

IN THE MATTER OF THE ARBITRATION BETWEEN

The State Library of Ohio

DRC-2019-00131-10

and

State Council of Professional Educators,  
OEA/NEA

Grievant, Sharon Douglass

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ARBITRATOR: Meeta A. Bass  
AWARD DATE: November 8, 2019

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**APPEARANCES FOR THE PARTIES**

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**UNION:**

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## **PROCEDURAL HISTORY**

The State Library of Ohio is hereinafter referred to as the "State" or the "Employer". The State Council of Professional Educators, OEA/NEA is hereinafter referred to as the "Union." Sharon Douglass is hereinafter referred to as the "Grievant".

Grievance No. DRC-2019-00131-10 was submitted by the Union to the Employer in writing on January 10, 2019 pursuant to the parties' Collective Bargaining Agreement hereinafter referred to as the "CBA." Following unsuccessful attempts at resolving the grievance, the Union requested that the grievance be advanced to arbitration.

Pursuant to the CBA between the Employer and the Union, the parties have designated this Arbitrator to hear and decide certain disputes arising between them. The parties presented and argued their positions on November 5, 2019 at the offices of Ohio Educators Association located at 225 East Broad Street, Columbus, OH 43215.

The parties stipulated to the issue to be resolved as follows:

Did the State violate the Collective Bargaining Agreement when it failed to recall Sharon Douglass? If so, what shall the remedy be?

The parties stipulated to the following facts:

1. The Grievance is properly before the Arbitrator.
2. Grievance was initially hired by the State of Ohio on June 25, 2006.
3. Grievant's start date was June 29, 2006.
4. Grievant's Classification was Librarian 2 (Technical Services).
5. Grievant was in pay range 11 at step 7.
6. Grievant had 11-years, 2-months, and 9-days of service.
7. Grievant's last day, per the Voluntary Layoff was September 1, 2017.
8. Grievant's layoff was effective September 2, 2017.
9. The date Grievant's Layoff Agreement expired was September 2, 2019.

During the course of the arbitration hearing, both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witness, and oral argument. The following individuals testified at the hearing:

Mr. Dominic Marsano, Past Union President

Ms. Sharon Douglass, Grievant

Ms. Stephanie Herriott, Human Capital Management Manager

Ms. Jamie Pardee, Chief Fiscal Officer

### **Joint Exhibits**

1. Joint Exhibit 1- Agreement Between the State of Ohio and State Council of Professional Educators OEA/NEA 2018-2021("Contract")
2. Joint Exhibit 2 - Copy of Grievance Snapshot DRC-2019-00131-10 (Pages 1-3)
3. Joint Exhibit 3- Librarian 2 (Technical Services) Job Posting (Pages 4-5)
4. Joint Exhibit 4- Grievance's Layoff/DisplacementForm, ADM 4138 (Pages 6-7)

### **Employer Exhibits**

1. Employer Exhibit 1- General Revenue Fund (GRF) Budget
2. Employer Exhibit 2- Librarian 2 Comparison

### **Union Exhibits**

1. Union Exhibit 1- Email correspondence between Dominic Marsano and Stephanie Herriott dated October 16, 2018.
2. Union Exhibit 2- News Letter, "State Library Addresses 13.57% Reduction in Ohio General Revenue Fund (GRF) Appropriations for FY 2018 and FY2019."
3. Ball letter dated June 29, 2018

The parties gave oral closings, and the the record was closed. The parties agreed that the award would be submitted on Friday, November 8, 2019.

## **PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT AND DEPARTMENT POLICIES**

### **ARTICLE 3 - MANAGEMENT RIGHTS**

#### **3.01 - Management Rights**

The Association agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer. Accordingly, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees for just cause; 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees; 5) make any and all rules and regulations; 6) determine the work assignments of its employees; 7) determine the basis for selection, retention and promotion of employees to or for positions not within the bargaining unit established by this Agreement; 8) determine the type of equipment used and the sequences of work processes; 9) determine the making of technological alterations by revising the process or equipment, or both; 10) determine work standards and the quality and quantity of work to be produced; 11) select and locate buildings and other facilities; 12) transfer or subcontract work; 13) establish, expand, transfer and/or consolidate, work processes and facilities; 14) consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work; 15) terminate or eliminate all or any part of its work or facilities.

### **ARTICLE 17 - TRANSFERS AND PROMOTIONS**

#### **17.01 - Vacancy**

As used in this Agreement a vacancy is defined as a new or existing permanent full-time or permanent part-time position in the bargaining unit which the Employer has determined to fill. A position for which a recall or reemployment list exists is not a vacant position.

## **ARTICLE 18 - REDUCTION IN WORKFORCE**

### **18.12 - Recall Rights and Procedures**

During the two (2) year period following the reduction in force or displacement, the Employing Agency shall not hire, transfer, or promote any person into a classification title and/or parenthetical subtitle in a facility operated by the Employing Agency for which a recall list exists. Employees reduced in force or displaced as a result of the reduction in force shall have recall rights for a period of two (2) years from the effective date of reduction in force or displacement.

#### **A. Recall Rights**

1. Recall rights shall exist statewide within the Employing Agency in which the reduction in force or displacement occurred. Within five (5) days of the notification of the reduction in force, the employee who is subject to recall may select the counties in which he/she is willing to accept recall. If no counties are designated, the employee shall be placed on the agency statewide recall list.

2. Within five (5) days of the notification of the reduction in force or displacement, the employee who is qualified for reinstatement in two (2) or more parenthetical subtitles may select in writing the parenthetical subtitles for which the employee wishes to be recalled. If the employee makes no selection, then the employee shall only be placed on the recall list for the classification and parenthetical subtitle held at the time of the reduction or displacement.

3. Each Employing Agency which has implemented a reduction in force shall prepare recall lists of all employees displaced or reduced as a result of a reduction in force. Such recall lists will be by classification and parenthetical subtitles and will include the employee's seniority, appointment type, and the counties to which the employee wishes to be recalled. Employees who have been reduced in force or displaced to a classification title and different parenthetical subtitle, or a lower classification title in classification series shall be placed on recall lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of reduction or displacement.

4. The reduced in force employee or an employee who exercised displacement rights with the most seniority shall be the first recalled to a position within the specific classification title and/or parenthetical subtitle which the employee held at the time of reduction in force or displacement, or into any classification in which displacement occurred, provided that the recalled employee is currently fully qualified for the position as established by the classification specification. If the employee displaces outside his/her classification series, the employee shall only be recalled to the classification (including different parentheticals) held at the time of displacement.

## B. Notification of Recall

1. Each employee recalled shall be notified of the offer of reinstatement by certified letter to the address maintained in the employee's official personnel file. The notice shall also specify under which conditions the employee's declining of an offered position may cause his/her removal from that or other recall lists.
2. The employee shall be allowed fourteen (14) days from receipt of the notice of recall to respond to the notice and/or report to work by accepting the offer of reinstatement. Such time limit shall be explained in the notice of recall. In the event of extenuating circumstances (illness, injury, absence from the state or other good cause as solely determined by the Employing Agency) preventing return to work within fourteen (14) days, a reasonable extension, not to exceed sixty (60) days, may be granted for return to work.

## C. Removal from Recall List

1. An employee who declines recall to a classification lower in the class series than the classification from which the employee was reduced or displaced shall thereafter only be entitled to recall to a classification higher than the classification declined, up to and including the classification from which the employee was reduced or displaced in the classification series.
2. An employee who declines recall to a classification and different parenthetical subtitle from which the employee was reduced shall be removed from all agency recall lists.
3. An employee accepting recall to a classification and different parenthetical subtitle from which the employee was reduced or displaced shall thereafter only be entitled to recall to the classification and parenthetical subtitle from which he/she was reduced or displaced.
4. An employee accepting or declining recall to the same classification and same appointment type from which the employee was reduced or displaced shall be removed from the agency recall list.
5. Failure of an employee who was reduced or displaced to respond to a notification of recall within fourteen (14) days of the mailing of the notification of recall by certified mail to the employee's current address, as maintained by the Employing Agency, shall cause the employee's name to be deleted from any recall list and will result in the loss of the right to recall.
6. If, after an employee has exercised his/her displacement rights, the employee is to be reduced in force or displaced due to a subsequent reduction in force, the employee's displacement right shall be in accordance with the classification from which he was subsequently displaced provided, however, he/she has right to recall in his/her previous classification. In the

event any displaced employee is subsequently reduced in force or displaced after recall, such employee's name shall be removed from the recall list two (2) calendar years after the subsequent reduction in force or displacement action.

#### D. Recall Qualifications

1. In no event shall an employee on a recall list be offered a position in a classification with a higher rate of pay than that of the classification or appointment type from which the employee was laid off or displaced.
2. An employee recalled under this Section shall serve a probationary period only if that employee was reduced during an original or promotional probationary period. Upon recall the employee shall begin a new probationary period only if recalled to the classification title held at the time of reduction or displacement.
3. An employee who exercises his/her recall rights must at the time of notification of recall, verify with appropriate documents to the Employer, that said employee is currently and fully qualified for the position as established by a position description, classification specification or by bona fide occupation qualification(s). Failure to present evidence of such qualifications or for such to be contained in the official personnel file of the employee to be recalled at the time such employee notifies the Employer of his/her desire to be recalled, will result in the employee's name to be deleted from any recall list and will result in the loss of the right to recall. The Employer shall maintain an accurate recall list which shall be open to inspection by employees subject to recall, and provided, upon request, to the Association.

## **STATEMENT OF FACTS**

The Grievant, who was an employee of the SEO Consortium State Library of Ohio located at the SEO Library Center in Caldwell, Ohio, took a voluntary layoff effective September 2, 2017. At the time of her layoff, the Grievant completed the Grievant's Layoff/Displacement Form, ADM 4138, which gave her statewide recall rights, and the Article 18.11 Agreement between the State Library of Ohio and the State Council of Professional Educators OEA/NEA which afforded her recall/re-employment rights in accordance with the parties' collective bargaining agreement until September 2, 2019.

Subsequently, the Employer made the decision to fill a Librarian 2 position at their office location in Franklin County. The Manager shared the position posting with the Union President on October 16, 2018 which was immediately followed up with a request for information regarding "the librarian who was laid off last year" and "any rights to the position." Prior to posting the position, the Manager checked the recall list and the Grievant's name was not listed.

The Employer internally posted the position for a Librarian 2 on November 16, 2018 and then externally posted the position on November 30, 2018. The Grievant did not receive a recall letter. When the Grievant saw the posting, she contacted the Union to figure out what had happened, and in particular, why she was not given the position. The Grievant also applied for the position. An extensive dialogue between all interested parties ensued for approximately one month. It was later determined that the Grievant was eligible for statewide recall rights and at that time all actions by the Employer under the posting process were stayed. The posting was withdrawn in mid December of 2018. However, when the meeting was convened to discuss returning the Grievant to the position, the Chief Fiscal

Officer alerted the Manager that the position could not now be filled due to financial constraints.

During 2018, a tenant of the Employer did not renew its rental agreement; the annual rent was \$75,000.00. At the time the tenant left the premises in June of 2018, the Employer had three potential tenants. Notwithstanding, the posting of the position was still approved. However, by the end of the year or December of 2018, none of the potential tenants signed a rental agreement resulting in a rental deficit which would have contributed to the wages of the employees and/or other expenditures of the general fund.

The General Revenue Fund Exhibit of the Employer indicates the 2019 expenses, 2020 projected budget, and 2021 projected budget break down for payroll, personal service and board travel, maintenance and supplies, and library materials and equipment. With allotments of 4.5mil for the 2019 fiscal year, and 4.5mil projected for the remaining two (2) years, the GRF Budget indicated an estimated deficit of \$98.21 for fiscal year 2019, breakeven for fiscal year 2020, and a deficit of \$117,488.00 for fiscal year 2021 if the position was funded. Further a comparison of the projected cost for funding the position with new hire at Step One (1) longevity and the Grievant at her Step Seven (7) longevity shows an increased cost of \$8,996.70 for fiscal year 2019, an increased cost of \$23,513.45 for fiscal year 2020, and an increased cost of \$20,213.67 for fiscal year 2021. Based thereon, the Chief Fiscal Officer opined that the budget could not sustain the funding of the position at any step. At the time the position was posted, the 2020-2021 biennium budget was not out and was approved until June of 2019. The position was posted during the 2018-2019 biennium budget, November 16, 2018, and the Chief Fiscal Officer had approved filling the position, and the position was posted.

## **POSITION OF THE PARTIES**

### **POSITION OF THE UNION**

The Union contends that the Employer violated the parties' CBA. The Union argues that the Employer showed extreme negligence, carelessness and blatant disregard for the parties' negotiated agreement when the Employer breached Article 17 and 18 of the CBA and failed to recall the Grievant to the position of Librarian 2 before posting the position. The Union asserts that the Employer violated the CBA when the position was posted contrary to the terms of Article 17 which specifically states "a position for which a recall list exists is not a vacant position." The Union recognizes that the Employer has the the right to direct the workforce but argues these rights can be diminished by the language of the CBA. The Union further asserts that the contract language expressly abridges or limits the management's authority when a recall list exists. The Union maintains that the Employer violated the CBA when it posted the position.

Further the Union contends that the Employer violated the parties' CBA when it failed to maintain the proper recall list. The Grievant executed the displacement form stating that she would work anywhere in the State. However, the Grievant's name was not placed on the recall list and the Grievant did not receive a recall letter pursuant to Article 18 of the CBA. The Union asserts that it is the Employer's responsibility to maintain a proper recall list. The Union argues that the Grievant has an impeccable work record and her address was current with the Employer at the time of the posting. The Union maintains that the Employer improperly denied the Grievant her recall rights when the Employer posted the Librarian 2 position.

Moreover, the Union contends that the Grievant should have been recalled on the date the position was posted, November 16, 2018. The Union argues that there was no change in the financial status of the Library at the time of posting. The Union also argues that the Library was in the same budget at the time of the posting, and continued to operate in that same budget for another year. The Union further argues that the Employer considered a projected budget for 2020-2021 fiscal years that was not even known to them at the time of the posting. The Union maintains that the Employer determined it could financially fund the position at the time of the posting, therefore, the Grievant should have been reinstated to the position at that time.

Lastly, it is the position of the Union that the grievance should be granted and the Grievant be awarded full back pay from the date she should have been recalled and reinstated.

## **POSITION OF THE EMPLOYER**

The Employer contends that no contractual violation occurred when management pulled the position due to financial limitations. The Employer asserts that pursuant to Article 3, Management Rights Clause, the Employer retains the right to hire and transfer employees, and determine the number of persons to be employed or laid off. The Employer argues that this language grants management the discretion to determine who is recalled or hired. The Employer maintains that the functions, rights, powers, responsibilities and the authority of the employer in the regard to the operation of its work and business shall remain exclusively those of the Employer.

Further, the Employer contends that once it was discovered that the Grievant had recall rights, management placed the posting on hold to verify whether filling the position at a higher step was financially possible. Management made the decision to determine whether it was financially feasible to fill the position through recall or hiring someone else at Step One. The Employer maintains that due to the existing financial constraints the budget could not sustain the funding of the position at any step, and the posting was properly pulled.

Moreover, the Employer contends that there was no prejudice to the Grievant and the Grievant suffered no harm. The Employer asserts that the financial analysis did not support a recall or hire. The Employer argues that management made a contractually justified decision to pull the posting based on its financial constraints and operational needs. Even though the position has not been abandoned, the Employer does not have any immediate plans to fill the position. The Employer maintains that the Contract does not require management to fill an open a position.

Lastly, it is the position of the Employer that there was no contractual violation of the Agreement. The grievance should be denied in its entirety.

## **DISCUSSION**

This is a contract interpretation case, and the Union bears the burden of proof by the preponderance of the evidence standard. The question presented is simply whether the Grievant had recall rights which entitled her to be reinstated into the position of Librarian 2 at the Franklin County Office. Having carefully considered the evidence and the arguments of the parties, this Arbitrator will focus only on those areas that are germane for this expedited award.

It is not disputed that the Grievant had recall rights. At the time of her layoff, the Grievant completed the required forms which gave her statewide recall and reemployment rights until September 2, 2019. Article 18.12(D)(3) reads "The Employer shall maintain an accurate recall list which shall be open to inspection by employees subject to recall, and provided, upon request, to the Association." The Grievant's name should have been on the recall list but was not. It is not disputed that the Employer is responsible for maintaining an accurate layoff list and the evidence revealed that it did not do so in violation of the CBA.

The plain language of Article 17 states "a position for which a recall list exists is not a vacant position." It is disingenuous for the Employer to argue there was no recall list when the Manager checked prior to posting the position when the error occurred due to the State's failure to include the Grievant's name on the recall list. The Librarian 2 position was posted contrary to the terms of the CBA.

The Grievant is currently employed as a catalogue librarian. The Grievant holds a Bachelor Degree in History from Hiram College, and a Masters in Library Science from Kent State University. At the time of her layoff with the Employer, the Grievant held the position of Library 2, Technical Services. Regarding her qualifications for the posted position of

Librarian 2, the Manager testified that she had reviewed the application of the Grievant, and the Grievant has excellent credentials. There is no dispute on the qualifications of the Grievant to hold this position.

The Employer asserts that the posting was pulled in December of 2018 due to financial restraints as a proper exercise of its general power to hire and transfer employees, and determine the number of persons to be employed or laid off. However the financial concerns of the Employer did not exist at the time of the original email on October 16, 2018 and on November 16, 2018 when the position was actually posted. In fact the Manager explained that if she had known that the Grievant had recall rights she would have been awarded the position because at that time, the position was funded. The Chief Fiscal Officer also concurred with this outcome when she testified that had the Grievant been returned under the recall procedure, she would not have been involved in the process whatsoever; those decisions would have been made by Human Resources at the time decision was made to fill the position. The Arbitrator is persuaded that the contract violations occurred on November 16, 2018. The remedy for the violation is measured and/or viewed from the date of the occurrence. If in fact the Employer faced financial difficulties in the 2020-2021 biennium years, the Employer had the right to exercise its management's right authority at that time.

It is the conclusion of this Arbitrator that the Union has established the violations of the CBA. The proper remedy is to make the Grievant whole from November 16, 2018, when her return to work should have occurred.

## **AWARD**

Grievance is sustained. The Grievant is awarded the position of Librarian 2 at their office location in Franklin County, Ohio with full back pay, and benefits from November 16, 2018 subject to standard offsets for outside earnings.

November 8, 2019

/s/ *Meeta A. Bass*  
Arbitrator Meeta A. Bass  
Dublin, Ohio

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Award was served upon the following individuals this 8th day of November, 2019 by electronic mail:

### **UNION:**

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### **EMPLOYER:**

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November 8, 2019

/s/ *Meeta A. Bass*  
Arbitrator Meeta A. Bass  
Dublin, Ohi