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September 27, 2000

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Kent J. Collings

FINANCIAL SETTLEMENT

CASE: KATHY CONROY DISCIPLINE

CASE NO: 97-16974

CASE NO: 97-19566

DATE: September 27, 2000

A financial settlement meeting was held at the law offices of Newcomb, Sabin, Schwartz & Landsverk, Attorneys at Law, Suite 4040, 111 S. W. Fifth Ave., Portland, OR, on August 15, 2000. The parties were CLEANPAK International, hereinafter referred to as "Company", represented by Jeffrey P. Chicoine, an attorney, and Sheet Metal Workers International Association, Local Union No. 16, hereinafter referred to as "Union", represented by Michael J. Tedesco, an attorney. The arbitrator was Dr. Kent J. Collings of Portland, OR. There was no court reporter.

ISSUE

On January 9, 1998, in his decision on Case 97-16974, Arbitrator Collings stated, "The arbitrator retains jurisdiction as to any disputes over the financial handling of this grievance." Further, on January 9, 1998, in his decision on Case 97-19566, Arbitrator Collings stated, "The arbitrator retains jurisdiction over any disputes involving the financial settlement."

Since no agreement has been reached on the financial settlement, the hearing was reopened for the purpose of reaching such settlement.

STIPULATIONS

Joint Exhibit 1 contains an historical list of the stipulated facts in the case as follows:

1. Before December 18, 1996, Conroy was employed in the position of lead machinist at the rate of $16.69 per hour plus a $2.35 premium for work as a lead person.

2. On December 18, 1996, Conroy was suspended for three days and demoted and removed from her lead person position.

3. Effective December 29, 1996, the premium pay was removed from Conroy''s wage rate as part of her suspension, reducing her to the base rate pay of $16.69.

4. The arbitrator rescinded the three day suspension and demotion from lead, reducing the discipline to an ""oral reprimand (recorded)."

5. On February 6, 1997, Conroy was terminated.

6. The Arbitrator reduced the termination to a 30 day suspension and demotion from lead.

7. Saturday, March 8, 1997, was the last day of Conroy''s 30 day suspension as awarded by the arbitrator.

8. Conroy immediately applied for work referrals at the Local 16 hiring hall.

9. On Tuesday, March 11, 1997, Conroy accepted employment at Cascade General, Inc. paying $17.25 per hour.

10. On March 17, 1997, Conroy voluntarily quit her employment at Cascade General, Inc.

11. Cascade General had continually employed pipefitters through June 1998.

12. On May 6, 1997, the corporation that had employed Conroy changed its name from PACE Company to CLEANPAK International, Inc. The assets of the PAH division, where Conroy had worked, and the PACE name were sold to York International. York continued to operate the former PAH Division as PACE Company under a collective bargaining agreement with Local 16.

13. On January 9, 1998, the arbitrator issued awards simultaneously in the suspension and discharge grievances, reducing the termination to a 30 day suspension that ended March 8, 1997.

15. On March 16, 1998, CLEANPAK unilaterally implemented its final offer, which included a top pay for journeyman of $15.50 per hour.

16. Starting July, 1998, Conroy accepted full time employment with Multnomah County and has been employed there since.

17. On July 9, 1998, the Local 16 commenced a strike against CLEANPAK which continued to this date.

18. CLEANPAK made an unconditional offer of employment to Conroy asking that she return to work on or before January 26, 2000.

19. As of the hearing, Conroy has not yet returned to work.

20. The union's claim for back wages is limited to January 26, 2000.

The arbitrator believes this list should contain some other pertinent facts, as follows:

17a. 8-14-98 - Circuit Court of the State of Oregon, for Clackamas County, dismissed action to overturn arbitrator's ruling.

17b. 12-29-99 - The Court of Appeals of the State of Oregon affirmed the Circuit Court's dismissal.

EXHIBITS

JOINT EXHIBIT 1 - A 4" thick 3-ring binder was submitted by the parties at the hearing, containing the stipulated facts and a list of exhibits.

UNION EXHIBIT 1 - Conroy Hourly Rates.

UNION EXHIBIT 2 - Conroy Lost Wages.

UNION EXHIBIT 3 - Conroy personal Out of Pocket Payment for Health Insurance.

UNION EXHIBIT 4 - Value of Vacation Time Lost.

UNION EXHIBIT 5 - Compensation which Conroy Lost, Wages, Insurance, and Vacation.

UNION EXHIBIT 6 - Interest Compounded at 9% on Lost Compensation

UNION EXHIBIT 1 (REVISED) - Conroy Hourly Rates.

UNION EXHIBIT 2 (REVISED) - Conroy Lost Wages.

UNION EXHIBIT 3 (REVISED) - Conroy Personal Out of Pocket Payment For Health Insurance.

UNION EXHIBIT 4 (NOT REVISED) - Submission of UNION EXHBIT 4 eliminated by Union.

UNION EXHIBIT 5 (REVISED) - Compensation which Conroy Lost, Wages and Insurance.

UNION EXHIBIT 6 (REVISED) - Interest Compounded at 9% on Lost Compensation, Conroy Wages and Interest Lost.

WITNESSES

For the Company

Suzanne Young - Human Resources Manager, Cleanpak

Ken Madden - Madden Industrial Craftsman, Inc.

For the Union

Michael D. Smith - Local 16

Kathleen Conroy - Grievant

PERTINENT CONTRACT LANGUAGE

The contract contains no language pertinent to the financial settlement of an arbitrator's decision.

CITATIONS

For the Union

1. V-1101 - Interest Rate Charged on Underpayments, dated 2000 - Shows April 1. 2000-September 30, 2000 underpayment of IRS taxes to be 9%.
2. 101 LA 515, dated 8-9-93, NLRB case, not arbitration - reason for interest payment.
3. 125 LRRM 1177, dated 5-28-87 NLRB case, not arbitration - NLRB in back pay cases uses IRS underpayment rate.
4. 71 LA 897 - Orlando Transit vs. Amalgamated Transit Union, 10-9-78. Employer bears the burden of proving grievant made insufficient efforts to mitigate damages.
5. 73 LA 1292, Markle Manufacturing Co. vs. IUEW, 1-4-80. An arbitration case. Allowing the employer to suspend his liability during a strike is to allow the employer to benefit from its own wrong doing. Also discusses payment of interest.

For the Company

1. Elkouri & Elkouri, undated, How Arbitration Works, page 593. Commonly recognized that the employee is liable for mitigating costs by seeking actively and obtaining employment.
2. 45 LA 751, 11-16-65, an arbitration. Employees have a back pay entitlement but also a duty to mitigate costs.
3. Hill & Sinicropi BNA, no date. Employees have duty to mitigate costs.
4. 458 US 232, 1982. Ford Motor Co. vs. EEOC. Not an arbitration. Duty to mitigate ancient principle of law. Rejection of job offer ends obligation of employer.

5. 94 LA 876, 4-18-90, Kings County Truck Lines vs. Teamsters. payment of interest denied. Failure to seek and find work a breach of continuing obligation to find and seek employment.
6. Standard Materials, Inc. vs. NLRB, 1989. Not an arbitration. Effect of employee quitting job.
7. Decisions of NLRB, 1961. Employee quits mitigating job because of nasty work. Not a compelling reason.
8. 106 LA 23, Cone Mills Corp. vs. Unite, Dec. 17, 1995. Arbitration. Back pay reduced when grievant forgoes job.
9. NLRB vs. Mercy, about 1974. Not an arbitration. Discussion of reasonable effort to find employment. Employee can't sit by idly.
10. Arlington Hotel vs. NLRB, 1989. Not an arbitration. Three employment contact per month insufficient effort to properly mitigate.
11. NLRB vs. Arduine Mfg. Corp., 1968. Not an arbitration. Reasonable effort to obtain employment varies. (Not much help.)
12. 73 LA 1171, 1979. Good Hope Refineries vs. OWLU. An arbitration. Reasonable diligence to mitigate not shown. The employee's age and health were okay. No award was made.
13. 93 LA(BNA) 302 1989. An arbitration. T. W. Recreational vs. machinists. Grievant ignored duty to mitigate damages. No back pay awarded.
14. Labor Arbitration Awards. Olson Brothers vs. meat cutters, 1961. An arbitration. Time spent on building his own house deducted from grievant's back pay.
15. 66 LA 961, Acme vs. steelworkers, 1971. An arbitration. Punative damages to company not proper.
16. 26 LA 155, 1956. Intermountain Operators vs. teamsters. An arbitration. Most arbitrators pay no interest.

17. Decisions of NLRB, pages 719-721, undated. Not an arbitration.
    Interest rate of 6% compounded used.
18. Decisions of NLRB, pages 1173-74, 1947. Not an arbitration.
    Interest paid at short term federal tax rate.

BASIC FACTS

In the first grievance (97-16974)(phony invitation), the arbitrator reduced the suspension and demotion to an oral reprimand (recorded). Suspension and demotion was cancelled and the money restored. Union computed the loss at $997.00, and Company agrees with this amount.

In the second grievance (97-19566), the arbitrator stated, "The Grievant will be returned to work immediately and paid full back pay (as a journeyman)(less earnings) for the period since the end of the suspension." The amount of this payment is in serious dispute.

UNION POSITION

The full text of the "Union's" post hearing brief may be found at tab "Union Post Hearing Brief." The Union's position is summarized here:

"During the three years between the arbitrator's decision and the Company's offer to reinstate Mrs. Conroy, she sought, and ultimately obtained, other employment. She initially sought another position as a machinist through the Union hiring hall. When that proved unsatisfactory, she sought other employment. In July 1998 she went to work for Multnomah County. In her current position she earns approximately $5.00 per hour less than she would have had the Company not discharged her.

"The Grievant mitigated her damages by actively seeking other employment pending the outcome of her grievance.

"The Grievant is entitled to 9% interest, compounded quarterly, from the date of the arbitrator's award.

"The Grievant's damages are not mitigated by the Cleanpak strike."

The Arbitrator will analyze the Union's more detailed arguments later on under "Discussion."

COMPANY POSITION

Company's seventeen page Post Hearing Brief will be filed in its entirety at tab marked "Company Post Hearing Brief." Company contends that the Grievant did not exercise reasonable diligence in looking for work and when taking alternative employment, but quitting. The Grievant's right to damages terminates after accepting comparable employment at Cascade General and then quitting when further work was available.

The Grievant failed to mitigate her damages by her failing to undertake a diligent and reasonable job search.

The Grievant could have found comparable machinist work within a week or two had she looked.

Because the Grievant would never have crossed the picket line, her back pay should terminate at the time of the strike.

Interest of any kind is not appropriate.

Company concedes the Grievant's loss of Union's request for $997.00 for the overturn of her December 1996 discipline.

The arbitrator will analyze the Company's more detailed arguments later on under "Discussion."

DISCUSSION

Both parties have submitted many citations to support their reasoning. The arbitrator has read every word of every citation in an attempt to understand better the arguments of the parties. His bill represents perhaps half of the time actually spent.

The citations are often conflicting and substantiate the old saying, "The devil quotes scripture to his use."

First of all, arbitration, unlike civil law, is not legally based on precedent and citations are at best a tool.

This arbitrator is a long time college professor and seminar leader in the areas of labor relations, collective bargaining, dispute resolution and arbitration. In his classes and seminars he often quoted the American Arbitration Association's (see tab marked "AAA Guidelines") advice not to use citations since they are often conflicting, send the arbitrator to the books, and raise the bill without benefit.

In this case there is general agreement that discharged persons should seek and find employment pending an arbitration decision, but sincere disagreement on the effect of a strike, payment of overtime and interest.

There is another problem for the arbitrator. Nearly all of the citations deal with the conduct of a grievant while awaiting an arbitrator's decision. Hardly any of them deal with the conduct of a grievant after an arbitrator's decision has been made and the Company elects to dispute it.

Does the Grievant now have the right to forget about mitigating the damages and wait for the "inevitable fat cat award?" Or does the responsibility of discharged persons to seek and find employment continue after the arbitrator's decision?

The citations are inevitably very old, dating back as far as 1947. Many of them are NLRB cases rather than arbitrations. They are actually not very useful as decision makers and sometimes confuse the arbitrator.

The analysis and awards that follow are the arbitrator's best judgment as to proper payment under the varying circumstances of this case.

Mitigating the Damages by
Seeking and Finding Other Employment

Immediately upon her discharge on 2-6-97, Grievant on March 11, 1997, accepted comparable employment at Cascade General. On March 17 she voluntarily quit her employment because the work was too hard on her physically and Cascade General was quite dissatisfied with her work. For the balance of the time after quitting Cascade until the arbitrator's decision on January 9, 1998, Grievant's efforts to secure additional acceptable employment were rather desultory and cursory.

Union states she tried sufficiently hard and Company disagrees totally. There is little question that she made some effort and there is little question that she could have done much more.

On January 9, 1998, the arbitrator reduced the discharge to a thirty day suspension which ended March 8, 1997. On that date Grievant had every right to believe she would be soon returned to her old job and should cease efforts to find employment. On July 1, 1998, she finally gave up and went to work for Multnomah County. Her efforts to mitigate costs by seeking and finding employment were certainly adequate under the circumstances from the period of the arbitrator's decision on January 9, 1998, onward.

Effects of the Strike

Company contends that there certainly should be no back payment of any kind after the strike started on July 9, 1998. Grievant admits to being a Union activist, to picketing during the strike, and even states that she would not have been a strike breaker.

Union contends, as in Union citation 5, that a strike does not lessen the back pay obligation of an employer.

While it is fairly obvious that Grievant is likely to have turned down an offer, she was never given a chance until January 2000 to turn down

a job. The obligation of the Company, strike or no strike, remains the same. This, of course, is why Company eventually made an offer to Grievant to return to work unconditionally by January 26, 2000. Until January 26, 2000 Company's obligation cannot be lessened because of a strike.

On January 9, 1998, the arbitrator ordered the Grievant back to work. Company made a calculated decision to challenge the arbitrator's award in court. The Company knew at that time that if it lost in court (and in later appeals), it could be liable for full pay and benefits for the entire period after January 9, 1998. This liability would not be affected by strikes, by the Grievant's conduct, or for any other reason if Company lost.

Company chose not to make an offer for Grievant to return to work until shortly after the Court of Appeals' decision on 12-29-99.

Overtime Pay

In an arbitration career stretching over 30 years, this arbitrator has never awarded overtime in a back pay award. Overtime is a bonus payment for extra work over a normal shift because of the physical strain involved. Overtime is not guaranteed by the contract nor is it certain to be available.

Despite the fact that Company, in a footnote on page 2 of its Post Hearing Brief, does not dispute the Union's use of 32 hours of overtime per quarter, the arbitrator is not inclined to award a grievant back pay for overtime not really worked.

Interest

In the same 30 year career, the arbitrator has never awarded interest in a back pay claim and the evidence is not persuasive that interest is apropos here. We should not forget that the arbitrator found the Grievant guilty and charged the Union to pay for the arbitration as the losing party. Interest in effect is punitive damages and the evidence does not convince the arbitrator that an exception should be made here.

The question of interest rate is moot since the arbitrator intends to award no interest.

DECISION AND AWARD

Case No. 97-16974

Company and Union agree that Conroy's loss in this case is $997.00. The arbitrator orders $997.00 to be paid the Grievant as agreed to by the parties.

Case No. 97-19566

(1) The Grievant will be paid fifty percent (50%) of back pay for the period March 8, 1997, (end of suspension) to January 9, 1998, (arbitrator's decision), less any wages earned on other employment. No overtime and no interest will be paid. Full (not half) health and welfare payments will be made for the period.

(2) Grievant will be paid full back pay for the period January 10, 1998 (day after arbitrator's decision) until January 26, 2000, (Company offer for Grievant to return to work), less outside earnings. No overtime and no interest will be paid. Full health and welfare payments will be made for this period.

(3) The arbitrator will retain jurisdiction if there is again disagreement as to the calculation of his award.

Kent J. Collings