

**LITTLETON ALTERNATIVE DISPUTE RESOLUTION, INC.
1901 W. Littleton Blvd., Littleton Colorado 80120**

In the Matter of Grievance Arbitration between:

RE: L0251-005

JEFFCO EDUCATION SUPPORT PROFESSIONALS ASSOCIATION
("JESPA" or "Association", on behalf of Grievant Casey Robinson

and

JEFFERSON COUNTY SCHOOL DISTRICT ("District")

FINDINGS AND RECOMMENDATION

THIS MATTER came on for hearing on Thursday, December 19, 2019. Erik G. Bradberry, Esq. appeared on behalf of JESPA. Testifying for JESPA was Lara Center ("Center"), President of JESPA, and Interim Executive Director Victoria Flores ("Flores"), and Wally Maistryk ("Maistryk"), school bus driver. Grievant Casey Robinson ("Robinson") was present throughout the hearing and testified on his own behalf.

Katharine Jensen, Esq., appeared on behalf of the District. Testifying for the District was Dean Warkinton ("Warkinton"), Workplace investigator, Mike Hinz ("Hinz"), Fleet Coordinator, and Greg Jackson ("Jackson"), ED Transportation & Fleet Services.

The hearing was concluded with the submission of written closing statements on January 13, 2020.

ISSUES TO BE DETERMINED

The parties did not agree on the issues to be determined. After hearing the evidence and reviewing the post-hearing briefs, the Arbitrator determines there are two issues to be determined:

- A. Did the District violate the Collective Bargaining Agreement ("CBA") when it terminated Robinson's employment due to the elimination of his position? If so, what is the appropriate remedy?
- B. When it made the decision to terminate Robinson's employment, did the District discriminate against him on the basis of his race, African-American, and/or retaliate against him for his protected activity, to wit, making reports of suspected financial impropriety in the parts warehouse, filing an internal complaint of race discrimination, or

supporting another employee's complaint of national origin discrimination,? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE NEGOTIATED AGREEMENT, Exh. 4

Article 2 General

2-1 Nondiscrimination

The District and the JESPA will not discriminate against any person because of ethnicity or race, color, religion, national origin, ancestry, sex, sexual orientation, marital status, age or disability, or membership or non-membership in any organization.

Employee grievances alleging discriminatory treatment by the District based, on any of the factors set forth in the first paragraph of this Article may be filed under Board Policy Staff Complaints and Grievances procedures, with the JESPA Grievance Chairperson or with the Office of Employee Relations.

The employee may choose either the Board/District Policy Staff Complaints and Grievances Procedures or the grievance procedures in Article 6 of this Agreement, but the employee may not use both procedures.

2-9 Management Rights

The authority of the Board to hire, transfer, promote, assign or retain employees; to suspend, demote or discharge employees or take other disciplinary action for cause; to terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons; to determine job descriptions and classifications, to determine practices and standards for hiring and promoting shall not be, and is not in any manner, impaired by or through the execution and performance of the Agreement.

Article 6 Grievance Procedure

6-1 Definitions

6-1-1 The term "Grievance" shall mean a complaint by an employee covered by this Agreement, or a complaint by the JESPA, alleging a violation, misinterpretation or inequitable application of any provision expressly set forth in this Agreement.

6-3 Time Limitation

No formal grievance shall be recognized by the District or the JESPA unless it is submitted to the Office of Employee Relations in writing within thirty-five (35) workdays after the aggrieved person knew, or should have known, of the act or

condition on which the grievance is based. A grievance not submitted within the aforementioned timeline will be considered waived.

6-5 Procedure

6-5-4 Step Four-Advisory Arbitration (excludes Paraprofessionals/Clinic Paraprofessionals)

6-5-4-1 If the grievance is not resolved at Step Three, a demand for an Arbitration hearing will be transmitted in writing by the JESPA to the office of Employee Relations, within thirty-five (35) workdays after the JESPA receives the Step Three decision. Parties agree that reasonable effort will be made to schedule and hold the hearing as soon as possible.

6-5-4-4 The arbitrator's decision shall be advisory.

Article 8 Employee Rights

8-2 Employees are entitled to due process whenever the District exercises its right to discipline or discharge employees.

Article 11 Reduction in Force

11-1 The term "Reduction in Force" shall mean the termination of ten (10) or more employees in a department, or ten (10 percent of the employees in a department, whichever is the lesser, provided that four (4) or more employees are affected.

Article 10 Transfers and Promotions

10-5-6-5 If internal candidates are substantially equal, the selection will be based on the greatest amount of continuous job-related service in the District.

Article 15 Corrective Action

15-3 General

15-3-1 While employees are entitled to due process as established in Article 8-2, the District shall have the right to discipline and/or separate employees for just cause as defined in Article 1-5-1.

INTRODUCTION AND POSITION OF THE PARTIES

This matter stems from a grievance filed by JESPA on behalf of Casey Robinson, who was employed by the District in the position of Lead Parts and Warranty Fleet Technician, from March 29, 2017 until his termination on April 19, 2019.

JESPA claims on behalf of Robinson that the termination is not authorized by the CBA as neither just cause exists for the termination, nor was the act a Reduction in Force under the CBA. It claims that if the District relieved Robinson of his duties under the general Management Rights clause of the CBA, for lack of work or other legitimate reason, there would be some evidence of the exercise of that right. Since no such evidence exists, JESPA argues, the Board improperly delegated its authority under the CBA to Jackson who made the decision to eliminate Robinson's position. Further, JESPA claims the real reason behind the decision to terminate Robinson is discrimination based on his race, African-American, and/or retaliation for his protected activity during the year before his termination.

The District seeks to limit the issue before the Arbitrator to whether its decision to eliminate Robinson's position as a result of an organizational restructure, is in fact pretext for discrimination and/or retaliation. The District argues Robinson was given an opportunity to apply for the restructured position, and that the interview panel rated Patrick Garcia ("Garcia") more highly. Robinson was laid off due to the elimination of his position and non-selection for the new position. The District argues JESPA's articulation of other issues are subsumed under the non-discrimination clause of the CBA or not properly before the Arbitrator, arguing that whether the Board properly delegated its management rights is not subject to arbitration in this case.

Following Robinson's receipt of the termination letter on April 19, 2019, JESPA filed a grievance on his behalf, asserting that the termination was issued without just cause and due process and was retaliatory and discriminatory (**Ex. 13.**) All Steps of the Grievance Process were followed or waived. Ultimately, on August 20, 2019, Tom McMillen, Community Superintendent, denied the grievance concluding that Grievant was "...not terminated from his position. Grievant was laid off, based on elimination of the former position and the selection of another candidate for the restructured position" (**Ex. 40 at 10.**)

FINDINGS OF FACT¹

1. The Transportation Department, in which Robinson, worked employs approximately 480 employees. It has four terminals. Fleet Services is a division of the Transportation Department consisting of approximately 45 employees who are responsible for maintaining the vehicles in the Transportation Department. The Parts department is in the Fleet Services division.

2. Robinson, who is African-American, began working for the District on March 29, 2017 in the Fleet Services division in the position of "Lead Parts & Warranty – Fleet Maintenance". Robinson and others referred to his position as the Parts Controller. The job description for this position was entered into evidence as **Ex. 6**. The education and training, experience, skills, and knowledge requirements for this position are set forth in the job

¹ All Findings of Fact are based on the unrecorded testimony of witnesses. Where admitted exhibits are relied upon, they will be designated as (**Ex. __.**)

description. The position has supervisory responsibility. Robinson reported to Paul Kusner², who reported to Greg Jackson, African-American.

3. At that time, the Fleet Services Division also included a position known as “Technician – Fleet Services Parts” (Ex. 7.) Robinson and others in Fleet Services commonly referred to this position as the Parts Driver. The education and training, experience, skills, and knowledge requirements for this position are set forth in the job description. At all times relevant herein, Patrick Garcia held this position and reported to Robinson.

4. Robinson’s job graded at a salary grade R-23, and required him to “manage fleet services warehouse operations at all 5 locations to include purchasing, receiving, stocking, negotiate parts prices, write bid specifications, oversee blankets and contract awarded pricing...vehicle and parts warranties for proper reimbursement and charges...accountable for inventory control to include quarterly cycle counts...analyze parts use and maintain adequate but not excessive parts on hand...provide ...good customer service and support...with fiscally responsible procurement, parts knowledge, and effective warehousing” (Ex. 6.)

5. Garcia’s job graded at a salary grade R-12, and required him to “pickup and deliver parts, mail and equipment...as needed, and assist with all aspects of the parts room...and perform light mechanical duties...(Ex. 7.)

6. Robinson testified that when he started, the parts department was unorganized. Drivers had easy access to the warehouse, vendors were coming and going, and there was about \$500,000 in inventory which was difficult to track. He attempted to institute processes for logging the inventory in a more orderly fashion.

7. Robinson first became concerned about theft or mismanagement of District assets in his department in September 2017. On September 25, 2017, Robinson emailed his supervisors, Paul Kusner, Fleet Services Manager, Greg Jackson, Executive Director of the Transportation Department, and all shop foremen, alerting them that five fleet-tracking devices (“Zonars”) were missing from a cabinet in his office. He reported he had attempted to locate them but was unable to do so. Robinson testified that nobody responded to his email, the devices were never located. It is undisputed that the District made no effort to investigate the disappearance of these devices (Ex. 21.)

8. Less than one month later, during a routine inventory count, Robinson noticed that eight “Houdini” vests were missing. Feeling responsible for all inventory, Robinson again emailed his supervisors Kusner and Jackson, along with at least ten other employees in the department to make them aware of the missing inventory. His supervisors did not respond to his email. One of the terminal directors responded to Robinson’s email, but only to wish him good luck locating the missing vests and to acknowledge they were worth “a lot of money!” (Ex. 41 at 2.) Again, it is undisputed that the District did no investigation into this missing inventory.

² Notes and exhibits from the hearing do not reveal the race of Kusner or Garcia. There is a reference in the Step 3 Response that Garcia is a member of a protected class (Ex. 40 at 10.)

9. Robinson testified he was getting frustrated with the loss in inventory. He asked to have new locks installed on the doors to the parts room, which request was granted. With the installation of new locks, the parts room would be open to fewer employees and if anything went missing, the District could more easily investigate the loss. The new locks were installed sometime in November 2017.

10. Robinson testified that soon thereafter, employees who had been coming and going in the parts warehouse were giving him negative feedback with the changed protocol. He testified that the most resistance came from the foreman of the North Terminal, George Frey, and his own driver, Garcia. Frey complained, for example, that Robinson deliberately failed to order parts Frey needed in his terminal. Robinson, who kept detailed records and invoices of his inventory and orders, was able to discredit Frey's assertions.

11. Robinson testified that Garcia became increasingly difficult to manage during this time. He too accused Robinson of failing to order parts for Frey. According to Robinson, Garcia refused to help Robinson with projects, such as shelving inventory, and refused to consider ways to be more efficient with his time while making deliveries. Garcia did not testify at the hearing and thus this testimony is undisputed.

12. In January 2018, Robinson reported to Kusner and Jackson what he felt were unfair accusations and harassment against him by Frey and Garcia. Neither of them responded to his concerns. Jackson admits he received this complaint. It is undisputed Jackson did not investigate the complaint.

13. In March 2018, Robinson met with Kusner and Garcia to discuss these and other issues. According to Robinson, Kusner's solution was to advise Robinson to stop managing Garcia, and to funnel requests of Garcia through Kusner.

14. In April 2018, before leaving for vacation, Robinson received into the warehouse an injector pump that he had ordered. When he returned from vacation, the pump was missing. He reported the pump missing to Kusner and Jackson on April 30, 2018 (Ex. 15.) He asked that a meeting be set to discuss this and other issues "ASAP."

15. Robinson met with Jackson to discuss the missing pump on May 3, 2018. During the meeting, Robinson shared his concerns about the missing pump and other misplaced inventory. Jackson testified he took the matter seriously, and worked with his staff attorney to conduct an investigation. He appreciated that Robinson brought this to his attention. Jackson testified that as a result, he made changes to security and installed cameras.

16. Jackson's meeting notes of his interview with Robinson during the investigation reflect that Robinson described his efforts to secure the inventory and his previous reports of inventory missing. Robinson raised concerns that Kusner was not taking the matter seriously and that he lacked support from others in the department (Ex. 16.) In addition, the notes reflect Jackson asked Robinson who he thought might have taken the injector pump. Robinson responded it might have been Frey, reasoning that Frey had a vehicle at his terminal that "takes this part and he [Frey] was having problems getting his vehicle fixed" (Ex. 16 at 2.)

17. On the same date, May 3, Robinson provided a written statement of the details surrounding when he ordered the pump, when it was delivered, and who had access to the missing part while he was on vacation. He attached invoices and other documents including log sheets and delivery sheets (Ex. 17.) On May 4, 2018, Robinson wrote an email to Jackson related to the Houdini Vests and the Zonars that had gone missing earlier, about which he had previously advised Jackson by email (Ex. 18.) Robinson also sent Jackson copies of his previous emails related to the missing parts (Ex. 20, 21.) Robinson was pleased that Jackson appeared to have become interested in the problem (Ex. 19.)

18. On May 8, 2018, Jackson memorialized his findings concerning the missing pump (Ex. 22.) Jackson agreed the pump was missing, but then concluded it had been installed on a District school bus with “no record of the transaction.” Jackson also concludes that Robinson’s “allegation” that Frey took the pump is “slanderous” and that there was no “evidence to support his claim” (Ex. 22 at 2.) He concludes Robinson’s timeline of events is not accurate, as it differed from the timeline provided by Garcia who was interviewed during the investigation (*Id.*)

19. I find the allegation of slander troubling. Jackson asked Robinson who he thought could have taken the pump. Robinson answered his question, but denies accusing Frey of anything. To say Robinson slandered Frey is a stretch. There was no evidence presented as to what other employees told Jackson during the investigation. Notwithstanding the allegation of slander, which Robinson testified he thought was unfair, Robinson thanked his supervisors for conducting the investigation (Ex. 23.)

20. Robinson testified that he continued to feel there was concerted animosity toward him in the department. He felt excluded from meetings and decisions that impacted his work. His only direct report, Garcia, refused to be managed and Robinson testified Kusner would not allow him to discipline Garcia. Robinson considered Garcia, Frey, and Kusner to be creating a hostile environment toward him. He began to suspect that his race might have been the factor separating him from his colleagues.

21. On July 29, 2018, Robinson submitted a written complaint of discrimination/hostile work environment to the District’s Employee Relations Department asserting that Frey, Garcia, and Kusner have committed acts of bullying, harassment and discrimination against him (Ex. 43.) He testified that following the submission of his complaint, “all hell broke loose,” citing increased conflict in the department.

22. District Staff Attorney Kristyn Myers received Robinson’s complaint and assigned Dean Warkentin (“Warkentin”) to investigate it (Ex. 25.)

23. Warkentin interviewed Robinson and a number of other witnesses not identified in this hearing. Warkentin testified that his role is to gather information, but make no conclusions as to whether Kusner or other District employees acted inappropriately toward Robinson. He testified he interviewed every witness identified by Robinson. His Summary of Investigation was introduced into evidence as Ex. 51. The name of any witness other than Robinson has been redacted.

24. Based on Warkentin's summary of witness statements, the District concluded on November 8, 2018, that the weight of evidence does not support a conclusion that District policies were violated (**Ex. 27.**) The District did conclude however that "one or more staff members did not meet our expectations and therefore will be recommending remedial action." The District did not expound on this finding at the hearing.

25. The next day, November 9, Kusner issued to Robinson a disciplinary Letter of Reprimand based on events that had allegedly occurred months earlier (**Ex. 46.**) In the letter, Kusner accused Robinson of being "unprofessional, aggressive and hostile" in a meeting nine months earlier with Frey, and also in a meeting in October with Mike Hinz, Garcia, Frey, and others. Ironically, Kusner admonishes Robinson to refrain from using "racial, discriminatory, or abusive ... language" and directs Robinson to "meet with EAP to work through some of these issues (*Id.*)

26. Kusner did not testify at the hearing in this matter. Mike Hinz testified at the hearing but was asked no questions regarding the events that are described in the Letter of Reprimand. Robinson testified that he disputed how Kusner described the events in the Letter and questioned the timing of the Letter, coming on the heels of his Complaint against Kusner and Frey.

27. On December 10, 2018, the School District entered into a services agreement with a management consultant named Matthew VanAuken (**Ex. 47.**) Pursuant to that agreement, the District retained VanAuken to:

- a. Discuss with Transportation Department leadership "current and future work expectations of all appropriate parties";
- b. Create clearly defined and specific job descriptions and duties for the Transportation supervisors;
- c. Provide coaching to help resolve workplace conflict; and
- d. Provide leadership coaching to a variety of leaders on the Jefferson County Public Schools Transportation and Fleet Services ("JTFS") team (**Ex. 47 at 2.**)

28. VanAuken did not testify at the hearing. The Services Agreement states the objectives of the work are "to assist the JTFS in developing clear goals and expectations of the Transportation Supervisors, connect with all terminal leadership, and help to resolve communication conflicts on various team throughout ...JTFS...and improve the key work deliverables of all appropriate members on the team, as directed by Greg Jackson, the Executive Director." (*Id.*) The Services Agreement does not reflect that VanAuken was asked to make recommendations concerning the structure or restructure of the Transportation Department, nor of the Fleet Services Division, nor concerning the elimination of any positions.

29. In December 2018, VanAuken met with Robinson. Robinson testified they talked about the conflict between Robinson and Garcia. Robinson walked VanAuken through the shop to show him what Robinson was trying to do to organize it.

30. On January 7, 2019, Transportation Department managers summoned Robinson and other Fleet Services employees to a meeting. Those in attendance included Chief Operating Officer Steve Bell (“Bell”); Executive Director of Transportation Greg Jackson; Paul Kusner, Mike Hinz, Patrick Garcia, Casey Robinson, and Matt VanAuken.

31. Bell began the meeting by explaining that there were going to be some changes made to the structure of the organization. He turned the meeting over to Jackson and VanAuken. Jackson told the assembled group that he and VanAuken had decided to restructure duties in the department. Certain jobs would receive new titles and different rates of pay, and certain jobs would be eliminated while others would be created. The result was that Kusner’s job, an administrative position not covered by the CBA, would change and receive a new title; and the positions held by Robinson and Garcia would be combined and reduced to one position for which they would have to compete. It is stipulated by the District that this “restructuring” is not a Reduction in Force under the CBA.

32. Jackson testified he brought in VanAuken to help him bring the team together due to the number of complaints he had received. He did not elaborate on who was making the complaints, but certainly Robinson’s complaints were part of the scenario. Jackson testified that together, he and VanAuken decided to restructure the department. I find that the impetus for the restructure were communication issues in the department, not budget or lack of work. Robinson testified no reason was given for the changes. There was no reference made in the meeting that the restructure was due to a lack of work or budgetary issues, and the VanAuken documents reflect no such issues.

33. At the meeting, witnesses testified that Garcia asked whether employees in the room might lose their jobs. According to Robinson, Jackson explained that JESPA bargaining unit members had certain job protections under the CBA and that even if they did not retain the positions they held at the time, they would not lose their job, they would be placed in some other position. Hinz testified he recalls Jackson’s response to Garcia’s question was the District would help anyone impacted by the elimination of a position to find another position, but he made no guarantee.

34. On February 20, 2019, a school bus mechanic in Fleet Services resigned his employment alleging discriminatory conduct against him by Frey (**Ex. 48.**) He sent a copy of his email to many employees including Robinson. Robinson took it upon himself to send the email to Steve Bell, acknowledging the complaint and affirming that he too had felt discriminated against by Frey. Bell requested a meeting. No evidence was presented as to what happened to this Complaint thereafter.

35. On February 25, 2019, VanAuken submitted a written report to Jackson (**Ex. 49.**) He sets forth an Executive Summary of the “position replacement process and recommendation for the Fleet Services Coordinator position.” His concerns are focused on the leadership in the

organization and his recommendations relate to a change in the position held by Kusner, Fleet Services Manager. Ultimately, Mike Hinz was placed in this position and Kusner, an at-will employee, left the District.

36. VanAuken's report is silent regarding the positions held by Robinson and Garcia. In fact, in the report, VanAuken makes no mention of a department restructure at all. It is entirely focused on the process to replace Kusner and the recommendation for the Fleet Services Coordinator position (*Id.*)

37. It is undisputed that the positions held by Kusner, and now Hinz, are management positions, not subject to the provisions of the CBA.

38. The position of Technician, Parts & Warranty – Fleet Maintenance was posted March 22, 2019 (**Ex. 33.**) Jackson testified that neither Robinson's job nor Garcia's job technically existed after the restructure, and that the single position remaining was a different position. Robinson and Garcia both applied for the position.

39. A review of the posted job description for the position of Technician, Parts & Warranty – Fleet Maintenance reflects it is largely identical to the position held by Robinson. A redline version was admitted as **Ex. 30.** Other than increasing the salary level from R-23 to R-24, the first page is identical to the first page of Robinson's job description (*Id. at 8*). On the second page, supervisory duties have been deleted, and duties such as delivery and pickup of parts have been added. The education and training requirements, the experience, skills and knowledge requirements are the same as those contained in Robinson's job description (*Id. at 9.*) Hinz admitted on a question from the Arbitrator that the new job is "essentially the same job as that held by Robinson, with driving duties added." Jackson testified to this fact as well.

40. I find this "new" position to be largely the same position held at the time by Robinson, with a one-step salary increase. It is a considerable upgrade from the position held by Garcia whose salary was R-12 (**Exs. 6, 7.**)

41. Jackson delegated to Hinz, the newly appointed Fleet Services Coordinator, responsibility to select members of an interview panel who would interview the candidates and make a recommendation as to who should be selected for the position. On April 9, 2019, Hinz sent Robinson an email thanking him for submitting an application and inviting him to interview on April 12. Hinz also attached questions which were to be answered in writing and asked that this be completed by April 11 at 7 am (**Ex. 34.**) Hinz testified that the questions were approved by Human Resources. According to Hinz, Robinson and Garcia received the same questions, and received the same score on this written test (**Ex. 11 at 1.**)

42. Hinz then convened the interview panel. Jackson testified he expected the panel to include individuals who would be working with the person in the new position. Jackson approved the members of the panel and testified he made no changes to the list other than to add

Wally Maistryk, a bus driver and member of JESPA, to serve.³ In addition to Hinz and Maistryk, the panel of six included Deanna Cable (Fleet Operations Supervisor), Barb Ruley (Purchasing Agent), Jeff McAlister (outside parts vendor), and George Frey (shop foreman).

43. Robinson raises issues of bias as to the selection of several of the individuals on the panel, including Frey, Cable and McAlister.

44. Regarding Frey, Hinz testified he felt strongly the panel should include a shop foreman and he chose Frey out of the six foremen because he was most available to serve. Clearly it was no secret Robinson had conflict with Frey. Jackson had accused Robinson of slandering Frey in connection with the missing parts investigation. Robinson had filed a Complaint of discrimination, bullying and harassment against Frey, among others. Hinz admitted he knew of the conflict between Robinson and Frey, but believed Frey could be “professional and look beyond the conflict with Robinson.” I find it very troubling that Hinz included Frey on this interview panel. Even if a shop foreman was an essential element, Hinz had others he could choose to fill this role. I find that by selecting Frey, Hinz made a deliberate choice which compromised the objectivity of the panel.

45. As for Deanna Cable, Hinz knew that her son had just been hired by Frey to work at the north terminal. Again, Hinz testified he did not consider this a conflict. I find that her selection creates at least the potential for bias, particularly where other more objective individuals could have been selected.

46. Jeff McAlister is an outside vendor of truck parts. Hinz testified he believed McAlister’s participation on the panel would be helpful. Robinson suggests using an outside vendor is highly unusual and that McAlister, who likely worked on commission, would have a bias against Robinson because Robinson did not choose to purchase parts from the company for which McAlister worked, whereas Garcia could be influenced to do so. Hinz testified of the 10-15 prior interview panels on which he has served, none has included an outside vendor. Jackson testified of the more than 50 interview panels on which he has served, three or four may have had an outside vendor. I find that while including an outside vendor on an interview panel is unusual, I do not have sufficient evidence to find McAlister was personally biased against Robinson or that his selection was based on an improper motive.

47. As to the interview panel overall, I find that including Frey and the mother of one of Frey’s subordinates does reflect a panel of individuals that was more likely than not to be biased against Robinson, a factor known to both Hinz and Jackson.

48. Wally Maistryk (“Maistryk”) testified he was asked by Jackson to sit on the panel the day before the interviews were to occur. He testified he was surprised to see Frey on the panel, as it was common knowledge in Fleet Services that Robinson and Frey had a history of conflict.

³ Lara Center testified she was asked to serve on the interview panel but declined. She testified she felt her presence could create an appearance of conflict since she knew Robinson well, and Garcia is not a member of JESPA, although he is in the bargaining unit.

49. On April 12, 2019, the interview panel met. Jackson and Hinz explained to the interview panel how they were to score each applicant's responses. That is, they were to listen to the response, take notes, and assign a score ranging from one to five. There was no other training to ensure consistency among ratings. No evidence was presented as to on how many interview panels each member had previously participated. After Jackson left the room, Hinz further instructed that each participant would ask one of the prepared questions, and they were to stick to the script.

50. Maistryk testified he felt uncomfortable with the interviews. Based on a question asked by Frey during Robinson's interview, Maistryk testified he thought Frey exhibited bias against Robinson, and he told Frey at the time they needed to remain objective. Maistryk admitted however that the issue of Robinson's race did not come up, nor did anyone raise the fact in his presence that Robinson had made earlier complaints about Frey. Maistryk testified without specificity he believed from the way Garcia answered questions during the interview that he had advance knowledge of the questions. Hinz denied talking with Garcia about the interview questions.

51. The interview questions template is included in the bid packet, as is a summary of the total scores received (**Ex. 11.**) Hinz testified in response to questions raised by the Arbitrator that he could produce the actual notes taken and scores given by members of the interview panel. This was done at the close of the evidence (**Ex. 52.**) Robinson testified he was not asked about his experience working as the District's Parts Controller. But a review of the questions and notes of responses given indicates, and I find that the questions certainly seem relevant to the experience of the candidates. (**Ex. 52.**) What is interesting, however, is the vast difference of opinion members of the panel had of the candidates.

52. A detailed review of the various scores in **Ex. 52** reflects Maistryk rated Robinson higher than Garcia; McAlister rated Garcia slightly higher than Robinson; and all other members of the committee rated Garcia far higher than Robinson. While I cannot substantively evaluate the scores given, and cannot evaluate answers to questions from the cryptic notes taken, I find the significant difference between the candidates troubling. It could be explained by a difference in what the members of the panel were looking for or a lack of detailed knowledge of the subject matter. No evidence was presented at the hearing to explain this discrepancy.

53. From these scores, it is clear four members of the interview panel considered Robinson far less qualified for his own job than Garcia, who had never performed the job. Yet, evidence reflects during his employment, Robinson was never advised he was failing in his job. Indeed, Jackson testified that Robinson "did a good job for Jeffco, he did not underperform." Given that Jackson also admitted the new position was essentially the same job as Robinson's prior job (without the supervisory duties and with driver duties added), the scores reflecting such great difference between Garcia, who never performed the job, and Robinson who successfully held essentially the same position for two years, causes great concern that something other than objective ratings was in play.

54. On April 19, 2019, Robinson received a letter from Jackson advising Robinson he was "not selected for the Fleet Services Parts Room Technician position; and therefore will be laid off from [his] position effective immediately" (**Ex. 12.**) Jackson informed Robinson that he

would receive pay through May 1, 2019, and that the benefits would end at the end of that month (*Id.*) Jackson instructed Robinson to return his identification card, keys, laptop, and all other District property in his possession. Robinson was encouraged to apply for any vacancies for which he is qualified, but Jackson offered no assistance.

55. On behalf of Robinson, JESPA timely filed a grievance alleging Robinson's termination from employment was without just cause and due process, was retaliatory and discriminatory (**Ex. 13**). On May 8, 2019 Robinson and Flores met with Jackson and Counsel for the District to discuss the grievance (**Ex. 40.**) At the meeting, Robinson also raised concern his termination was improperly based on his reports of financial improprieties in violation of Board Policy DIF (**Ex. 39.**)

56. On May 17, 2019, Jackson issued a response denying the grievance and addressing the various issues raised (**Ex. 40 at 2-4.**) Jackson asserted that Robinson's "position was eliminated because of an organization-wide restructure." Jackson goes on to advise Robinson that to the extent he is arguing there was not just cause for the restructure, the argument is essentially untimely because he had notice of the restructure on Jan. 7, 2019. The grievance as to that issue, he contends, would have had to be filed by Feb. 25 under the CBA (**Ex. 4 at 17.**) The issue as to timeliness was not raised again by the District at Steps 2 and 3.

57. JESPA and Robinson appealed Jackson's decision to Step 2 of the grievance process. On June 14, 2019, Chief Operating Officer Bell denied the grievance and stated that Robinson "[was] not terminated; [his] position was eliminated, along with other positions in the department as the result of a [department-wide] restructure" (**Ex. 40 at 5.**) Bell stated that he and Jackson determined that the Fleet Services department needed to be restructured, making no reference to the work of VanAuken. Bell refers to "objective test results and numerical scoring provided by the interview panel" to support his denial of the grievance. Bell concludes: "You were not terminated. The letter given to you on April 19, 2019 is not a termination letter, but a letter informing you that you were not selected for this new position" (*Id.* at 6.) Finding no evidence to support Robinson's claims of discrimination and/or retaliation, Bell denied the grievance concluding "your position was not terminated; your position was eliminated....".

58. JESPA and Robinson appealed Bell's decision to Step 3 of the grievance process. Community Superintendent Tom McMillen found that the department restructuring had been contemplated for some time affected "all four positions involved with the parts department". McMillen found no evidence that the restructure was targeted at Robinson due to his race or for any other reason. For the first time during the grievance process, McMillen indicates that Robinson was not selected for the position "based in part on a tie score in one portion of the process which gives a preference to the applicant with seniority" (**Ex. 40 at 10.**) It is undisputed Garcia had more seniority than Robinson.⁴ McMillen denied the grievance.

⁴ Seniority is a tie-breaker in the event internal candidates are deemed substantially equal for a transfer or promotion under Art. 10-5-6-5. This provision is not applicable in this case since the District has never suggested the "new" position was a transfer or promotion. There is no evidence the District considered seniority as a factor during the interview process.

59. JESPA and Robinson filed a timely appeal to Step 4 of the grievance process, and this advisory arbitration ensued.

CONCLUSIONS

The District raises considerable argument about the statement of the issues, claiming that JESPA raises new issues for the first time after the completion of the grievance procedure. While it may be true that JESPA articulates the issues somewhat differently, I find that JESPA has argued consistently throughout this matter that the District violated the CBA by purporting to eliminate Robinson's position in a restructuring of the department. I will address that issue first. To the extent JESPA, on behalf of Robinson, argues Robinson was targeted for termination due to his race or in retaliation for his protected activity, I will address those issues separately, even though the District is correct that such conduct would also violate the CBA nondiscrimination provisions.

Although not part of the District's argument now, I want to first address the issue of timeliness raised by Jackson in the Step 1 response to the grievance. He states in his response that Robinson's contention that there was not just cause for the restructure is untimely as he had notice of the restructure on January 7, 2019 but did not file his grievance about it within the 35 day provision of the CBA. I conclude this argument is without merit. Robinson's knowledge of an upcoming restructure would not create a grievable event. It is the events that followed the announcement of the restructure, combined with his history in the Fleet Services division, which caused the purported elimination of his position and termination that create the grievable event. I conclude it is Robinson's termination on April 19, 2019 that is the triggering event for the grievance. The grievance is timely.

A. Did the District violate the Collective Bargaining Agreement ("CBA") when it terminated Robinson's employment due to the elimination of his position? If so, what is the appropriate remedy?

1. During the relevant period in this case, JESPA and the School District's Board of Education ("Board") were parties to a CBA (Ex. 4).

2. As the Parts Controller, Robinson was a member of one of the bargaining units represented by JESPA. Like other bargaining unit employees, the terms and conditions of Robinson's employment are subject to the CBA.

3. The CBA places limitations on the District's ability to terminate the employment of all bargaining unit members. First, the CBA provides that the District could terminate employees "for just cause" (Ex. 4 at 46, Art. 15-3-1.) It is undisputed that the District did not have just cause to terminate Robinson. Indeed, in each of the written responses of management along the path of the grievance process, the District states that Robinson was not even terminated. It claims rather that his position was eliminated, and he was simply not selected for the newly created position for which he applied.

4. Second, the CBA contemplates termination of employees in the event of a reduction-in-force (**Ex. 4 at 34-35, Art. 11.**) The District stipulated at the hearing that no Reduction in Force as the term is defined in the CBA was intended or implemented.

5. Finally, the CBA sets forth the general Management Rights retained by the District, and in part allows the Board of Education to “relieve employees from duty for lack of work or other legitimate reasons” (**Ex. 4 at 12, Art. 2-9.**) Relying on its argument that it neither discriminated nor retaliated against Robinson, the District merely assumes it has the right to “eliminate a position” without describing from where that right emanates. I do not agree with this argument.

6. Practically, Robinson’s employment with the District was terminated. Calling the termination a “layoff” does not change the impact of the decision. As a member of the bargaining unit, he has the right to retain his position unless management properly exercises its right to terminate him.

7. Arbitrators have recognized the right of management to eliminate jobs where financial conditions, improved methods or other production justifies such action. Elkouri & Elkouri, *How Arbitration Works* at 13-52 (7th Ed.) See e.g., *Cleveland Elec. Illuminating Co.*, 105 LA 817 (Frankiewicz, 1995)(employer did not violate CBA when it eliminated jobs, following redesign of internal mail delivery system to achieve greater efficiency); *Hyatt Cherry Hill*, 103 LA 99 (DiLauro, 1994)(employer in financial difficulty did not violate contract when it eliminated cashier classification and added those duties to other classifications, to maintain efficiency of employees). Here, however, the evidence does not reflect any such justification.

8. The District argues in its written closing argument that “...the restructure of the Department was based on legitimate cost-saving and efficiency efforts...” (**Respondent’s Proposed Findings of Fact and Conclusions of Law at 11.**) While this may be its after-the-fact justification, the District produced no evidence to support this argument. A detailed review of the notes of testimony presented at the hearing, as well as careful review of the District’s responses to the grievances, produces no evidence that at the time, these were the articulated reasons for the District’s decision to restructure the department. Jackson testified he made the decision to restructure based on the recommendation of Matt VanAuken. And he testified that the impetus to engage VanAuken was the number of complaints he was receiving.

9. VanAuken did not testify in the hearing. In his written report, VanAuken does not even address the positions held by Robinson and Garcia, although mentions a “misalignment of duties,” without specificity (**Ex. 49.**) VanAuken was engaged, according to the Services Agreement not to restructure the department, but “to assist the JTFS in developing clear goals and expectations of the Transportation Supervisors, connect with all terminal leadership, and help to resolve communication conflicts on various team throughout ...JTFS...” (**Ex. 47.**)

10. No witness who testified at the hearing stated that the purpose for the restructure was cost savings. While Jackson testified that combining positions resulted in the District saving money, logical since they went from four positions to three positions, neither he nor VanAuken in the written report state that was a key objective of the exercise. As for efficiency being a

stated goal, Jackson presented no evidence that the Department sought to gain efficiency through the restructure. Robinson testified no reasons were given for the restructure.

11. In each of the District's responses during the grievance process, the District repeats that Robinson's position was eliminated due to an organization-wide restructure. The problem is there is no authority in the CBA for such a restructure unless it is a Reduction in Force, or unless the employee is "relieved ...from duty for lack of work or other legitimate reason..." (Ex. 4 at Art. 2-9.) The District stipulates this was not a reduction in force. And it has not argued or presented any evidence Robinson was relieved from duty for lack of work. No other legitimate reason has been provided. The District just keeps saying the position was eliminated with no stated authority or particular reason given. Steve Bell states in his Step 2 Response he was involved in the decision to restructure, but never states under what authority or for what justification the position was eliminated.

12. I do not have to reach the issue of whether the Board of Education properly delegated its authority to terminate Robinson for lack of work or some other legitimate reason. I conclude that the District has not established there was a lack of work or any other legitimate reason to eliminate Robinson's position and terminate his employment. As a result, the District cannot establish any of the grounds under the CBA for terminating Robinson's employment. I conclude the District violated the CBA when it terminated Robinson's employment.

B. Did the District discriminate against Robinson on the basis of his race, African-American, or retaliate against him for protected activity, when it made the decision to terminate his employment? If so, what is the appropriate remedy?

13. Although I have found that the District violated the CBA when it eliminated Robinson's position and terminated him, I will also address the second issue presented in this case.

14. Robinson alleged during his employment that he believed he was being discriminated against because of his race. Both he and Jackson are African-American. Jackson is undisputedly the decision-maker in this case, accepting the recommendation of the interview panel.

15. Robinson alleges in addition that he was retaliated against for his protected activity, to wit, making reports of suspected financial impropriety, filing an internal complaint of race discrimination, or supporting another employee's complaint of national origin discrimination. There is no dispute by the District that Robinson did engage in protected activity during the year before his termination, from which he is entitled to protection from retaliation.

16. The District properly articulates the legal principles for establishing discrimination set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973.) The analytical framework for establishing discrimination or retaliation is clear and was adopted in Colorado long ago. See, e.g., *Colorado Civil Right Commission v. Big O tires, Inc.*, 940 P.2d 397, 400 (Colo. 1998.) It is undisputed that Robinson can establish a prima facie case as he is a member of a protected class, was qualified for the job at issue. suffered an adverse employment

action when his employment was terminated, and the evidence permits an inference of unlawful discrimination. *Big O Tires* at 400-401.

17. At this point in the analysis, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action. The District made this showing by articulating its defense of restructuring the organization and eliminating a position. Then, the burden shifts back to the employee to show by “competent evidence that the presumptively valid reasons for the adverse employment decision were in fact pretext for discrimination or unlawful retaliation. (*Id.* at 401).

18. Ultimately, the question is whether the evidence supports a finding that but for his race and/or his protected activity, Robinson’s employment would not have been terminated.

19. Courts recognize that “only in the rarest of situation will an employee have direct evidence of discrimination or retaliation.” *Bodaghi & State Personnel Bd. V. Dep’t of Natural Resources*, 995 P.2d 288, 296 (Colo. 2000.) Thus, employees must rely on indirect evidence and reasonable inferences to establish that the employer’s stated reason for taking adverse employment action is pretextual. *Anderson v. Coors Brewing Col*, 181 F.3d 1171, 1179 (10th Cir. 1999.) An employee may prove pretext by demonstrating “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence” (*Id.*)

20. Here, I find the facts do indeed demonstrate that the District’s claim that it legitimately eliminated Robinson’s position is replete with troubling factors that cause me to find its explanations are pretext for a wrongful motive.

21. First, I agree with JESPA’s argument that in fact the department was not restructured. Regardless of whether the “department” is the Transportation Department of 480 employees, or Fleet Services of 45 employees, what actually occurred were minor changes. The evidence reflects several job descriptions were revised, and in that context Kusner was replaced by Hinz and Robinson replaced by Garcia. These minimal adjustments do not amount to an organizational restructure as stated repeatedly by the District. Only Kusner and Robinson lost their jobs. Kusner was an at-will employee. Robinson was the only classified employee, covered by the protections of the CBA, who lost his job.

22. Furthermore, I question whether Robinson’s position was eliminated at all. Both Jackson and Hinz admitted at the hearing that the new position was essentially the job Robinson had been performing, with supervisory duties deleted and driver duties added. The education, training, experience, skills and knowledge requirements of the new position are identical to those of Robinson’s position, not Garcia’s (**compare Ex. 6 and 7 with 30.**) The salary grade of the new position is just one step higher than Robinson’s position, but is 12 steps higher than Garcia’s. If anything, it would have made more sense to merge Garcia’s driving duties into Robinson’s position. But instead, the District went through an unnecessary elaborate scheme to cause Robinson to lose his job.

23. Second, testimony establishes that Jackson stated in response to a question asked by Garcia at the January 2019 meeting that no classified employees would lose their jobs because they have job protection under the CBA. Although Hinz testified Jackson made no such guarantee, even he admitted Jackson promised to help any affected employee find another position. Yet, Robinson was terminated “effective immediately” through the April 19 letter with no offer of, or actual, assistance in finding a new position.

24. Third, I conclude Hinz impaneled a group of people on the interview committee with a clear bias against Robinson. Selecting George Frey was very intentional. Hinz knew that Robinson and Frey had a history of conflict. Others knew it as well. He also selected Deanna Cable whose son had just been hired to work in Frey’s shop. Whereas Lara Center specifically declined to serve on the committee due to an appearance of conflict, Frey and Cable apparently had no such concern. Hinz testified he believed Frey could put the past conflicts behind him and serve on the panel objectively, yet, Maistryk testified he saw bias in the questions asked by Frey.

25. The outcome of the interview panel shows not only that four of the six panel members found Garcia more qualified, they found him dramatically more qualified for a position he had never held. Yet Robinson, who Jackson testified was “not underperforming” in the position, was found by two-thirds of the interview panel to be far less desirable in the position.

26. The wide disparity of the scores on the interview panel establishes the subjectivity of the process. There was no evidence presented that the members of the panel really knew what they were looking for by way of answers or whether an answer was right or wrong. They received a list of questions to ask and were directed to score the answers 1-5. The subjectivity is clear when review of the scores is made. For example, in response to question #4, “Who are your customers in this position?”, Cable gave Robinson a score of “2” for his response whereas McAlister gave him a “5” for the same answer. In scoring Robinson’s answer to question #13, Maistryk gave him a “5”, while Ruley gave him a “1”. This type of subjectivity, couched by decision-makers as objective because scores are given, establishes pretext.

27. Further compromising the credibility of the outcome of the interview, Hinz created an interview summary sheet that reflects scores unrelated to the interview scores or the written test scores. He explained that he made the decision that Garcia scored 20 out of 20, a perfect score, while Robinson scored only 17 (**Ex. 11 at 1.**) Each member of the interview committee signed at the bottom of this summary sheet apparently agreeing with it (**Ex. 11 at 2.**) But there is no evidence what criteria Hinz used to create these scores. Objectively, and I conclude, it is highly unlikely that an individual who had never worked as a Parts Controller in any job in his career would be subjectively considered a perfect candidate earning a perfect score.

28. To the objective observer, the position of parts controller held by Robinson is far more involved than the position of driver held by Garcia. Robinson was required in his position to, among other duties, manage warehouse operations in five locations, which includes purchasing, negotiating prices, writing bid specifications, controlling inventory, analyzing parts use, and conducting quarterly cycle counts. Robinson had been satisfactorily performing this position for two years. In addition, Robinson worked as a parts coordinator in the computer

industry before working for over ten years as an assistant manager at an automotive parts store (Ex. 50.) By contrast, Garcia had never served in the position except as Jackson testified when Robinson was out or “on occasion.” Garcia’s lengthy work history is primarily in meat departments for grocery stores, including 18 years as meat department manager at King Soopers (Ex. 11 at 17.) While an impressive career if one is working in a meat department, the connection to truck parts controller is not immediately evident. Where the facts reflect that an employee is better qualified than other candidates for the position, the factfinder may draw an inference of pretext. *Santana v. City & County of Denver*, 488 F.3d 860, 865 (10th Cir. 2007.)

29. I further conclude it is contrary to reasonable behavior for the District to rebuff, or at least to view negatively, Robinson’s efforts to account for and track inventory in the first place. This was expressly his responsibility under the job description (Ex. 6.) Robinson’s first two emails about missing parts were entirely ignored by management. While his third was seemingly taken seriously by Jackson, in the course of the investigation, as well as in his conclusions, Jackson strangely admonished Robinson for “slandering” Frey. It is unknown if Frey learned of this allegation prior to his service as part of the interview panel.

30. Robinson filed a Complaint less than a year before his termination, alleging bullying, harassment and discrimination by his manager Kusner and co-worker George Frey. Following an investigation, the District found no evidence that policies had been violated but did find that unidentified staff members acted in a way that did not meet District expectations. The District failed to elaborate on this finding at the hearing, and I am left wondering if Kusner or Frey were among those whose behavior toward Robinson fell below standards.

31. The very next day following the end of the investigation into his complaint of discrimination, clearly protected conduct, Robinson was formally reprimanded for behavior that allegedly occurred months ago, accusing him of aggressive and hostile behavior, allegations eerily similar to the allegations Robinson had made of Kusner in his discrimination complaint. In that Letter of Reprimand, for no apparent reason, Kusner advised Robinson to go to EAP “to work through some of these issues...” (Ex. 46.) The timing of this Letter of Reprimand provides a clear nexus to the protected activity.

32. In short, I conclude there exist many troubling facts in this case leading to the decision to eliminate Robinson’s job and select Garcia over Robinson in an interview rife with subjectivity and bias. I conclude Robinson has established pretext through the showing of multiple inconsistencies, implausibilities, and contradictions in the District’s proffered legitimate reasons for its action that cause me to find them unworthy of credence. *Anderson v. Coors Brewing Co.* 181 F.3d 1171 (10th Cir. 1999.)

33. The final question becomes pretext for what? Did the District have an illegal or wrongful motive for its actions?

34. Although JESPA has alleged Robinson was wrongfully terminated based on his race, I conclude it has not presented enough evidence to show that but for his race, which is the same as Jackson’s, Robinson would not have been terminated.

35. However, I do conclude that JESPA has established that but for his protected activity, Robinson would not have been terminated. I conclude that Robinson's complaints of both missing/unauthorized use of District equipment under District policy DIF (**Ex. 39**), and his complaints of discrimination based on race and harassment by his supervisor and co-workers, all of which constitute protected activity, were met by increased hostility from Supervisors Kusner and Jackson, and co-workers Frey and Garcia. The culmination was for the District to retaliate against Robinson in all of the ways described in detail above in its effort to remove him from the workplace.

36. In this context it is clear to the Arbitrator that the District has failed to articulate a legitimate basis for its decision to eliminate Robinson's position and terminate his job. I find the District's effort is pretext for wrongful retaliation against Robinson for his protected activity.

For all the reasons set forth above, I conclude the District violated the CBA and retaliated against him when it eliminated Robinson's position and terminated his employment. I make the following recommendations to the Board:

1. That the Grievance be GRANTED;
2. That Robinson be reinstated to employment with the District in a position for which he is qualified at or above the salary grade where he would be but for his termination;
3. That Robinson receive all back wages and benefits of employment he would have received but for his termination.

If either party requires further hearings in this matter, they may file the appropriate motion.

Dated this 23rd day of January, 2020.



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