UNION,” a bargaining unit certified by the Minnesota Bureau of Mediation Services. The Grievant in this

matter was first employed by the District in September of 2003 as a Grade 11 Architect I. The record of the hearing reflects that although Grievant actually applied for a posted Architect II position, he was hired as an Architect I due to budget considerations. On December 13, 2011, following a job study performed by the Employer's Human Resources Department, Grievant was promoted to the position of Architect II. This job study was initiated by Grievant's immediate supervisor, Tom Parent, who noted that Grievant was apparently performing the duties of an Architect II. As noted above, this promotion was subject to a one (1) year probationary period.

Grievant was issued a "six month Summary Evaluation" as an Architect II on 7/19/12 by Parent. This evaluation indicates that Grievant "Meets Standard" and can only be characterized as positive even though the report suggests some areas that could "use significant growth."¹

On December 7, 2012 the Employer and the Association executed a Memorandum of Agreement extending Grievant's probationary period through June 13, 2013. Ten days later, on December 17, 2012, Grievant was given an Employee Supervisory Evaluation Report which is characterized as an "annual review." This document indicates Grievant's last promotion as January 2011. There is no explanation in the record for this apparent discrepancy over the date of Grievant's promotion. The Evaluation Report indicates that Grievant "Meets Standard" in a majority of the areas evaluated but "Needs Improvement" in Interpersonal (skills), Communicating, Decision Making, Motivating and Executing. It further indicates that he "Exceeds Standard" in

¹ Grievant's appointment as an Architect II began 12/13/11. His first appraisal (and apparently the only appraisal during the probationary period) was dated 7/19/12. It was not signed by Parent until 7/26/12 or acknowledged by Grievant until 8/2/12. However, Article 6.1, supra, requires that a probationary employee's progress report be submitted to the Human Resources Director at the end of the 4th and 8th month of employment.

Learning. Overall, Grievant is rated as needing improvement and a work plan was to commence on December 7, 2012 with a ninety day follow-up on June 13, 2013.²

Grievant was issued another Summary Evaluation on May 29, 2013 indicating that his performance was “Below Standard” and that he was specifically “Below Standard” in five evaluation areas, “Standard” in six evaluation areas, and “Exceeds Standard” in one evaluation area. He was also given a letter from Parent on the same day which states, in relevant part:

You are hereby informed that you are discharged from employment with the Saint Paul Public Schools effective June 3, 2013, within the probationary period of your position. This action is pursuant to Article 6, PROBATION, of the labor agreement covering Architect IIs.

The Association responded with a grievance letter from Association Counsel Mike Wilde to Labor Relations Assistant Manager Joyce Victor dated June 4, 2013. This letter asserts that Grievant was terminated in violation of Articles 3, 6.4, and 18.1 of the collective agreement and that Grievant’s “discharge is without just cause.” Indeed, the response maintains that Grievant “has served the Employer for nearly a decade without any discipline.” In remedy, the grievance letter requests that Grievant be “reinstated with full back pay and all related seniority rights and benefits.”

The Employer answered in a letter to Wilde from Victor dated July 12, 2013. This letter states that there were “significant concerns” regarding Grievant’s performance, notes the above extension of probation, maintains that it “was determined on June 13, 2013” that Grievant “had not satisfactorily improved and was terminated during the probation period.” The District’s response states that:

² Obviously June 13, 2013 is well after the 90 day period apparently required by Part V (Potential Evaluation Improvement) of the Supervisory Evaluation Report of 12/17/12. (Employer Exhibit #12.)

The District does currently have the Architect promotional series, however the Architect 1 position is not vacant or populated with anyone less senior or otherwise. The work of the Architect 1 position no longer exists and the business need is for Architect 2 positions. Mr. H would hold recall rights to the position of Architect 1 for two years as outlined in the labor agreement, Article 7, Seniority and Civil Service Rules if an Architect 1 position becomes available. The District also asserts that Mr. H was given ample opportunity and notice to correct his performance issues during his probation period as Architect 2.

Therefore, I conclude there is not a vacancy for demotion to the position of Architect 1. The probationer was terminated during probation of the Architect 2 position under the terms of the labor agreement and Civil Service Rules and there were no violations.

Grievance denied.

The grievance was appealed to Step 3 of the grievance procedure by the Association on July 13, 2013. The letter of appeal also requested certain information from the Employer relevant to the grievance. The appeal was denied and, following an unsuccessful attempt to mediate the dispute, the grievance was advanced to arbitration as provided for in Article 19 of the parties' collective agreement. There is no contention that the grievance was untimely filed or processed. Accordingly, it is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer takes the position that Grievant's termination was effectively a lay off since he failed to qualify for permanent employment as an Architect II and his former position as an Architect I had been rendered redundant by a reorganization of the work performed by Architects employed by the District. Accordingly, there was no Architect I position for him to be reinstated to. In this connection the Employer argues that work

assigned to Architect IIs was “bundled” or re-structured between 2010 and 2012 so that these architects were required to perform larger and more complex tasks. The Employer maintains that the above re-structuring was wholly within its sole discretion under the retained rights provision of Article 2.1. The Employer further takes the position that since Grievant did not satisfactorily complete probation and there was no Architect I position for him to return to, he must be considered laid off and is only entitled to recall rights for two years as set forth in Article 7.5 of the parties’ agreement. The Employer rejects the Association’s contention that Grievant was discharged and argues that it has no obligation to demonstrate just cause for its actions.

The Association takes the position that, assuming arguendo that the Employer properly terminated Grievant from his probationary appointment as an Architect II, the plain meaning of Article 6.4 or the parties’ agreement requires that Grievant be returned to his prior position as an Architect I. Such a conclusion, the Association argues, is supported by bargaining history. The Association further argues that the specific language of Article 6.4 modifies the District’s claim based on Management Rights. To sustain such a claim would result in an absurd outcome likely to deter bargaining unit members from accepting promotional offers. The Association further takes the position that Grievant’s successful nine year career as an Architect I for the District together with the District’s own job study effectively satisfies his probation. Finally, the Association contends that the District’s misuse or mischaracterization of Grievant’s termination as a lay off is an alternative attempt to discharge Grievant without just cause. Accordingly the Association asks that the grievance be sustained.

DISCUSSION AND OPINION

A critical issue in this dispute is the question of whether Grievant was discharged or laid off as the Employer contends. It cannot be denied that the letter terminating Grievant makes no reference whatsoever to lay off or is lay off mentioned in the grievance letter.³ Lay off is not even alluded to, and then indirectly, until the District's answer to the grievance which suggests only that Grievant would "hold recall rights to the position of Architect I for two years as outlined in the labor agreement, Article 7, Seniority and Civil Service Rules is an Architect I position becomes available."⁴ Indeed, it would appear that the contention that Grievant was laid off was not raised until the instant arbitration hearing. On the contrary, the termination letter clearly states that Grievant was "discharged from employment with the Saint Paul Schools effective June 3, 2013." It is therefore extremely difficult for the Arbitrator to accept the District's belated contention that Grievant was laid off rather than discharged. The dubious argument that the District viewed Grievant's termination as a lay off is further weakened by the fact that it never gave him a notice of layoff as required by its own Civil Service Rules.

Particularly relevant is the role of the District's Manager of Facility Planning, Tom Parent. The record reflects that it was Parent who first recognized that Grievant was already performing Architect II work in October of 2011 and requested that a job study be conducted. (Employer Exhibit #8) Further, the parties stipulated at the hearing that Grievant was effectively performing his duties at the time. The results of this job study

³ Employer Exhibits #4 and #5.

⁴ The Civil Service Rules require that "the appointing officer shall give two weeks notice to any employee being laid off, except in cases of seasonal, temporary, intermittent or similar employment or in a cases of unforeseeable lack of work or funds." No such notice was ever given to Grievant.

confirmed Parent's perception that Grievant was, indeed, doing Architect II work. (Employer Exhibit #3) It was also Parent whose evaluation of Grievant's performance in July of 2012 indicated that Grievant was meeting the standards expected of an Architect II. At this point it would appear that Grievant had been satisfactorily performing the work of an Architect II for nearly a year and possibly longer. However, it was also Parent who five months later apparently determined that Grievant's work was no longer meeting the standards of an Architect II and extended the probationary period. It cannot be determined from the record what, if anything, occurred during this apparently critical five month period to change Parent's perception. Parent was not called to testify by the Employer. The Arbitrator can therefore only draw an adverse inference from Parent's failure to testify and explain his role in this matter or provide evidence of Grievant's below standard performance after July of 2012. While District Facilities Director Sara Guyette did credibly testify concerning the re-organization of the work performed by Architects which occurred between 2010 and 2012 and noted that Grievant had experienced problems with "communication, follow-up and inability to advocate on the part of the owner," she did not directly supervise Grievant from 2011 (when Parent was hired as her subordinate) to 2013, and her last evaluation of Grievant as a direct report in June of 2010 indicates that his work was at or above standard. (Employer Exhibit #18)

Grievant's probationary period and the conduct thereof by the District is problematic. Following the above noted job study, Grievant was placed on probation as an Architect II for one year despite the fact that he had already been performing Architect II work for some time. Article 6.1 of the labor agreement provides that "in the case of a one (1) year probation, the employee's progress report shall be submitted to the Human

Resources Director at the end of the fourth (4th) and eighth (8th) month of employment. No such progress reports were offered into evidence by the Employer and the Arbitrator can only conclude that they were never submitted. Likewise the probation extension document (Employer Exhibit #12) requires a ninety day follow up from the start date of December 7, 2012, but no document or testimony evidencing such follow-up was offered. At the very least, these apparent failures on the part of the Employer to follow its own requirements lend credence to the Association's contention that Grievant was unaware that his job was in jeopardy and suggest a lack of evidence that Grievant was afforded a fair test regarding his competence and qualifications. Indeed it would appear that the probationary period, as here utilized by the Employer, was little more than a device used to justify Grievant's termination without showing just cause.

Given the foregoing discussion it is readily apparent that, as the Association argues, Grievant demonstrated through his performance over several years that he successfully performed the duties of an Architect II, even though he may not have fully met the expectations of his supervisors. It is further apparent that the District's attempted to mischaracterize Grievant's termination as a lay-off was rather an attempt to subvert the job security provisions and the just cause requirement of the collective agreement. It is also true that the Employer's decision to terminate Grievant from probation and then maintain that his former position no longer exists can only be viewed as a thinly veiled attempt to avoid the just cause provision of the agreement and replace Grievant with another candidate deemed better qualified or otherwise more suitable from the Employer's perspective. The Arbitrator is therefore compelled to find that Grievant was constructively discharged in violation of Article 18 of the parties' collective agreement.

The Arbitrator has made a detailed review and analysis of the entire record in this matter and has given full and due consideration to the post-hearing briefs submitted by the respective parties. Further, he has determined that certain other issues and arguments which arose in these proceedings must be deemed immaterial, irrelevant or side issues at the very most, and therefore has not afforded them any significant treatment, if at all, for example: whether or not the functions of the Architect I position were merged into the Architect II functions ⁵; whether or not Grievant was primarily assigned to stand alone projects prior to the Employer's reorganization of Architect duties; whether or not Grievant was offered recall rights to the Architect I position; whether or not Grievant experienced personnel stress related to his Father's illness during the probationary period; whether or not layoff is a "hot-button" issue for bargaining unit members; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective agreement, the evidence clearly and convincingly establishes that the Employer did not lay Grievant off but rather constructively discharged him.

Accordingly, an award will issue, as follows:

⁵ Indeed, the Arbitrator is fully in concurrence with Arbitrator Lundberg's opinion that the Arbitrator has no jurisdiction over the District's organizational structure.

AWARD

THE EMPLOYER TERMINATED GRIEVANT WITHOUT JUST CAUSE AND IN VIOLATION OF ARTICLES 6 AND 18 OF THE PARTIES COLLECTIVE AGREEMENT. THE GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED WITH BACK PAY TO HIS POSITION AS AN ARCHITECT II EFFECTIVE JUNE 3, 2013 WITH NO LOSS OF SENIORITY OR BENEFITS. THE AMOUNT OF BACK PAY DUE WILL BE REDUCED BY ANY UMEMPLOYMENT COMPENSATION OR OUTSIDE EMPLOYMENT AS AN ARCHITECT RECEIVED DURING THE PERIOD OF HIS TERMINATION.

JOHN REMINGTON, ARBITRATOR

February 7, 2014

Minneapolis, MN