IN ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN

FLORIDA PBA INC. on behalf
of Francisco Torres,

Union,

and

FLORIDA BOARD OF REGENTS, on behalf of
FLORIDA INTERNATIONAL UNIVERSITY,
a member of the State University System,

Employer.

Before: Leslie W. Langbein, Arbitrator

Appearances:

For the Employer: Thomas Mead Santoro, Esq.
General Counsel, FIU
Vicente A. Tome, Ass't General Counsel, FIU

For the Union: James C. Casey, Esq.
SLESNICK & CASEY

Also Present: Jesse Campbell, Director, Public Safety Dept, FIU
Officer Shelia Cain, Davie Police Department
Officer Dwight Pitts, Public Safety Dept., FIU
Officer Pamela Turner, Public Safety Dept., FIU
Tim Wellborn, Florida PBA
Officer, Francisco Torres

I. Introduction

The arbitration arises out of Article 6 of the Collective Bargaining Agreement ("CBA") between State of Florida Board of Regents and Florida Police Benevolent

Association ("Union") for the period 1999-2002. The Union challenges a decision by the University to restore the seniority of a former member of Florida International University's ("University") Public Safety Department ("PSD") who resigned and then returned to the department three months later.

The Arbitrator accepted her appointment and a hearing was held before her on July 10th, 2002. At hearing, the parties stipulated that the issues to be determined were: 1) whether the University violated Articles 25.1 and 29 of the CBA and 2) if so, what is the proper remedy ? Each party had full opportunity to present, examine and cross-examine witnesses and all pertinent evidence. All witnesses were sworn and the rule of sequestration was invoked. A court reporter was present and transcribed the proceedings. The transcripts are deemed to constitute the record of the hearing. The parties submitted post hearing briefs. Upon receipt of the University's brief on July 22, 2002, the hearing was deemed closed. The parties agreed that the Arbitrator could take additional time to issue this Award.

The Arbitrator has carefully considered the testimony and evidence presented at hearing, given all relevant evidence the weight she deems such evidence should be accorded, has reviewed arguments made and the precedent cited by the parties both during and after hearing and has prepared this opinion and award.

II. Positions of the Parties

Union: The University's agreement with Officer Morris, a former member of the bargaining unit, to restore his seniority upon his return to the department after a three month break in service violates Article 25.1. The University cannot evade Article 25.1's

stricture of "continuous employment" by retroactively treating Officer Morris' time out of the bargaining unit as a "leave of absence." Likewise, the University cannot promise Officer Morris a promotion on his return. The University's actions constitute an arbitrary and inconsistent application of the collective bargaining agreement and the rules governing employment within the State University System and the University, in particular. The violation should be remedied by ordering the University to cease and desist from violating the CBA and rescind the seniority rights granted to Officer Morris.

Employer: The grievance is untimely and therefore, the Arbitrator lacks jurisdiction to decide this matter. (There is no contest as to subject matter jurisdiction). Grievant knew that Officer Morris had returned to the PSD on October 27, 2000 and admittedly heard rumors three weeks thereafter that Officer Morris' former seniority had been restored. Accordingly, the Grievant "knew or should have known" that a possible violation of the CBA occurred which commenced the thirty (30) day period for filing grievances under Article 6. Even assuming the grievance was timely, the University properly exercised a managerial perogative to allow Officer Morris to rescind his resignation and treat his time away from the department as a personal leave of absence. Because Officer Morris was on leave, he met the requirement of "continuous service" and no violation of the CBA occurred.

III. Pertinent Contract Provisions

Article 1 of the CBA recognizes the Union as the sole and exclusive bargaining agent for members of the unit. Article 30 defines management's rights, which include the traditional rights to hire, retain, discipline, manage and direct employees and to exercise

control and discretion over the organization and efficiency of operations. A grievance concerning management's interpretation or application of the agreement must be filed within thirty (30) days of the "act or omission giving rise to the grievance or the date on which the employee knew or should have known of such act or omission if that date is later." Article 6.

Article 25 entitled "Seniority" defines seniority as follows:

> 25.1 Definition. For purposes of this Article, "seniority" shall be defined as continuous service in the job classification; provided, however, that any unauthorized absence for three (3) or more consecutive days shall be considered a break in service.

Article 29 incorporates by reference all pay and benefits provisions published in the SUS Employment Rules which cover employees and which have not been modified by the CBA or the Legislature.

Article 5.3, entitled "Consultation" provides:

> A. The Presidents or their representatives on each campus shall meet with local PBA representatives to discuss matters pertinent to the implementation or administration of this Agreement, university actions affecting terms and conditions of employment unique to the university or any other mutually agreeable matters. The party requesting consultation shall submit a written list of agenda items no less than one (1) week in advance of the meeting. .....The Employer and the PBA understand and agree that such meetings may be used to resolve problems regarding the implementation and administration of this Agreement, however, such meetings shall not constitute or be used for the purpose of collective bargaining.

IV. Background to Dispute

On July 7, 2000, Officer Matthew Morris tendered a resignation from the University's PSD to be effective July 20, 2000. Officer Morris left FIU to join the Miami-Dade County

Public School Police Department. His former position at the University remained vacant.

Three months later Officer Morris contacted Chief Campbell and discussed a possible return to the University. Their discussion included restoration of Officer Morris' departmental seniority and a promotional opportunity. In agreement with these terms, Officer Morris returned to the PSD on October 27th, 2000. The University then converted Morris' time away from the department into a personal leave of absence.

Evidence at hearing showed that within three weeks of Office Morris' return, rumors spread through the department that his full seniority had been restored despite the three month gap in service. Though it was not clear at hearing, the rumor may have been prompted by the posting of a seniority list in the department.

Grievant joined by Officer Shelia Cain attempted to verify the rumor by visiting the University's Human Resources Department. They requested to see Officer Morris' personnel file but documentation that would prove or disprove their beliefs was not in it. They brought the matter to the attention of the Union. The Union then continued the inquiry into Officer Morris' seniority status.

Because the posted seniority list was not issued on university letterhead or signed by a member of staff, it was unclear from where the list had emanated or whether it was official. The Union then directly contacted the University's chief human resource officer and the PSD chief and learned the University had indeed restored Officer Morris' seniority. Based on this and other pending issues, the Union requested a consultation pursuant to Article 5.3 of the CBA.

The consultation occurred on November 21, 2000. One of the items on the agenda

for discussion was seniority. Testimony at hearing established that Officer Morris' restored seniority was actually discussed at the meeting. The University's written response issued on December 11, 2000 states in pertinent part:

> "Please elaborate in writing and with specificity as to how seniority is misinterpreted and we will take the matter under advisement. Of course, contradictions in the contract are subject to the grievance mechanism. If management has been deficient, you are encourage to seek remedy through appropriate procedures."

The Union then filed this grievance on December 21, 2000. On January 9, 2001, the University's Step 1 written response issued:

> "According to your statement of the facts the alleged violation of the collective bargaining agreement occurred on October 27, 2000. Our agreement requires all grievances to be filed within thirty (30) days of the act, or missions, giving rise to the grievance, if that date is later. The period for filing a Step 1 grievance expired on November 27, 2000."

OPINION & AWARD

The first matter which must be addressed is procedural arbitrability. The University argues the grievance was filed later than thirty (30) days of the time the Grievant "knew or should have known" of the facts giving rise to the claim. See, Article 6.1(B). [1] It supports this position through Grievant's admitted awareness of Officer Morris' return on October 27th, 2000 and rumors concerning Morris' restored seniority.

The Union counters that Grievant lacked actual knowledge of Morris' restored seniority; all he had was an unconfirmed suspicion three weeks after Morris' return. Attempts to verify the suspicion by reviewing Officer Morris' personnel file were

[1] The Arbitrator notes that Article 6.2(C)(4) requires that issues of arbitrability be bifurcated, however, neither party raised this as an objection.

unsuccessful. It was not until the facts were verified immediately prior to the parties' consultation that he "knew or should have known" of the facts giving rise to the grievance. The Union raised the issue at the consultation on November 21, 2000; its grievance dated December 21, 2000 was timely.

The Arbitrator agrees with the decision of the Step 2 reviewer that given the Union's unsuccessful attempts to verify the rumor, it did not know and could not have known that Officer Morris returned with full seniority until actually confirmed by the University. But, even if this conclusion were wrong, other bases support the grievance's timeliness.

Testimony established that the Union contacted management representatives before it requested the November 21, 2000 consultation. It "knew or should have known" at that time (unspecified at hearing) that there was a dispute regarding the interpretation or application of the CBA. Article 5.3 allows the Union to call for a consultation to "resolve problems" regarding the "implementation or application" of the CBA (in this case, the misapplication of Article 25.1). What effect, if any, did this have on the Union's obligations under Article 6 ?

The language of Article 5.3 slightly differs from that of Article 6. Article 5.3 provides a means to "resolve problems" regarding the "implementation or administration" of the CBA. Article 6's language speaks to a means to remedy "disputes" regarding the "interpretation or application" of a specific provision of the agreement. Article 5.3 contains no deadlines for requesting consultation, however, when it is requested, the University "shall" meet to discuss the matters raised by the Union. The only time restriction mentioned in Article 5.3 is that the Union provide an agenda of issues to be raised at

consultation to Management no later than five (5) days before the meeting. Article 6, on the other hand, has specific deadlines that must be followed or a dispute is deemed waived.

While the language of Article 5.3 is much broader than Article 6, there is no doubt that consultation can be used as a precursor to, or in conjunction with, grievance procedures. In fact, Section 6.1 seemingly references Article 5.3 by encouraging "the informal resolution of employee complaints:"

> Such reviews and discussions should be held with a view to reaching an understanding which will resolve the complaint in a manner satisfactory to the employee without need for recourse to the formal grievance procedure prescribed in this Article. If the complaint is not resolved by such informal discussion, the employee may proceed to file a grievance consistent with the provisions of this Article.

Given Article 5.3's requirement for five days advance notice of topics of discussion, it can be inferred that the University "knew or should have known" around October 17th, 2000, that the Union believed there was a "problem" concerning Officer Morris' restored seniority–i.e., the University's "implementation or administration" of Article 25.1. The University gave no indication between the time of the request, the date the agenda was prepared and the date consultation actually took place that its decision regarding Morris' seniority was final and must be addressed only through Article 6.

In fact, the parties discussed the "problem" at consultation. University representatives were shown a copy of the posted seniority list with Morris' restored date and asked whether it was official. The University substantiated that is was. While the University denies this discussion took place, curiously its December 11, 2000 response

invites the Union to file a grievance about seniority if "management has been deficient." When the Union accepted the invitation ten (10) days later, the University's response was its grievance under Article 6 was untimely.

Certainly, the University created an impression that it might "resolve the problem" of Officer Morris' restored seniority through consultation–i.e., informal pre-grievance discussions. Even if the grievance was technically untimely, there is sufficient basis for finding the University waived timeliness by inviting a late-filed grievance. The facts would also support a finding that the University "lulled" the Union into missing the thirty (30) day deadline.

It could also be concluded that the University suffered little prejudice by a late filing. The evidence shows that the Union and the Grievant did not sleep on their rights. They promptly undertook an investigation, met with university officials and raised the issue at consultation. The University was aware of the dispute. And, the ongoing dialogue may have negated the necessity for a grievance. Given the facts supporting alternative bases, the Arbitrator concludes the grievance was timely filed, she has jurisdiction and must consider the merits of the claim--whether the University violated Articles 25.1 restoring Officer Morris's seniority ?

Since the University is a state agency, it is governed by principles of administrative law incorporated into Florida Statute Chapter 120. The University's citation to rules of the Board of Regents and FIU is an implicit recognition of its need to rely on statute or Florida Administrative Code provisions for support. Under the Florida Constitution and Chapter 120, state agencies possess only the powers granted by law and such inherent

authority as can be reasonably inferred to carry out their statutory missions. When the exercise of its discretionary authority is challenged, an agency must demonstrate: 1) that a statute supports its actions; 2) the authority conferred is either self-executing or the result of properly implemented administrative rules, and 3) there are established criteria to guide the exercise of its discretion. In labor disputes, the agency must also show that it has not bargained away managerial rights through the collective bargaining process.

Here, Chapter 240 and Board of Regents rules provide authority to the University to implement a personnel system for its faculty, staff and administrators. Section 6C-5.920, cited by the University, provides BOR directives to guide officers and administrators in personnel matters, including the forms of authorized leave which can be granted. Additionally, the University has enacted rules, including Section 6C8-4.018, F.A.C., that allow an employee to rescind a previously tendered resignation under certain circumstances.

The problem with the University's reliance on the BOR rules, however, is that they do not permit a university to grant an individual a leave of absence for personal reasons. The only authorized types of leave are compensatory, sick , annual , compulsory medical leave, FMLA, worker's compensation, military, and various forms of administrative leave, none of which is pertinent here. Nor is leave of absence for personal reasons authorized in Rule 6C8-4.018; this rule strictly governs terminations of employment of administrative (A & P), university support personnel (USPS) and Other Personal Services (OPS) staff. Rule 6C8-4.018 provides methods by which the University may separate ***non-unionized*** employees and recognizes the at-will rights of all employees, whether bargaining unit

members or not, to resign at any time. Section 3 of that rule relied upon by University states:

> (3) Resignation by A & P, USPS and OPS Staff. Staff members will give ***three months written notice of resignation when at all possible***. A resignation may not be rescinded by the staff member without concurrence of the University. [Emphasis Added].

The obvious reasoning behind the requirement for three months' advance notice is to permit the University to advertise and fill the position in a seamless transition between the departing employee and the newly hired one. During the three month notice period, the resigning employee is still an employee (and thus is continuously employed). If the employee changes his or her mind, the rules permit the University in its sound discretion to allow the employee to rescind the resignation. The University can exercise this discretion precisely ***because, and when,*** the employee is ***still employed***.

What occurred in this case is a far different scenario. Officer Morris tendered a written resignation and ***left*** his employment at the University. His resignation was accepted and he did not seek to rescind it ***while he was still employed***. For three months he worked for another law enforcement agency. Once his resigned was tendered, accepted and he left, he was no longer a current employee (as contemplated by the rule), but a *former employee.*

It is axiomatic that a university cannot grant leave to someone who is no longer an employee. Thus, the University's retroactive attempt to grant leave to Officer Morris was invalid and cannot save Officer Morris from having suffered a break in service.

While the University has the right to re-instate the leave banks of an employee who

has been separated for one hundred (100) days of less, its right to re-hire does not include inherent authority to restore seniority, especially when that right is governed by a collective bargaining agreement. Article 25.1's requirement of "continuous service" means just that: a break in service, even if for a short time, operates as a forfeiture of seniority. And, given the CBA's recognition clause, the University and a returning employee could not negotiate and enter into a side agreement.

While the University certainly did not wish to lose the opportunity to re-hire Officer Morris, an experienced officer, only the terms of the collective bargaining provision could have permitted reinstatement of seniority under such circumstances. Compare, Union Carbide and Steelworkers, Local 8359, 91 LA 181 (King, 1988) [loss of seniority upon transfer out of bargaining unit] and Champion Int'l Corp and Paperworkers Local 1161, 108 LA 104 (Statham, 1997). [contract provides for maintenance of full seniority for 6 mos upon a transfer out of bargaining unit]. And, the same result must obtain if the converse was to have occurred: The Union would not be able to insist that the University reinstate the seniority of someone like Officer Morris who suffered a break in service.

Given the University's lack of authority under statute, rule and collective bargaining agreement to restore Officer Morris' seniority, it is not necessary to address whether the University's rule lacks specific criteria for the exercise of its authority. The Arbitrator only notes that if Rule 6C8-4.018, F.A.C. was applied as interpreted by the University, it most likely would be held invalid since Chapter 120 requires state agencies to set out criteria to guide the exercise of administrative discretion.

At hearing, the University could not cite any criteria to guide administrators in the

the exercise of discretion under Rule 6C8-4.018, F.A.C. When asked if the rule (as interpreted by the University) would authorize the University to consider rescission of a resignation by a former employee who had been gone a year, the University's representative did not know. One would expect that if a rule like Rule 6C8-4.018, F.A.C. permitted the University to exercise discretion, it would contains a list of factors such as "needs of the University" or "employee's prior performance" to be applied in consideration of a request to rescind a resignation.

For the reasons expressed herein, the Arbitrator makes the following award:

Award

The grievance is sustained. The University shall cease and desist from violating Article 25.1 of the CBA and shall revise the seniority list to reflect that Officer Morris' seniority date is October 27, 2000 or the date he was actually hired back. As Grievant's collective bargaining rights (and all other officers in the department) is affected by the University's misinterpretation and misapplication of Article 25.1, all records of the Department shall be adjusted accordingly to show the correct seniority rankings of the bargaining unit members as of July 20, 2000, the date Officer Morris resigned. The fees and expenses of the Arbitrator, as detailed by separate invoice, shall be borne by the University. The Arbitrator retains jurisdiction for ten (10) days of the date this award is issued to clarify any matters which arise as a result of this Award.

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Leslie W. Langbein
Arbitrator 9/9/02