

faith reorganization that is within the Employer's managerial authority. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer violate the parties' collective bargaining agreement when it laid off Investigators Patricia Labrocca and Gail Schiff?

RELEVANT CONTRACT LANGUAGE

Article 5 Employer Rights

It is recognized that except as specifically modified by this Agreement, the Employer retains all inherent managerial rights and any rights and authority necessary to operate and direct the affairs of the Employer and its agencies in all its various aspects. These rights include, but are not limited to: determine its policies, functions and programs; determine and establish budgets; utilize technology; select, assign, direct, evaluate and promote employees, to plan, direct and control all operations and services of the Employer

Article 8 Discipline and Discharge

Section 1. Purpose. Disciplinary Action may be imposed only for just cause and shall be corrective where appropriate.

Article 16 Vacancies, Filling of Positions

Section 5, Reclassification. Employees may submit requests for job audits directly to Minnesota Management and Budget, or their own Appointing Authority if it has delegated classification authority

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Minnesota Management & Budget or an Appointing Authority with delegated classification authority, shall notify the Association President regarding any class studies they plan to undertake. Prior to the actual implementation of any class study results, the

Association shall be offered the opportunity to meet and confer with the appropriate authority regarding the results and the implementation plans.

A. Effect of Change in Allocation on the Filling of Positions. When the allocation of a position has been changed as the result of changes in the organizational structure of an agency or abrupt changes in duties and the responsibilities of this position, such position shall be considered vacant under the provisions of this article and filled in accordance with Sections 1-4.

B. Effective of Reallocation on the Filling of Positions. When the allocation of a position has been changed as a result of changes over a period in time in kind, responsibility or difficulty in the work performed in a position, such situation shall be deemed a reallocation and not considered a vacancy.

The incumbent employee shall be appointed to the reallocated position provided the employee has performed satisfactorily in the position and possesses any licensure, certification, or registration which may be required.

Article 17 Layoff and Recall,

Section 1. Definition of Layoff. An appointing Authority may layoff an employee by reason of abolition of the position, shortage of work or funds, or other reasons outside the employee's control, not reflecting discredit on the service of the employee.

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Section 3. Permanent Layoff

A. Layoff Procedures.

1. Determination of Positions. The Appointing Authority shall determine the position(s) in the class or class option if one exists and the employment condition and work location which is to be eliminated.

FACTUAL BACKGROUND

The grievants in this proceeding are two long-term Investigators employed by the Minnesota Board of Psychology. The Board first hired Ms. Labrocca in 1995, and she has worked as an Investigator since 1998. The Board hired Gail Schiff in 2001, and she has worked as an Investigator since 2004.

These two Investigators, supported by an Office and Administrative Specialist (OAS), constituted the Board's Complaint Resolution Unit. This unit was charged with investigating complaints alleging that psychologists licensed by the Board had violated provisions of the Psychology Practice Act.

The grievance has its origin in the Employer's decision to layoff the two Investigators on November 2, 2012. On that day, the Board's Executive Director, Angelina Barnes, hand-delivered a letter to each grievant stating that the layoffs were due to a "shortage of funds and in order to strategically align the Board's work and finances." Each grievant was immediately escorted out of their work location. One working day later, on November 5, 2012, the Board posted a vacancy announcement for a new Investigative Senior position. In December 2012, the Board hired Scott Payne, a retired St. Paul police officer, to fill this position.

The Union filed a grievance on November 21, 2012, claiming that the Employer violated the parties' collective bargaining agreement by eliminating the grievants' positions. The Employer denied the grievance which has now advanced to this arbitration proceeding.

At the arbitration hearing, the grievants testified to their belief that the layoffs were not a bona fide reorganization, but rather a ruse to terminate the grievants without having to comply with the collective bargaining agreement's just cause requirement. Ms. Schiff testified that she believed that Ms. Barnes laid her off because she did not appreciate Schiff's talents and wanted a younger, more loyal worker. Ms. Labrocca testified that Ms. Barnes disliked her and that they had a contentious relationship. Schiff and Labrocca testified that Barnes has attempted to "clean house" since she became Executive Director in 2009, and that she has accomplished a more than 100% turnover in staff employees. In its post-hearing brief, the Union states that "Ms. Barnes' human resources management style can rightly be described as a complete train wreck."

The grievants also testified that the duties currently being performed by Mr. Payne, the Senior Investigator, are substantially similar to those previously performed by the two Investigators. According to Ms. Labrocca and Ms. Schiff, both classifications investigate complaints, work with the Attorney General's Office on the more serious cases, perform policy analysis, and engage in outreach and education activities.

Ms. Labrocca further testified that the Investigator Senior position pre-dates the 2012 posting. Ms. Labrocca testified that in 1998 an employee who previously served as an Investigator was "reallocated" to the higher classification of Investigator Senior. Ms. Labrocca stated that the employees in the two classifications performed similar duties, but that the higher classification reflected greater seniority.

In her testimony at the hearing, Ms. Barnes painted a very different picture. She described a lengthy consultative process leading up to the reorganization that triggered the two layoffs. The process allegedly began in April 2011 with a situation assessment of the Board's work by the Management Analysis Division of Minnesota Management and Budget (MMB). In January 2012, Barnes met with human resources and budget staff to discuss issues associated with a possible reorganization of the Complaint Resolution Unit. In May of that same year, Barnes presented a reorganization plan to the Board's Administrative Committee. The plan proposed to replace the duties of the two Investigators with a single higher classified Investigator Senior position and with certain administrative tasks delegated to a lower classified OAS position. In June, 2012, Ms. Barnes submitted an audit request to MMB seeking authorization for the new Investigator Senior position which MMB subsequently approved.

According to Ms. Barnes' testimony, the "tipping" point for implementing the reorganization plan occurred in August 2012 when budget instructions for fiscal year 2014

required each department to include proposals for a five percent budget reduction. Ms. Barnes testified that the combination of organizational and budgetary incentives persuaded her that the time for the contemplated reorganization had arrived, and she briefed the Administrative Committee about such plans in September. Ms. Barnes also discussed the potential need for layoffs with MAPE representative Mike Asmus in September and raised the likelihood of layoffs at an October 16 staff meeting. Neither discussion, however, identified the likely layoff targets.

Ms. Barnes also provided testimony comparing the duties of the new Investigator Senior position with the previously existing Investigator positions. She testified that Mr. Payne is expected to perform higher-level duties such as serving as a lead worker for the OAS position and engaging in more advanced policy development and outreach activities. In terms of investigation procedures, Ms. Barnes and Mr. Payne testified that the Senior Investigator is now expected to conduct face-to-face interviews and to prepare detailed investigative reports, activities that the grievants did not regularly perform prior to the layoffs.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer violated the parties' collectively bargaining agreement when it laid off the grievants for an impermissible reason. Pursuant to the agreement, an appointing authority may lay off an employee due to a legitimate position abolition, but not for a reason that “reflect[s] discredit on the service of the employee.” In this instance, the Employer's claimed reliance on budgetary and organizational factors rings hollow in that the purported budget crisis never materialized and the alleged reorganization simply replaced two employees with another who performs substantially similar duties. The Union maintains that the Employer's true motivation was to shed two employees for whom she had a personal dislike

without complying with the agreement's just cause provision. The Union additionally argues in the alternative that the Employer should have reallocated at least one of the existing Investigator positions rather than treating the new Investigative Senior position as a vacancy.

Employer:

The Employer asserts that it has the right to lay off employees for legitimate organizational reasons. Here, the Employer had two legitimate incentives for its actions: a threatened budgetary shortfall and the potential that a reorganization would improve the Board's efficiency and effectiveness. In contrast, the Union's speculation that the layoffs resulted from a non-legitimate motive has little evidentiary support in the record. Finally, since the new Investigator Senior position performs duties at a higher level than those previously performed by the grievants, the latter had no claim of right to the new position approved by MMB.

DISCUSSION AND OPINION

I. The Layoff Decision

As with any contract interpretation case, the proper starting point for analysis is with the language of the parties' collective bargaining agreement. In this regard, Article 17, Section 1 provides as follows with respect to layoffs:

An appointing Authority may layoff an employee by reason of abolition of the position, shortage of work or funds, or other reasons outside the employee's control, not reflecting discredit on the service of the employee.

The Employer maintains that it acted in accordance with this provision in laying off the grievants for budgetary and organizational purposes. The Union disagrees, claiming that the Employer's actions were disguised terminations without cause.

A. The Budgetary Rationale

The Employer asserts that a major motivation for its layoff decision was a projected budgetary shortfall. In August 2012, the Governor's office sent out budget instructions for fiscal year 2014 that directed each state agency to submit a proposed budget that included a five percent reduction in spending. Executive Director Barnes testified that these instructions were a motivating factor in deciding to reduce spending by replacing two Investigator positions with one Investigator Senior position and one lower paying OAS position. The Union disputes this contention, pointing out that the layoffs occurred approximately eight months prior to the beginning of the new fiscal year and that, in any event, the budgetary reduction was never implemented.

Article 17, Section 1 authorizes an appointing authority to premise a layoff due to "shortages of funds." The Union argues that such a shortage must actually exist and not be merely hypothetical in nature. In this instance, however, the possibility of a budget reduction was more than hypothetical; it was on the drawing board. An appointing authority should not have to wait until their finances actually dip into the negative side of the ledger before taking ameliorative action. I conclude that a layoff taken in anticipation of a likely shortage of funds comes within the language and purpose of Article 17, Section 1.

B. The Reorganization Rationale

The Employer additionally claims that the layoff decision was part of a reorganization designed to improve the efficiency and effectiveness of the Complaint Resolution Unit. Executive Director Barnes testified that she consulted with various parties - both internally and externally - to determine the best structure for the Complaint Resolution Unit. Ultimately, she reached the conclusion that having two Investigators perform the same set of functions was

redundant. She decided that it would be more efficient to abolish the Investigator positions, reassign some of the lower level functions to the OAS position, and create a new Investigator Senior position charged with performing higher level functions.

The Union claims that the alleged reorganization plan was a ruse to get rid of the grievants. In support of this claim, the Union elicited testimony from both Ms. Labrocca and Ms. Schiff to the effect that duties performed by Mr. Payne in the Investigator Senior position are essentially the same as those previously performed by the grievants. These duties include investigating complaints, working with the Attorney General's office on the more serious cases, and engaging in outreach and education activities.

While the two positions certainly share many similar attributes, the new Investigator Senior position operates at a higher level. Unlike the prior Investigators, Mr. Payne conducts face-to-face interviews and prepares detailed investigative reports. His work duties also depart from those performed by the grievants in terms of acting as a lead worker for the OAS position and engaging in more advanced policy development and outreach activities. The fact that MMB approved the Investigator Senior position as a distinct, more highly rated classification provides strong evidence that the new position is not simply a carbon copy of the laid off positions.

A legitimate reorganization is a permissible basis for a layoff pursuant to Article 17, Section 1 of the parties' agreement. The only exception would be if the principal motivation for such action is one that "reflect[s] discredit on the service of the employee," an issue addressed in the following section.

C. Disguised Terminations

The Union's principal contention in this grievance is that the Employer disguised the termination of the grievants as layoffs. If, indeed, it could be shown that the Employer's true

motive was to get rid of the grievants due to personal animosity or poor performance, such an action would be lawful under the collective bargaining agreement only if the Employer could show that such action was supported by just cause.

Each of the grievants testified that they had a strained relationship with Executive Director Barnes and that they believe that Barnes engineered the reorganization as excuse to terminate two employees she disliked. The grievants also testified to what they perceive as a pattern of conduct by which Barnes has either terminated or pushed out virtually all of the staff that she inherited. In this regard, the record indicates that there has been more than a 100 per cent turnover of agency employees since Ms. Barnes became Executive Director in 2009. For her part, Ms. Barnes denies that personal or other non-legitimate motivations played any role in the reorganization decision.

From an evidentiary standpoint, the burden is on the Union to establish that the layoffs were, in fact, disguised terminations. But the record is devoid of any evidence to support that conclusion beyond the opinion testimony of the grievants. It may well be true that Ms. Barnes has a contentious management style, but that alone is insufficient to overcome the tangible evidence in support of what appears to be a genuine reorganization.

II. Reallocation

The Union alternatively argues that the Employer should have reallocated at least one of the existing Investigator positions rather than treating the new Investigator Senior position as a vacancy. The governing contract provision, Article 16, Section 5B, states as follows:

When the allocation of a position has been changed as a result of changes over a period in time in kind, responsibility or difficulty in the work performed in a position, such situation shall be deemed a reallocation and not considered a vacancy.

The incumbent employee shall be appointed to the reallocated position provided the employee has performed satisfactorily in the position and possesses any licensure, certification, or registration which may be required.

The Union points out that in 1998, the Employer reallocated a then existing Investigator position to a higher grade Investigator Senior position. The Union argues that this precedent should have been followed in 2012, with Ms. Labrocca's more senior Investigator position reallocated as an Investigator Senior position.

The problem with this argument is that the contract language does not support it. The reallocation language of Article 16 contemplates a situation in which a position slowly morphs over time by gradually assuming more demanding tasks. That, however, is not what happened in this case. Here, the change in duties did not evolve over time but instead resulted from a planned and abrupt change in duties and classification. Pursuant to Article 15, Section 5A, such a change results in a vacancy to which current employees have no claim of right:

When the allocation of a position has been changed as the result of changes in the organizational structure of an agency or abrupt changes in duties and the responsibilities of this position, such position shall be considered vacant under the provisions of this article and filled in accordance with Sections 1-4.

In sum, the contract's reallocation provision is inapplicable to the instant dispute.

AWARD

The grievance is denied.

Dated: December 31, 2014

Stephen F. Befort
Arbitrator