#1898

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/DRC

Before: Robert G. Stein

Grievant(s): Jason Owens
Case # 15-00-041130-0136-01-09

Advocate(s) for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on June 12, 2006 in Westerville, Ohio. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. In lieu of making oral closings, the parties submitted written closings.

ISSUE

The parties stipulated to the following issue:

Did the employer violate the Collective Bargaining Agreement as cited in the grievance when it demoted him from his position as an Electronic Design Coordinator? If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

BACKGROUND

The Grievant in this matter is Jason Owens (hereinafter "Grievant" or "Owens") who has been employed by the Ohio Department of Safety (hereinafter "Employer" or "Department") since 2001. The central issue in this case involves the Grievant's probationary removal from the position of

Electronic Design Coordinator. The Grievant originally applied for the position of Electronic Design Coordinator in 2002 during which time the Employer, based upon the Grievant's application, determined Owens did not meet the minimum qualifications for the position. Owens grieved the actions of the Employer, which eventually was resolved at the Non-Traditional arbitration step of the grievance procedure. At the urging of Arbitrator Pincus, the parties reached a settlement agreement to promote the Grievant to the position of Electronic Design Coordinator, which involves serving a probationary period.

According to the Employer, the Grievant was given every opportunity during his probationary period to acclimate to the position of Electronic Design Coordinator. The Employer asserts that it also attempted to give the Grievant considerable help and assistance, including a performance improvement plan to clarify what he was expected to do in order to retain his promotion. The Employer's attempts failed to assist the Grievant in the performance of his job as Electronic Design Coordinator, and he was eventually removed from the position. The Employer asserts it has every right to use its discretion to determine the ability of a newly promoted employee to successfully perform in a position. The Grievant claims he was treated in a disparate manner and was not given a reasonable opportunity to succeed during his probationary period.

SUMMARY OF UNION'S POSITION

The Union argues that from the very start of his probationary period the Grievant "was destined not to make it through his probationary period." The Union further asserts that unlike his peers, the Grievant was held to a higher standard of performance utilized for the purpose of determining whether he could successfully perform in the position of Electronic Design Coordinator. The Grievant and the Union acknowledge that the Grievant's supervisor had to make corrections to his layout design, but contend that changes of this nature are not uncommon in this type of work and do not prove his inability to successfully perform as an Electronic Design Coordinator. The Union asserts that what the Employer calls a lack of talent by the Grievant simply represents aesthetic differences.

The Union also contends that the Grievant's performance evaluations were not objective, fair, or impartial. The Union asserts that the Grievant and his immediate supervisor were not active participants in the evaluations or in the Performance Improvement Plan as called for by the Employer's own policy. The Union points out that during his 180 day probationary period the Grievant understood his duties, was cooperative, completed all of his assignments, and did not receive any complaints from his customers.

Based upon the above and the record produced at the hearing, the Union urges the Arbitrator to grant the grievance.

SUMMARY OF EMPLOYER'S POSITION

The Employer flatly denies the accusations of the Grievant in this matter. It asserts that supervision harbored no animus toward the Grievant and that it wanted him to successfully complete his probationary period. The Employer further argues that supervision invested a considerable amount of time and effort in providing assistance to the Grievant in order for him to successfully complete his probationary period. The Employer argues that the Grievant and the Union failed to provide any evidence that other similarly situated employees were provided more training, assistance, constructive feedback or were treated with greater more leniency than the Grievant.

The Employer contends that while providing reasonable assistance to the Grievant on numerous occasions, it was not wiling to provide the Grievant with fundamental skill training in areas in which he should have already possessed the fundamental skills to perform the job of an Electronic Design Coordinator. The lack of fundamental skill in performing the job of Electronic Design Coordinator caused the Grievant to produce work of an inferior quality, argues the Employer. The Employer simply asserts the Grievant "was not able to do the job."

Based upon the above and on the record produced at the hearing, the Employer urges the Arbitrator to deny the grievance.

DISCUSSION

In the instant matter the Grievant asserts he met the minimum qualifications for the position of Electronic Design Coordinator and that he received "inadequate training," faced a "hostile work environment," and was treated in a disparate manner (see Joint Exhibit B, grievance). He claims the Employer violated Articles 22.03, 24.03 of the Agreement in regard to his performance evaluations and treatment by supervision.

Article 5, Managements Rights, and Article 6, Probationary Employees, contained in the Agreement, provides the Employer with considerable latitude to judge the fitness and ability of an employee to successfully complete their promotional probationary period. The Agreement thereby vests in the Employer broad discretion to manage its business operations, subject to the specifically negotiated rights, benefits, or protections granted to the Association in the Agreement.

> In reviewing an employer's exercise of discretion, it is not an arbitrator's function to substitute his independent judgment for that of the employer. Rather, an arbitrator is limited to determining whether an employer's decision is within the reasonable range of discretion, is not arbitrary or capricious, and was not motivated by anti-union animus or another improper reason.

Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264, 115 LA 190 (Landau 2001).

"While it is not an arbitrator's function to second-guess management's determination as to a grievant's qualifications, he does have an obligation to make certain that a determination was reasonably fair and non-arbitrary." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 1, Local 1699*, 92 LA 1209 (2002). While one of the most firmly established principles in labor relations is that management has a right to direct its work force, the Association and the Grievant have a reciprocal right or duty to challenge managerial actions perceived by the latter to have been ill-founded, arbitrary, or capricious. *Minn. Mining and Mfg. Co and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 LA 1055 (1999). The only circumstances under which an employment decision imposed by management may be legitimately set aside by an arbitrator are those where discrimination, unfairness, bad faith, or capricious or arbitrary action is proved—in other words, where there has been an abuse of discretion." Where contracts make the employer the sole judge in determining fitness and ability of employees for bid positions, management's action must not be capricious, arbitrary, or unreasonable." *Hussman Corp., IC Indus. Co. and United Steelworkers of Am., Local 9014*, 84 La 23 (1984). In the matter at hand the Grievant is asserting that the Employer's actions were arbitrary,

capricious, and unreasonable and that he was treated in a disparate fashion.

While the facts demonstrate that the Employer initially took a firm position that the Grievant was not qualified for the promotion of Electronic Design Coordinator position, it also demonstrates that the Employer eventually agreed to place the Grievant in the position following a grievance settlement/NTA award. Whether the Employer harbored resentment in having to agree to promote the Grievant and subsequently acted in hostile and unreasonable manner is certainly basis for speculation. However, in arbitration it is proof and not speculation that matters.

I find the Union has failed here to establish a *prima facie* case indicating that the Employer has actually violated any Agreement provision. A grievant must produce sufficient evidence that furnishes a reasonable basis for sustaining his/her claim. *Kata v. Second Nat'l the Bank of Warren*, 26 Ohio St.2d 210, paragraph 2 of syllabus, 271 N.E.2d 292in (1971). A party who by necessity must prove the existence of a fact is obligated to do so by a preponderance of the evidence. *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928). The burden of proof was on the Union and Grievant to demonstrate that the Employer's challenged decision that the Grievant was not able to perform the work of an Electronic Design Coordinator demonstrated a violation of the Employer's

duty or the Grievant's rights under the Agreement. The Union has here failed to sustain that requisite burden of proof and has failed to prove that the Employer, following a reasonable and contractually adherent period of probationary observation, acted in an unreasonable, arbitrary, or capricious manner in determining the Grievant was not able to perform the job requirements of the position of Electronic Design Coordinator.

It is the role of an arbitrator to observe the witnesses and determine who is telling the truth. *Givaudin Corp.*, 80 LA 835, 839 (Deckerman 1983).

> The arbitrator must look beyond actual testimony and search to expose any bias or motivation for the testimony given. Where there is a conflict in testimony, this does not necessarily mean that any party may be deliberately misrepresenting or falsely testifying. Hearings may be replete with good faith conflicting testimony as to what the witnesses thought they heard or saw.

Am. Baking Co., Merita Div. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local No. 28, Dist. 65, 87-1 Lab. Arb. Awards (CCH) P 8176 (Statham 1986). In addition to determining the credibility of witnesses, the arbitrator also determines the weight to be accorded the evidence submitted by the parties. *Minn. Teamsters Pub. and Law Enforcement Employees Union, Local No. 320 and City of Champlin, State of Minn.*, 00-2 Lab. Arb. Awards (CCH) P 3499 (Berquist 2000). Because reliability resolution is often the most difficult fact for any fact-finder to resolve, it is proper to take into account the appearance, manner, and demeanor of each witness while testifying, his apparent frankness and intelligence, his capacity for consecutive narration of acts

and events, the probability of the story related by him, the advantages he appears to have had for gaining accurate information on the subject, the accuracy or retentiveness of his memory as well as the lapse of time affecting it, and even the intonation of his voice and his positiveness or uncertainty in testifying. *Racing Corp. of West Virginia d/b/a Tri-State Race and Gaming and United Steelworkers of Am., ALF-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3625 (Frockt 2000).

I found the testimony of management witnesses, which included a fellow bargaining unit member, to be probative and for the most part credible. The testimony of the Employer's witnesses contained the important element of specificity that was not refuted by the Grievant in any specific or substantial manner. In contrast, the Grievant's direct testimony was far more general and at times vague. Moreover, it was for the most part accusatory in nature, focusing on what he perceived was the bias of those supervisors and employees in the department and did not convincingly impart what knowledge or skill he possessed to do the job. The weight of the Employer's witnesses' testimony demonstrated that a considerable amount of assistance was given to the Grievant in performing his work. It is also clear that in several instances the Grievant sought help in areas where he lacked fundamental knowledge regarding the basic application of software, such as Pagemaker, in order to perform what appears to be typically routine work of an Electronic Design

Coordinator. For example, during the hearing, fellow employee and management witness, Kristine Marple, testified,

"The training I had to do with the Grievant was more like teaching rather than orienting to procedures. "I have never had to give such training to college interns, who come into the department with knowledge Grievant did not have"

It is very apparent that the job of Electronic Design Coordinator requires careful attention to detail and accuracy. It also requires the possession of design skills, that witness Molly Bush, like Kristine Marple, indicated many of her college students possessed, but that the Grievant lacked. While it is very plausible that the manner in which the Grievant was promoted to the Electronic Design Coordinator position caused him to have to overcome a strong perception that he had to "prove himself," there is little evidence in the record to demonstrate he knew enough and was sufficiently skilled to successfully perform the work of an Electronic Design Coordinator in accordance with acceptable standards, or for that matter, as well as the performance of some college interns who performed this type of work.

The above findings are not intended to state that the Grievant will never possess the requisite skills to perform the work of an Electronic Design Coordinator. This decision, as is typical of most arbitration decisions, focuses upon the facts in play at the time and the Employer's actions in response to those facts. There is no evidence to demonstrate that the Employer took action in this case that treated the facts in an

arbitrary fashion or violated the Collective Bargaining Agreement. The evidence supports the Employer's position that at the time of his promotion the Grievant lacked basic skills and knowledge to be able to successfully perform the work of an Electronic Design Coordinator.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 8th day of September, 2006.

Robert G. Stein, Arbitrator