

AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

UNIVERSITY OF FLORIDA

And

UNITED FACULTY OF FLORIDA

Grievance No. 08-12

Grievant: Dr. Andrea Pham
(Layoff)

Date of Hearing: 1/23/09

Briefs Received: 3/4/09

Date of Decision: 3/14/09

APPEARANCES

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I. STATEMENT OF THE CASE

The University of Florida (University or UF) and the United Faculty of Florida (UFF or Union) are parties to a collective bargaining agreement which governs the wages, hours and other terms and conditions of employment of member of a bargaining unit comprised of members of the faculty and staff employed by the University. It also provides for a grievance procedure culminating in final and binding arbitration as the mechanism to be used to resolve any disputes concerning the interpretation or application of its terms.

At issue in this case is a grievance which was filed by UFF on June 19, 2008, on behalf of the grievant, Dr. Andrea Pham. It pertains to the fact that she was selected for layoff from her position as Assistant Professor effective June 10, 2009 as a part of a plan to reduce operating costs. The UFF does not dispute the fact that adverse financial circumstances provide a legitimate basis for layoffs under the terms of the Collective Bargaining Agreement. It argues nonetheless that the layoff of the grievant was improper in the present case because the University

inappropriately designated her organizational level -- i.e. the Vietnamese language program -- as the layoff unit.

The grievance reads in pertinent part as follows:

Article(s) and Section(s) of Agreement allegedly violated:

Article 13 and all other applicable articles of the CBA

Statement of grievance (must include date of acts or omissions complained of):

On June 12 I received by certified mail the Notice of Layoff. I have been a tenure-track assistant professor at UF for 6 years. Many others in my department and college have served for less than 5 years. I should not have been laid off when these people stay. The Human Resources website. . . states: "Layoff units are determined by administrative reporting rather than funding. For academic units, except the College of Agriculture and Life Sciences, each individual college will be designated as a layoff area." Clearly this procedure was not followed in my case.

Remedy Sought:

To make grievant whole.

The University's response to the grievance at Step 2 of the procedure is dated September 23, 2008, and reads in pertinent part as follows:

"After careful review of all Step I and Step 2 materials, my findings are in basic agreement with those from the Step I review.

Specifically regarding the three issues raised in your Step 2 summary, I find as follows:

Regarding CBA Article 13.2 b, I find that the lay-off unit was designated by the University as the area of Vietnamese Language,

and thus there were not other employees with fewer years of service who could have been laid off instead of you.

You contend that "adverse financial circumstances" were not the reason for your layoff. However, I find that the University did indeed face adverse financial circumstances and opted to deal with these in part through layoffs.

Finally, you argued that your layoff was discriminatory. I find no evidence that the intent of the layoff was to discriminate on the basis of gender, minority or foreign-born status.

In summary, I do not find evidence to support your claims in Step 2 of your grievance. Please contact me if you have any questions."

The Notice of Arbitration that was signed by the grievant and her Union Representative on September 30, 2008 sets out the following statement of the proposed issues before the arbitrator:

"On June 12, 2008, Dr. Pham received a Notice of Layoff from the University of Florida (effective June 2009). She has been a tenure-track assistant professor at UF for 6 years. According to Article 13 of the 2001-2003 Collective Bargaining Agreement (in force at the time of the layoff notice), Dr. Pham should not have been laid off when others in her Department who have served for less than 5 years remain. The UF Administration claims that the layoffs were due to "adverse financial circumstances" while expending uncommitted funds for a variety of other discretionary functions. Further, the pattern of layoffs and rescinding of layoffs that took place shortly after the layoffs were announced, clearly demonstrated a pattern of discrimination on the basis of gender and national origin by the UF administration in violation of Article 6 of the CBA and Dr. Pham was one of the victims of that discrimination."

Having been unable to resolve the dispute through the grievance procedure the Union invoked arbitration. Following the selection of the undersigned as arbitrator by mutual agreement of the parties, a hearing was conducted at Gainesville, Florida on January 23, 2009. In the course

of the hearing both parties were afforded ample opportunity to present evidence and to cross-examine witnesses called by the opposing party. At the conclusion of the hearing the record was closed pending the issuance of this opinion and award.

II. THE ISSUE

At hearing the parties stipulated to the following formulation of the issue: Did the University violate Article 13 of the Collective Bargaining Agreement in laying off the grievant, Dr. Andrea Pham? If so, what should the remedy be?

III. RELEVANT CONTRACT PROVISIONS

Article 13.1

- (a) Layoff. When a layoff is to occur as a result of adverse financial circumstances; reallocation of resources; reorganization of degree or curriculum offerings or requirements; reorganization of academic or administrative structures, programs, or functions; or curtailment or abolition of one or more programs or functions; the Board or the university shall notify the local UFF Chapter and the UFF state office no less than thirty (30) days prior to taking such action. UFF may request a consultation with the Chancellor or the president or their representative pursuant to Sections 2.1 or 2.2 during this period to discuss the layoff.
- (b) Layoff Unit. The layoff unit may be at an organizational level of the university, such as a campus, division, college/unit, school, department/unit, area, program, or other level of organization as the Board or the university deems appropriate.

Article 13.2

Layoff considerations. The selection of employees in the layoff unit to be laid off will be determined as follows:

- (a) No tenured/continuing multi-year/permanent status position in the layoff unit with more than five (5) years of continuous university service shall be laid off if there are any such employees with five (5) years or less service.
- (b) No employee in a non-tenured/non-permanent status position in the layoff unit with more than five (5) years of continuous university service shall be laid off if there are any such employees with five (5) years or less service.
- (c) The sole instance in which only one (1) employee will constitute a layoff unit is when the functions that the employee performs constitute an area, program, or other level of organization at a university.
- (d) The provisions of 13.2(a) and (b) will apply unless the Board or university determines that an Affirmative Action employment program will be adversely affected. When an Affirmative Action Program has been so affected, the Board or university shall notify UFF in writing.
- (e) Where employees are equally qualified under (a) or (b) above, those employees will be retained who, in the judgment of the Board or the university, will best contribute to the mission and purpose of the institution and the State University System. In making such judgment, the Board or the university shall carefully consider employees' length of continuous university service, and shall take into account other appropriate factors, including but not limited to performance evaluation by students, peers, and supervisors, and the employee's academic training, professional reputation, teaching effectiveness, research record or quality of the creative activity in which the employee may be engaged, and service to profession, community, and public.
- (f) No tenured/continuing multi-year/permanent status employee shall be laid off solely for the purpose of creating a vacancy to be filled by an administrator entering the bargaining unit.
- (g) The university shall notify the local UFF Chapter in writing regarding the use of adjunct and other non-unit faculty in those departments/units where employees have been laid off. The use of adjunct and other non-unit faculty in

departments/units where employees have been laid off may be the subject of consultation meetings pursuant to Section 2.2.

Article 20

GRIEVANCE PROCEDURE AND ARBITRATION

20.8 Formal Grievance Procedure

* * *

(f) Step 3 Arbitration.

* * *

(3) Authority of the Arbitrator

- (a) The arbitrator shall neither add to, subtract from, modify, or alter the terms or provisions of this Agreement. Arbitration shall be confined solely to the application and/or interpretation of this Agreement and the precise issue(s) submitted for arbitration. The arbitrator shall refrain from issuing any statements of opinion or conclusions not essential to the determination of the issues submitted.
- (b) Where an administrator has made a judgment involving the exercise of discretion, such as decisions regarding tenure or promotion, the arbitrator shall not substitute the arbitrator's judgment for that of the administrator. Nor shall the arbitrator review such decision except for the purpose of determining whether the decision has violated this Agreement. If the arbitrator determines that the Agreement has been violated, the arbitrator shall direct the university to take appropriate action. . . .

* * *

IV. SUMMARY OF THE EVIDENCE

The operative facts of this case are relatively simple and largely undisputed. In 2006 the University of Florida was confronted with adverse financial circumstances due to a reduction in funding in the

amount of six million dollars. Several steps were taken to address the problems associated with the shortage of funds. One such step involved the abolition of all course offerings involving the Vietnamese language. Since the grievant was the only faculty member who taught such courses, she received notification on June 12, 2008, that she would be laid off effective June 10, 2009. The reason provided for her layoff was adverse financial circumstances. Since the time the grievant was notified of her impending layoff, efforts have been made by the University to place her in a suitable alternative position, but thus far such efforts have proved to be unsuccessful. It was pointed out during the hearing that because the grievant was not a tenured faculty member, the University could non-renew her contract by providing her one years' notice.

The first witness called on the grievant's behalf was Jane Brockman, who has been employed by the University thirty-two years and is currently a professor in the Zoology Department. She has served on the Faculty Senate on several occasions and was President of UFF for three years in the 90's. For the past two years she has served as Chairman of the Grievance Committee.

Ms. Brockman testified that this is the first case involving an Article 13 layoff. She stated that in this instance the layoff unit was defined by the University as the Vietnamese Language Unit. She noted, however, that it is not one of the organizational units described in Article 13 of the

Collective Bargaining Agreement. Moreover, it has no minor or major. Instead, it simply involves two courses – introductory and intermediate Vietnamese. She noted that the Unit Directory for the College of Liberal Arts and Sciences does not list Vietnamese language as a center of instruction or as a program.

According to Ms. Brockman, under University policies and procedures a layoff unit is defined as the college. Consequently, if the Asian and African Language Department in which the grievant was employed were treated as the layoff unit, several employees in that department who were less senior than the grievant should have been laid off before her.

On cross-examination Ms. Brockman acknowledged that the document published by the Human Resource Services concerning employees impacted by UF layoffs states that each individual College will be designated as a layoff "area", not a layoff unit as she had previously indicated. She also agreed that Article 13.1.6 allows for an instance where one employee can constitute a layoff unit and that under that circumstance seniority is not a consideration.

Dr. Ann Wehmeyer has been employed by the University of Florida since 1980 and a member of the faculty in the Department of Language, Literature and Culture. Until July 1, 2008, she was in the Department of Asian and African Language and Literatures. On that occasion it was

merged with another department and several employees, including the grievant, were laid off.

Dr. Wehmeyer testified that during the six year period that she was Chairman of the Asian and African Language Department, the courses covered languages as well as literature involving Africa, Asia and the Middle East. The courses also involved the teaching of linguistics. She stated that there was no degree program or a major or minor in the Vietnamese language like there was for Chinese.

Dr. Wehmeyer testified that the grievant accepted a position in her department as a lecturer in Vietnamese after it was upgraded to a tenure-track position in August, 2002. She has been employed continuously since that time and has seniority over approximately eight non-tenured employees in her department. According to Dr. Wehmeyer if the grievant were not laid off there is ample work she could perform, such as teaching linguistics, experimental phonetics, tone theory and some courses in Asian linguistics and literature, as well as Vietnamese poetry. She added that there are several existing courses in linguistics, such as Sounds of Human Language and Phrenology, that the grievant is qualified to teach.

On cross-examination Dr. Wehmeyer acknowledged that the grievant was hired to teach beginning and intermediate Vietnamese and, to the best of her knowledge, she is not qualified to teach any other language offered in her department.

The grievant, Andrea Pham, testified that she was hired by the Agency in August, 2002, as a tenure-track, Assistant Professor in the department formerly known as Department of African and Asian Languages and Literature in the College of Liberal Arts and Services, with an affiliation with the Department of Linguistics. She has a Masters Degree as well as a Ph.D. In Linguistics from the University of Toronto. She stated that she is currently in her seventh year with the University and had planned to apply for tenure but that her impending layoff prevented her from doing so.

The grievant testified that she has taught a linguistics course called "Sounds of Human Language" and she works with a committee that oversees Ph.D. degree students. She added that there are several existing courses she is qualified to teach, which include Linguistics, Phrenology, Sounds of Human Language, Language Variations and Structural Vietnamese. She added that she could also teach a course on Vietnamese language and culture. The grievant explained that she has not applied for a position in the Department of Linguistics because there are no jobs available in that Department.

On June 9, 2008, Dr. Pham was notified that she had been selected for layoff as part of a plan to reduce costs throughout the entire university. This plan called for each of UF's colleges and schools to reduce costs by 6% with the decision as to how to do so to be determined

by each such unit. The UF Office of Human Relations posted information on its website addressing questions about the impact of the layoffs resulting from this const reduction program in May, 2008. This document contains the following answer to the question "What is a layoff unit?":

Layoff units are determined by administrative reporting rather than funding. For academic units, except the College of Agriculture and Life Sciences, each individual college will be designated as a layoff area. IFAS is designated as its own layoff area. In non-academic areas, the layoff unit will be defined by the Vice Presidential area.

Dr. Pham was not informed of the layoff unit in her case in the notification letter. Rather, she was told that the layoff unit was "the area of Vietnamese Language" in the September 23, 2008, Step 2 grievance decision.

The UF Provost's office describes the organizational structure of UF as follows:

Colleges and Academic Units

The college is the basic degree-granting unit of the university and may include departments, centers, and schools. The Dean is the chief administrative officer of a college and is appointed by the Provost (as the President's designee). The Dean has the authority and the responsibility for the administration and supervision of the college, and is the agent of the faculty for the execution of educational policy.

Except for the Graduate School, a school is a unit subordinate to a college organized for a special program of studies. The administrative officer of a school is the director. The department is the fundamental unit of academic and administrative organization. The administrative officers of departments are Chairs. Chairs and directors have the authority and responsibility for the administration and supervision of all activities of the department.

Chairs and directors are responsible to their Deans and to their respective Vice Presidents.

The teaching, research, and extension functions of a department or school are conducted by the faculty under the auspices of the chair or director.

Centers and Institutes

Centers and institutes focus on domains of knowledge that reside within a discipline or are cross-disciplinary in scope. These organizational mechanisms can be used to provide greater depth in teaching and/or research to a narrower range of problems within a discipline or to apply a broader vision to problems that cross traditional knowledge boundaries. Centers and institutes are established and abolished according to specific funding and program needs. The administrative officers of these units are directors.

It is through these units that students pursue their degree programs and through which assignment, supervision and evaluation of faculty are carried out. There is no department, school, center, or institute of Vietnamese, nor is there any degree program, major or minor. Instead, there are simply two courses in the Vietnamese language. It was determined by management that these two courses should be eliminated as part of the cost reduction plan, but that decision did not include determining who, if anyone, would be laid off as a result of that decision.

Caroline Wiltshire is the Director of the Linguistics Program at the University. She is a tenured Professor and she teaches courses in Linguistics and Phonology. She noted that there are eleven faculty members and eleven affiliated members in the Linguistics Department. She stated that the grievant is affiliated with her Department, has

graduate faculty status and is fully qualified to teach a number of courses that the program offers on a regular basis.

On cross-examination Ms. Wiltshire acknowledged that the Dean has not authorized her Department to hire any new employees, including the grievant. She stated that she asked the current Dean to consider employing the grievant but that he declined to do so because her employment is the subject of a grievance. She also acknowledged that they do not have current funding for the position.

Dr. Wehmeyer was recalled as a witness during the University's case in chief. She testified that after the financial problems surfaced, she explored various avenues for obtaining alternative funding but was able to find funding to cover only one person. She took her plan to the Dean and asked that one person be taken off the layoff list based on the Department's priorities. She stated that because the greatest need was in the area of Japanese literature, the position they retained was in that area.

Kimberly Brown is the Budget Director for the College of Liberal Arts and Sciences. Her responsibilities include establishing the budget, overseeing expenditures and assisting departments in maintaining fiscal responsibility. She has been employed by the University for twenty years and assumed her present position in May, 2006. She stated that when she began her current job the College had been experiencing deficit

financing for two years. She assisted in the development of a plan to overcome that problem within two years. It included reducing the budget by some six percent, which amounted to approximately six million dollars. Some of the steps taken to meet the budget cuts were reducing expenses, not filling positions when employees retired and making some reductions in personnel.

Dr. Allen Burns has been an Associate Dean for Faculty Affairs in the College of Arts and Sciences since August, 2004. His position involves working with faculty assignments, the Tenure and Promotion Committee and orientation and graduate education programs. He testified that he was familiar with the financial problems and difficult budgeting situation that the College had experienced in recent years and which had resulted in a need to reduce costs. He stated that when he was told of the impending need to reduce the budget by six percent for the 2008-09 school year in January, 2008, he began a series of meetings with the Deans in the College which continued until April. During those meetings a priority plan was developed which would minimize the adverse effect on personnel. He added that during that process a decision was made that the program reductions were unavoidable. He stated that during the process there were no discussions regarding the layoff of specific faculty members. However, certain language and sciences were discussed as units which were susceptible to layoff. He stated that it was ultimately

determined that languages would be considered a unit in and of themselves.

Dr. Burns explained that untenured faculty members are on probation for a period of seven years at which time they can apply for tenure. He stated that in the interim they can be issued a notice of non-renewal. If they become tenured, however, they cannot be removed without just cause.

IV. DISCUSSION AND DECISION

As a beginning point in analyzing the merits of the grievance, and in the interest of bringing the issue into sharper focus, it is helpful to review some of the facts that are not in dispute. First of all, the UFF conceded at the outset of the hearing that the University faced adverse financial circumstances sufficient to trigger the layoff provision set out in Article 13 of the CBA. Second, there is no question concerning the fact that the University has the managerial right to eliminate its course offerings in Vietnamese. Finally, while it is clear that Article 13 gives the University broad authority regarding the manner in which layoffs are conducted, it is equally clear that there are some limitations on this authority, particularly with respect to determining the appropriate layoff unit.

The governing provision is Article 13.1 (b), which specifies that the layoff unit will be "at an organizational level of the University" as deemed

appropriate by management. In my judgment this language conveys a clear and distinct intent that a.) the layoff unit selected must actually be an organizational unit that is recognized as such by the University; and, b.) the University has discretion as to which such existing organizational unit to select. There is no indication, however, that it affords the University the discretion to establish an organizational unit solely for the purpose of affecting a layoff. Moreover, to read such an intent into the language of the provision under the guise of interpretation would render the language meaningless because it would give management complete and unfettered control over layoffs. It is a well-established arbitral principle that an interpretation that tends to nullify or render meaningless any part of a contract should be avoided based on the general presumption that the parties do not write into their CBA words that are intended to have no effect. When that principle is applied here it is reasonable to conclude that the interpretation suggested by the UFF is the correct one because it is obvious that the parties intended to impose some restrictions, albeit limited, on the manner in which layoffs are to be implemented.

As the UFF aptly noted, it is evident that the parties recognized that in a complex organization like a University, there are multiple organizational levels at which it makes sense to determine layoffs rather than University-wide. By providing management the discretion to choose

which smaller level of organization to use, the Union protects a larger segment of unit members from being affected by a particular layoff decision where such a smaller unit is selected. Management in turn is afforded greater flexibility in determining from which areas of its operations layoffs will come. However, the action that has been taken here goes well beyond that discretion and flexibility because there is no evidence that the two non-degree courses which the University describes as the "Vietnamese program" was ever considered by anyone before as constituting any kind of an organizational level. Moreover, to do so is neither contemplated nor permitted by any reasonable interpretation of Article 13.1 (b).

It is also important to note that Article 13.1 was negotiated at a time when employees at all ten of the State Universities were in a single bargaining unit. As a result, it was necessary to use a wide range of terminology to encompass all of the different names used by the various universities to describe their organizational structures. It is for this reason that so many terms are used, not to permit one University to seize upon the words "area" or "program" where it actually has no organizational unit so named. Moreover, this conclusion is made clear by Article 13.2 (c), which states:

"The sole instance in which only one (1) employee will constitute a layoff unit is when the functions that the employee performs constitute an area, program, or other level of organization at a University."

This provision establishes that the negotiators intended that layoffs be determined according to reasonably objective criteria, not by using the language to selectively target particular individuals. Dr. Pham cannot constitute a layoff unit by herself under the plain language of this provision because Vietnamese simply does not constitute an organizational unit of the University.

The evidence shows that UF has a well-defined organizational structure for both administration and academics. This structure is reflected in Joint Exhibits 3 and 4. No where in these documents is Vietnamese identified as any kind of organizational unit, nor does the so-called "Vietnamese program" have any of the characteristics common to those so identified. There is no chair or director, major or minor, graduate students or degree program whatsoever. Dr. Pham has no authority over anyone or anything except the students she teaches. These courses are nothing more than electives available in the Department of African and Asian Language and Literature, which is a part of the College of Liberal Arts and Sciences. Accordingly, based on all of the reasons set out above, I have concluded that both the Department of African and Asian Language and Literature and the College of Liberal Arts and Sciences are both appropriate layoff units in the present case and that the UF has the discretion and authority to designate either. It did not,

however, have the authority to designate the courses that Dr. Pham teaches as an organizational unit for purposes of layoff.

Having determined that the grievant was improperly selected for layoff, the only remaining issue concerns the appropriate remedy. In that regard the University contends that because the grievant did not have tenure, it had the right to terminate her employment by providing her notice of non-renewal, in which event the grievant would have been entitled to a one year's notice that her employment would be terminated. The University argues that since she received such notice, it has the right to terminate her employment effective June 10, 2009, even if she was improperly selected for layoff. The primary flaw of this argument is that it is based on the erroneous predicate that a layoff and a non-renewal are one and the same. In fact, they are entirely different employment actions that are governed by distinctly different sections of the Collective Bargaining Agreement. In this case the University elected to layoff the grievant rather than non-renewing her application. That being the case, the authority of the arbitrator is limited to deciding whether a.) the layoff was in violation of the Collective Bargaining Agreement; and, if so, b.) what the remedy should be for that violation. After considering all relevant factors I have concluded that a fair and proper remedy is to direct UF to rescind the Notice of Layoff issued June 9, 2008, and permit

the grievant to remain employed for such time as she can have the opportunity to apply for and be considered for tenure.

AWARD

In accordance with the foregoing opinion and for the reasons set forth therein, the grievance is sustained.



Stanley H. Sergent
Arbitrator

Sarasota, Florida
March 14, 2009