BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED LEGAL WORKERS

and

LEGAL ACTION OF WISCONSIN, INC.

Case 7
No. 57277
A-5747

(Linda Orton Grievance)

Appearances:

Ms. Connie E. R. Deer, Coordinator, United Legal Workers, c/o Legal Action of Wisconsin, Inc., 31 South Mills Street, P.O. Box 259686, Madison, Wisconsin 53725-9686, for the Union.

Michael, Best & Friedrich, Attorneys at Law, by **Attorney Jose A. Olivieri**, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, for the Employer.

ARBITRATION AWARD

Pursuant to a joint request by United Legal Workers, herein the "Union" or "ULW," and by Legal Action of Wisconsin, Inc., herein the "Employer" or "LAW," Dennis P. McGilligan was appointed Arbitrator by the Wisconsin Employment Relations Commission on March 9, 1999, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. The hearing was held in Madison, Wisconsin, on June 21, 1999. The hearing was transcribed, and the parties completed their briefing schedule on August 31, 1999.

After considering the entire record, I issue the following decision and Award.

ISSUES

The Union frames the issue as follows:

Did the Employer, LAW, violate the collective bargaining agreement when it failed to issue a recall notice to former employe, Linda Orton?

The Employer frames the issue in the following manner:

Whether the Grievant, having resigned from her employment after receiving a notice of proposed layoff, accrued recall rights under the collective bargaining agreement?

Based on the entire record, the Arbitrator frames the issues as follows:

1. Did the Employer's action constitute a constructive layoff of the Grievant?

2. If so, did the Employer violate the collective bargaining agreement when it failed to issue a recall notice to the Grievant?

3. If the answer to the second issue is affirmative, what is the proper remedy?

FACTUAL BACKGROUND

The Employer provides legal services to the poor in the State of Wisconsin where it maintains offices in Madison, Milwaukee and Kenosha.

In 1995, federal budget allocations for the Legal Services Corporation were significantly cut which in turn led to a "difficult budgetary" situation for the Employer. The Employer used some carry-over funds immediately after the cut to forestall a budgetary crisis but projected that if staff positions were not reduced, particularly in the Madison office, a deficit would occur. In early 1996, the Employer decided in fall, 1996, some staff positions, whether through attrition or layoff, would have to be eliminated.

By memorandum dated February 14, 1996, John F. Ebbott, Executive Director of the Employer, informed all staff of the decision by the Board of Directors of the Employer to adjust to budget cuts through staff reduction rather than through reducing employees to part-time status. Regarding the staff reduction approach, Ebbott noted:

> It should be emphasized that the staff reduction approach may also include attrition where possible. Layoff decisions will be made giving serious consideration to any attrition which has occurred. Whether attrition averts layoffs depends on the client service needs of the office. For example, if, through attrition, half the lawyers left an office, we may have to hire some new lawyers and would still have to lay off paralegals and/or secretaries. Thus, while attrition may mitigate the extent of layoffs, other factors must also be considered.

Ebbott added:

> Therefore, as staff reduction actions will have to be taken in or about mid-November for Madison, layoff notices will be sent in or about mid-March.

By letters dated March 14, 1996, the Employer gave five employes notice that they would be laid off effective November 15, 1996: the Grievant (Linda Orton), Jack Longert, Susan Carter Pearsall, Patricia Fox-Caron and Lisa Hutter. The letters stated, in relevant part:

> This letter is your notice of layoff under the collective bargaining agreement between Legal Action and the ULW. We are sending it at this time to provide you with as much notice and opportunity to make other plans as possible. As you know, this layoff has been caused by severe Congressional funding cuts. It is possible that attrition may reduce the number of layoffs which we are required to make but we cannot guarantee that attrition will affect your layoff status.
>
> I hope that this notice period of eight months provides you with the opportunity to adjust to this unhappy circumstance.

Ultimately, only two of the five employes were actually laid off: Fox-Caron and Longert. Both of them were subsequently recalled.

Although the Employer initially told Carter Pearsall that she would be laid off, it subsequently rescinded her layoff notice by letter dated September 4, 1996, and never laid her off.

In addition, by memorandum dated October 3, 1996, Hutter informed the Employer as follows:

> I have just been notified today, that I am to begin working 20 to 30 hours per week more at my current afternoon, part-time job starting tomorrow at 10:00 am. Due to the fact that I really have no option other than to accept the hours that I am given, or they will have to hire someone else for these extra hours. And because I know my job with Legal Action will end soon, I feel obligated to do what is right for myself and my family.
>
> I am truly sorry for not being able to give more of a notice that I am leaving, but under the circumstances, I have no other choice.

Finally, by memorandum dated October 21, 1996, the Grievant informed the Employer as follows:

> This memo is to confirm that my last full-time work day with Legal Action of Wisconsin, Inc. will be November 1, 1996, due to my acceptance of a position with Balisle and Roberson.
>
> I have offered part-time services and the dates that I would be available from Balisle and Roberson would be November 8th, November 14th and November 15th, with the possibility of some hours on November 7th. I need to let their office manager know what days I will be at LAW. I would appreciate your letting me know by this Wednesday.
>
> I await your response.

By letter dated October 30, 1996, the Employer responded:

> This is to confirm the memorandum from Hal Menendez to you dated October 23, 1996. Your resignation is accepted effective at the end of the business day on November 1, 1996. Legal Action declines your offer to work on a part-time temporary basis after November 1, 1996. Instead, as stated in Hal's memo, you should complete all work, including the transfer of all files, by November 1, 1996.
>
> I am pleased that you have secured employment at a family law firm, and wish you complete success in your new job.

But for her proposed layoff, the Grievant would not have quit her employment on November 1, 1996, to find employment as a legal secretary.

On June 16, 1998, the Grievant filed a grievance:

GRIEVANCE

> The undersigned hereby request, grieve and otherwise seek the following action from the management/employer: that the management/employer promptly issue a recall-from-layoff letter to Linda Orton at 267 Franklin St., Evansville, WI 53536 with a copy provided to the ULW for the position described in the job announcement dated May 15, 1998 and entitled Volunteer Lawyers Project Coordinator/Administrative Law Paralegal, Madison Area Office.
>
> The management/employer failed to issue such letter prior to its publication or posting of the job description to the general public and is contrary to the provisions of the ULW contract under Article IX, Section 7 and 8 of the ULW paralegal and secretaries contract dated December 13, 1994 and Article IX, Section 6 and/or 7 of the ULW paralegal and secretaries contract dated May 8, 1997.

Before her resignation, the Grievant had been an employe of LAW since July, 1978. She held the position of administrative legal secretary when she started working for the Employer in the Janesville office. She transferred to Madison in 1983, where she became the Volunteer Lawyer Project Secretary until 1989. In February, 1989, she became the Family Law Paralegal for the Employer. She has never held the position of Volunteer Lawyers Project Paralegal with the Employer.

By letter dated July 14, 1998, the Employer denied the grievance in relevant part as follows:

> 2. Ms. Orton resigned from her employment and said resignation was accepted by Legal Action. Therefore, Ms. Orton does not have any recall rights.

Next, the Legal Action Personnel Committee denied the grievance at Step Three as follows:

After hearing presentations by both sides and meeting in closed session, the Legal Action Personnel Committee determined that the question is whether the Collective Bargaining Agreement was violated by management by not sending a recall letter to Linda Orton. The committee finds that because Linda Orton had resigned, therefore, she was not entitled to a recall letter. The grievance alleging a violation of a Collective Bargaining Agreement is hereby denied.

Thereafter, the grievance proceeded to arbitration as noted above.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VIII

Grievance Procedure

. . .

SECTION 5 Authority of Arbitrator

The parties agree that the arbitrator must interpret this Agreement and apply it to the particular case presented to him/her but shall, however, have no authority to add to, subtract from, or in any way modify the terms of this Agreement. Any questions of arbitrability of any issue shall be determined by the arbitrator. In cases involving suspension, termination or emergency discharge, the arbitrator shall have the authority to increase or reduce any disciplinary sanction and restore or modify all or any part of the benefits, including back pay, which have been the subject of the sanction.

The decision of the arbitrator shall be final and binding on the parties.

. . .

ARTICLE IX

Job Vacancies, Work Force Reduction and Seniority

. . .

SECTION 6 Recall from Layoff

Employees shall be recalled from layoff by certified mail sent to the last known address of the employee as listed in the files of the Employer. Any employee who fails to report for work within ten (10) working days of the post-marked date a recall notice was mailed shall lose all recall rights. Up to two (2) weeks of additional time shall be allowed for employees to return to work for employees required to give two (2) weeks' notice to another employer.

SECTION 7 Recall Rights

Employees shall have recall rights for a period of two (2) years from the date of layoff. Such employees shall, upon recall, be credited with accrued sick leave unused at the time of layoff.

SECTION 8 Notice of Layoff

Any regular employee who has completed his/her probationary period and is laid off due to a reduction of staff in his classification in accordance with the provisions of this Article shall be given sixty (60) calendar days' notice of such layoff, provided funds are available.

. . .

POSITIONS OF THE PARTIES

The Union basically argues that the Grievant was constructively laid off and that she is entitled to be recalled by the Employer. The Union requests that the grievance be sustained and that the Arbitrator order the Employer to re-employ the Grievant and make her whole for any losses incurred, as well as other relief as is just and reasonable.

The Employer basically argues that pursuant to the collective bargaining agreement an employe must be laid off in order to retain recall rights. The Employer maintains that since the Grievant resigned her employment at LAW prior to the layoff date, she was not laid off and is not entitled to recall. The Employer requests that the grievance be denied and the matter be dismissed.

DISCUSSION

Constructive Layoff

The Union argues that the Grievant was constructively laid off while the Employer maintains that she quit her employment with LAW.

The record supports the Union's position.

It is undisputed that by letter dated March 14, 1996, the Employer gave five employes, including the Grievant, notice that they would be laid off effective November 15, 1996. The record also indicates that by memo dated October 21, 1996, the Grievant informed the Employer that her last full-time work day with LAW "will be November 1, 1996, due to my acceptance of a position with Balisle and Roberson."

The Arbitrator agrees with the Employer that the memo the Grievant "presented in order to resign" makes no mention of the reason for her resignation. However, the Grievant testified, unrebutted by the Employer, that but for the proposed layoff she would have stayed at LAW. (Tr. at 15-17)

Such a conclusion is supported by Arbitrator Amedeo Greco who found that "But for their proposed layoffs, neither Orton nor Hutter would have quit." LEGAL ACTION OF WISCONSIN, INC., CASE 6, NO. 54460, A-5521, P. 3 (JULY 22, 1997). The Arbitrator agrees with the Employer's contention that the aforesaid case is not "binding" herein. However, it is relevant to a finding that the Grievant did not voluntarily quit but instead was constructively laid off.

The Employer argues contrary to the above that the motivation for the Grievant's quit does not turn it into a layoff. In support thereof, the Employer cites several arbitration awards for the proposition that employes "who jump the gun and leave employment before termination on a date certain given by the employer have repeatedly been found to have quit."

The cases the Employer cites are distinguishable from the instant dispute.

In KENNEWICK IRRIGATION DIST., 93-1 ARB SECTION 3022 (BOEDECKER, 1992), the Employer states an employe who voluntarily quit his job when his position was eliminated waived recall rights. However, in KENNEWICK, unlike the instant dispute, the employe was given an opportunity to continue working with the employer in a different capacity which the employe declined. The employe also made two statements that he would never work for the employer again. The employer further gave the employe an opportunity in writing to repudiate that sentiment to which the employe never responded. Based on the employe's aforesaid specific behavior which evidenced his clear intent not to work for the employer again, the

arbitrator found that the employer could reasonably conclude that the employe voluntarily quit his employment when his job was eliminated and waived his right to recall. The record evidence supports a finding that the Grievant did not voluntarily quit her employment with LAW or waive her right to recall.

In GENERAL TELEPHONE CO., 86 LA 726 (CRAVER, 1985), according to the Employer, an employe who opted for early retirement rather than loss of income while on layoff waived recall rights. However, in GENERAL TELEPHONE, unlike the present case, the arbitrator construed the specific facts of that case to establish a voluntary retirement which severed any right to recall. The arbitrator reached this conclusion based on the fact that while on layoff receiving continuance pay benefits the employe, afraid of an earnings gap when those payments were exhausted, elected early retirement in face of the eminent shutdown of the facility where she worked. The Company specifically told the employe that if she accepted early retirement she effectively "resigned" from the Company thus forfeiting her seniority and recall rights. GENERAL TELEPHONE CO., SUPRA, P. 728. The arbitrator stated: "One simply does not think of a retiree as a person who can reasonably anticipate any future employment opportunities with his or her previous firm." GENERAL TELEPHONE CO., SUPRA, P. 730. As pointed out by the Union, retirement is not an issue in this case and the facts are not otherwise transferable to the Grievant's case.

In MONTY CLEANERS, 9 LA 602 (MYERS, 1947), the Employer states the arbitrator found an employe who left his job after being told that there was not enough work was not laid off. However, the arbitrator's decision was based on a different set of facts than the instant dispute. In MONTY CLEANERS the arbitrator decided that while it may have been true that the employe would not have left except for the employer's advice, he nevertheless had the protection of the equal distribution work clause in the agreement if he preferred to remain. The decision keyed on the fact that the employe could have remained employed at the company; he passed up that opportunity. In other words, he could have stayed with the employer by "requesting a share of the work made available at the retail store." Failing that, the arbitrator concluded that the employe "left of his own free will," and denied his request for vacation pay. MONTY CLEANERS, SUPRA, P. 605.

Again, as pointed out by the Union, the Grievant did not have the option to remain employed at LAW. She tried by requesting part-time work, but her request was denied. In addition, as noted above, the Grievant did not leave of her own free will. She was forced to find employment elsewhere, while facing eminent layoff, in order to support her family. (Tr. at 17-18)

Finally, in PILLSBURY CO., 100 LA 436 (STALLWORTH, 1993) the Employer states the arbitrator found where a contract provides severance pay for employes laid off due to plant closing, employes who leave before shutdown date are not eligible for severance even if they left to obtain other employment in light of the impending shutdown. In said case, the arbitrator denied severance pay to employes who resigned after the company announced that it

would be closing its grocery line, despite a contention by the Union that the grievants' eligibility for severance was triggered by the aforesaid announcement. However, unlike the present case, he based said decision in part on express contract language which provided that employes are not eligible for severance pay if they resign or are terminated for just cause. Also, unlike the instant dispute, he based his decision on bargaining history which indicated that the employer only agreed to provide for such severance pay in a contract which went into effect after the date of the filing of the grievance. The record simply indicates that there were no similar negotiations here and the parties' agreement lacks similar relevant definitions.

The Employer also argues the fact that the Grievant received a notice of intended layoff does not mean that she would have ultimately been laid off. (Emphasis in original) The Arbitrator agrees. However, this does not change the fact that but for her proposed layoff, the Grievant would not have quit her employment with LAW.

Based on all of the above, and the entire record, the Arbitrator finds that the answer to the first issue as framed by the undersigned is YES, the Employer's action constituted a constructive layoff of the Grievant.

Contract Violation

The next question is whether the Employer violated the collective bargaining agreement when it failed to issue a recall notice to the Grievant. The Union argues for such a violation while the Employer takes the opposite position.

The Union cites several arbitration awards and other authorities for the proposition that the Arbitrator should require the Employer to "establish good or just cause for its actions or ommissions (sic) as to its failure to recall the employee, Linda Orton." For the reasons discussed below, the Arbitrator disagrees.

The materials relied upon by the Union in support of the aforesaid position all address discharge or termination as the nature of the dispute and, therefore, are not applicable to the instant dispute. For example, in ATLANTIC SOUTHEAST AIRLINES, 102 LA 656, 660 (FEIGENBAUM, 1994), the arbitrator found that the refusal of the airline to allow a flight attendant to withdraw her resignation because her job offer from another airline fell through was a constructive discharge in violation of the contractual just cause standard. (Emphasis added) In REGENTS OF THE UNIVERSITY OF MICHIGAN, 90-2 ARB SECTION 8529 (SUGARMAN, 1990), the arbitrator found that the two-week notice to quit submitted by the employe was without effect since the employe was mentally ill, under stress and unable to understand the import of his resignation. The arbitrator set aside the resignation so that the employe could apply for long-term disability benefits provided by the employer to eligible employes. In CITY OF YOUNGSTOWN, OHIO, 91-1 ARB SECTION 8287 (GIBSON, 1990), the arbitrator found that

the employer wrongly constructively discharged two employes who signed a pre-typed registration form instead of being fired. (Emphasis added) The arbitrator held that the resignations were not voluntarily made and returned the employes to work. Finally, in HICKORY VINYL CORP., 105 LA 572, 576 (HAYFORD, 1995), the arbitrator found that an employe's action of leaving work early without permission did not constitute a voluntary resignation and, thus, the employer did not have good cause to discharge said employe, where he waited for the relief man, and management did not confront him with suspicion that he was under the influence of alcohol. (Emphasis added)

Likewise, Elkouri and Elkouri, How Arbitration Works, 4th Edition, pages 655-656 (1985) addresses "Discharge Versus Resignation." And Remedies in Arbitration, Hill and Sinicropi, pages 41-42 (1981) reviews the standard of "just cause" in the context of discipline and discharge cases.

Unlike the above cited authorities, the instant dispute is not about challenging a discharge or termination; it is about layoff and recall. The grievance on its face states regarding the action being grieved or sought from the employer: that LAW "promptly issue a recall-from-layoff letter to Linda Orton . . . for the position described in the job announcement dated May 15, 1998 and entitled Volunteer Lawyers Project Coordinator/Administrative Law Paralegal, Madison Area Office." Said grievance adds:

> The management/employer failed to issue such letter prior to its publication or posting of the job description to the general public and is contrary to the provisions of the ULW contract under Article IX, Section 7 and 8 of the ULW paralegal and secretaries contract dated December 13, 1994 and Article IX, Section 6 and/or 7 of the ULW paralegal and secretaries contract dated May 8, 1997. (Emphasis added)

All of the above cited contract provisions deal with layoff and recall rights.

In addition, the record is undisputed that the Grievant did not challenge the Employer's action at the time she received notice of layoff and involuntarily resigned from her employment at LAW on November 1, 1996. Instead, she seeks to enforce her recall rights as stated in the aforesaid grievance which was filed on June 16, 1998.

Based on all of the above, the Arbitrator will not apply a just cause standard in reviewing the Employer's failure to recall the Grievant to a paralegal position in May, 1998. Instead, the Arbitrator will look to the parties' agreement, particularly to the sections dealing with recall rights, to determine the Grievant's rights herein.

Article IX, Section 7 provides that employes "shall have recall rights for a period of two (2) years from the date of layoff." Article IX, Section 6 states that employes "shall be recalled from layoff by certified mail sent to the last known address of the employee as listed in the files of the Employer." As noted above, the Grievant was constructively laid off by the Employer. The record is undisputed that the Grievant was not afforded recall rights or recalled from layoff as required by the aforesaid contractual provisions. The Grievant previously worked for the Employer as a paralegal; the same type of position for which the Grievant is asserting her recall rights. The Employer offered no persuasive evidence that the Grievant is not qualified for the disputed position herein. Based on same, the Arbitrator finds that the Employer violated Article IX, Sections 6 and 7 of the parties' collective bargaining agreement by its failure to recall the Grievant to the Volunteer Lawyers Project Coordinator/ Administrative Law Paralegal, Madison Area Office in May of 1998.

The Employer argues, however, that a finding on behalf of the Grievant would add a provision to the agreement which states: "upon receipt of a notice of proposed layoff an employee may leave employment with LAW before the scheduled date of layoff and retain recall rights." The Employer maintains that such an addition would require that the Arbitrator add to or modify the agreement contrary to Article VIII, Section 5 of the agreement which provides that an arbitrator shall "have no authority to add to, subtract from, or in any way modify the terms of this Agreement." (Emphasis in original)

The Arbitrator disagrees. There is nothing in the agreement which restricts the Arbitrator's authority to find, based on the instant record, that the Employer constructively laid off the Grievant. Nor does the agreement expressly state that an employe who is constructively laid off is not entitled to recall rights. Article IX, Sections 6 and 7 provide laid off employes with recall rights and a procedure for recall from layoff. The Grievant was not afforded her recall rights from layoff. The above finding is simply intended to enforce the Grievant's contractual rights to be recalled from layoff. It does not add to, or modify the terms of the parties' collective bargaining agreement. Such a finding, therefore, would be in compliance with Article VIII, Section 5 of the agreement.

Based on all of the foregoing, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the second issue as framed by the undersigned is YES, the Employer violated the collective bargaining agreement when it failed to issue a recall notice to the Grievant.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties related to the instant dispute. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Remedy

A question remains as to the appropriate remedy.

The Union requests that the grievance be sustained and that the Employer be ordered to issue a recall notice to the Grievant and re-employ her with compensation for any losses incurred.

Based on all of the foregoing, and the record as a whole, and absent any persuasive argument to the contrary, the Arbitrator sustains the grievance and orders the Employer to issue a recall notice to the Grievant and make her whole for all losses she incurred as a result of the Employer's action.

AWARD

The grievance is sustained and the Employer is ordered to issue a recall notice to the Grievant for the paralegal position described in the job announcement dated May 15, 1998, and entitled Volunteer Lawyers Project Coordinator/Administrative Law Paralegal, Madison Area Office. (It is not necessary to determine whether October 21, 1996 (the date of her resignation letter), November 1, 1996 (the effective date of her resignation) or November 15, 1996 (the date two employes were laid off) is the beginning of the Grievant's recall eligibility since the Grievant's complaint/grievance is timely under any date.) If the Grievant reports to work pursuant to Article IX, Section 6, she shall be made whole for all losses she incurred as a result of the Employer's failure to recall her as noted above.

Dated at Madison, Wisconsin, this 2nd day of November, 1999.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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