

IN THE MATTER OF THE GRIEVANCE ARBITRATION

)	
JEFFCO EDUCATION SUPPORT)	
PROFESSIONALS ASSOCIATION)	
AND)	
Grievant G. Dunning)	ARBITRATION RECOMMENDATION
)	AND FINDINGS
-and-)	
)	Ruth M. Robinson J.D., MBA
)	Arbitrator
JEFFERSON COUNTY)	
SCHOOL DISTRICT)	
)	
)	
)	Issued: September 7, 2021
Grievance #878		

I. Appearances

For Jefferson County School Dist.¹

Craig Blake
Jeffco Public Schools
1829 Denver West Dr.
Bldg #27
Golden, Colorado 80401

Craig.Blake@jeffco.k12.co.us

For Jeffco Education Support Professionals Association,² and Grievant Gillian Dunning

Eric G. Bradberry
Colorado Education Association
1500 Grant St.
Denver, Colorado 80203

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II. Introduction and Jurisdiction

On or about March 12, 2021, the undersigned received notice of selection to hear this matter.³

¹ Hereinafter “the District” or “Jeffco”

² Hereinafter “JESPA”

The parties are signatories to a Collective Bargaining Agreement, effective from September 1, 2019 to August 31, 2025.

Cases were presented at the Jefferson County School District offices on June 21 and 22, 2021. No transcript was taken. With concurrence of Counsel, the undersigned audio-recorded the hearing. In addition, the proceeding was audio-recorded on the Jeffco system integrated in the hearing room. Arrangements to make that recording available to Attorney Bradberry were pending. Witnesses testified under oath/affirmation.

The parties had full opportunity to present their cases and to cross-examine one another's witnesses. Post hearing briefs were filed on August 4, 2021, pursuant to the advocates' agreement.

The following testified:

For Jeffco:

Brian Connor
Principal, Oberon M S
Chris Esser
General Counsel
Keri Wakefield
Director, HRIS
Diane Hamilton
Budget Analyst

For JESPA and Grievant Dunning:

Laura Center
President, JESPA
Gillian Dunning
Grievant

III. Background Summary⁴

Primary relevant background is:⁵

As of 8/16/ 2019, Grievant Dunning was employed as a Restorative Practices Liaison at Oberon Middle School.⁶ She had previously been a SPED in the District, since 2012.

³ From a list provided to the parties by the American Arbitration Association

⁴ The advocates' briefs cited other background facts, many of which were not in dispute. The brief list I offer, for date context, and in the interest of brevity, is not intended to dismiss as unimportant other background offered by the parties.

⁵ Citations are to exhibits as page numbered in the respective Exhibit binders presented at hearing: "Dist XXX" or "JESPA XXX"

⁶ The evidence and testimony supported Grievant's status, throughout her employment, as fully capable and skilled in her position, and a "valued member of our Jeffco community". (Dist 040, dated July 31, 2020) See also May 21, 2020 Connor recommendation letter, Dist 047.

5/7/20 Principal Connor's letter to Ms. Dunning, serving ". . . as official notification that your employment . . . will end due to budget restrictions and an elimination of position on May 22, 2020." (Dist 045)

6/17/20 Board budget adopted (JESPA 076)

7/2/20 Step One Grievance Form filed (Dist 038)

7/24/20 Step One Grievance meeting (date as referred to in Dist 039)

7/31/20 Step One Grievance response (Dist 039)

8/28/20 Step Two Grievance Form filed (Dist 041)

9/2/20 Step Two Grievance Hearing Date (as documented in Dist 042)

9/23/20 Step Two Grievance Findings Report (Dist 042)

IV. The Issue for Decision

JESPA's Post-Hearing Brief proposed the issues:

Was the School District's decision to terminate Gillian Dunning's employment supported by legitimate reasons, as required by the collective bargaining agreement? If not, what is the appropriate remedy?

Jeffco's Closing Brief submits the issues as:

1. Are the July 2, 2020 Step One Grievance and August 28, 2020 Step Two Grievance filed on behalf of Gillian Dunning timely under Article 12 of the CBA?⁷
2. Does Gillian Dunning's May 22, 2020 termination fall within the District's retained Management Right "to terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons" under Article 2-2-2 of the CBA?
3. Is the July 2, 2020 Grievance filed on behalf of Gillian Dunning arbitrable under Article 10 of the CBA? If so, was there just cause for her termination?

By standard arbitration practice, when the parties do not or cannot agree upon an issue statement, it falls to the arbitrator to formulate an appropriate issue.⁸ An issue statement that

⁷ Evidence and testimony on both hearing days combined the issues of procedural (#1) and substantive (#3) arbitrability, as well as the merits of the dispute.

⁸ *Warehousemen Local 767 v. Standard Brands*, 560 F. 2nd 700, 96 LRRM 2682 (5th Cir 1977); *How Arbitration Works*, 8th edition, Elkouri & Elkouri (May, ed.) p. 7-6,7. And, Counsel concurred at the hearing that I would formulate the applicable issue.

seeks a “yes” or “no” answer to a one-sided or too narrow question is not appropriate. While a simple issue statement can be useful, Issue statements that are too narrow risk restricting a full consideration of the procedural and/or substantive merits of the case.

My recommendations herein are based upon the issue as follows:

Did the District’s May 22, 2020 termination of Grievant Dunning’s employment violate the terms of the parties’ 2019-2025 Collective Bargaining Agreement?⁹

V. Select Relevant Collective Bargaining Agreement Language¹⁰

Preamble

THIS AGREEMENT is made and entered into by and between JEFFERSON COUNTY SCHOOL DISTRICT in the STATE OF COLORADO and the JEFFCO EDUCATION SUPPORT PROFESSIONALS ASSOCIATION of JEFFERSON COUNTY SCHOOL DISTRICT this 1st day of September, 2019.

...

The partnership between Jeffco Public Schools and the JESPA fosters open communication, consensus-building, consistency, ambition, creativity, and active involvement between administration and staff. We believe the best decisions are made in an environment that includes mutual trust, respect, understanding, cooperation, and support.

...

Article 1 Definitions

...

1-10 “Grievance” means a complaint by an Article 1-7 employee, or a complaint by the JESPA, alleging a violation, misinterpretation, or inequitable application of a provision of this Agreement

...

Article 2

2 Organizational Rights

...

2-2 Retained Management Rights

2-2-1 This Agreement shall not impair any constitutional, common law, statutory or traditional duties or responsibilities of the public employer to organize or manage its structure, perform its functions or operations, or determine its policy. These sole and exclusive duties and responsibilities shall not be abridged.

⁹ For reasons stated herein, I have omitted the usual or typical “if so, what shall be the remedy.”

¹⁰ In the interest of brevity, I have not included all provisions as cited in Counsel briefs. Where any provision not listed above is relied upon in this Recommendation, it is separately identified.

2-2-2 The authority of the District 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; . . . shall not be and is not in any manner, impaired by or through the execution and performance of this Agreement.

...

Article 10

10 Corrective Action

10-1 Due Process and Just Cause

10-1-1 Employees are entitled to due process and just cause whenever the District exercises its right to discipline or discharge employees.

10-1-2 Due process includes the following rights:

...

10-1-3 Just Cause includes the following rights:

...

10-1-3-6 Penalties: the corrective action administered shall adhere to progressive process outlined in Article 10

...

Article 12

12 Grievances

12-1 The purpose of the grievance procedure is to provide a fair, formal and expeditious manner of resolving differences as to any matter contained in this Agreement. To that end, employees are encouraged to first attempt to informally resolve their concerns with their direct administrator before initiating a grievance.

...

12-2 Procedure

12-2-1 Step One – Department Level Grievance

...

12-2-2 Step Two – District Level Grievance

12-2-3 Arbitration

If the grievance is not resolved at Step Two, a demand for Arbitration will be transmitted in writing by the JESPA to the office of Employee Relations . . .

...

The arbitrator shall establish procedural rules, conduct necessary hearings and issue recommendations and findings to both the District and the JESPA. The

arbitrator is encouraged to issue recommendations and findings within twenty-one (21) days from the conclusion of the hearing.¹¹

...

12-3 General

12-2-1 Grievance timelines may be extended by mutual Agreement of the Parties.

...

12-3-5 Neither the Board nor any member of the administration shall take reprisals affecting the employment status or working conditions of any employee, any JESPA representative, or any other participant in the grievance process

VI. Summary of the Parties' Positions¹²

Jefferson County School District

Grievant's non-disciplinary termination was proper under Article 2-2-2 of the Parties' CBA. The outcome of the budgeting process, within the District's management right to organize its structure and any perform its functions and operations, led to elimination of the Oberon Restorative Practices Liaison position.

The Grievance, at both Step One and Step Two was untimely and thus not properly before the arbitrator. The "incident" that led to the Grievance occurred when Grievant terminated employment on May 22, 2020. Ten workdays from May 22, 2020 is June 8, 2020 and the Grievance at Step One was filed July 2, 2020. The Step Two Grievance was filed on August 28, 2020 - 20 workdays after the CBA required deadline. There was no Article 12-3-1 timeline extension agreement in place.

Arbitrators recognize that employers have the right of management to eliminate jobs for financial reasons. That right is specified in CBA Article 2-2-2. The District in this matter properly exercised its rights under that Article because it terminated Grievant for lack of work, or alternatively, for other legitimate reasons.

The plain meaning of "lack of work" speaks to the absence of a role or duties for an employee to perform. That is what caused Grievant's termination as the principal needed to balance the school's budget, resulting in the elimination, or absence of the position.

¹¹ At hearing, Counsel agreed that by standard arbitration practice, the "hearing" is not concluded until briefs are filed. This Recommendation was "due" on or about August 25, 2021. My apologies for taking two weeks longer.

¹² Please note; summaries are for the limited purpose of providing context and for the ease of a reader's overall understanding of the totality of this Opinion. The summaries should not be taken as an assurance of their adequacy as such, nor as an indication of my agreement with the parties' positions or arguments as I have portrayed them in the summaries.

Alternatively, Grievant was terminated for "other legitimate reasons". The plain meaning of that term within the context of Article 2-2 speaks to the need for a reasonable, good faith justification to terminate a bargaining unit member in a situation covered by Article 2-2-1.

According to hearing testimony, principals have the discretion to determine how individual school budgets are structured. This flexibility allows them to prioritize how to use a limited, and the sometimes-decreasing fund allotment. For the 2020/21 year, Principal Conner faced new considerations, including COVID pandemic forecasted budget cuts, the need to replace a .6 FTE music position with a 1.0 FTE, and budget effects of the school's decreasing enrollment.

Contrary to the Union's understanding, principals have control only over their own school's budget and staffing. Principal Conner did not have the authority to transfer Grievant to an open position at another school or to promise her employment elsewhere in the District. And, Article 4-2 does not create an affirmative duty for the District to transfer employees whose positions have been eliminated.

Considering the non-disciplinary nature of Grievant's termination, Article 10 due process and just cause guarantees are not applicable to this case. The grievance is not arbitrable under Article 10 and should be denied.

JESPA/ Grievant Dunning

The current version of the CBA contains negotiated language that includes "management rights" provisions. But, the District cannot discharge employees for ANY reason. Instead, the District retained authority to terminate employees "for lack of work or other legitimate reasons." The District's circular reasoning (if Principal Conner was justified in eliminating Ms. Dunning's position, then the elimination gave rise to a lack of work, which renders the discharge permissible under the CBA) misses the mark. Such circular reasoning would lead to a harsh and absurd result. Such a result would allow a view of the CBA that would render meaningless every job protection afforded.

There were many other available positions in the District (Ms. Dunning, like all other District employees, was employed by the District, not by a particular school) to which Ms. Dunning could have been transferred. The CBA contemplates that employees might move from one work location to another. Transfer can be done without the employee's consent; employees may also choose to request transfers. Even if there are multiple employees requesting transfer into the same vacant position, the District can exercise its discretion to place one employee without following contractual posting procedures.

Oberon Middle School did not experience a budget reduction from 2019/20 to 2020/2, Despite the District's oft-repeated excuse for terminating Ms. Dunning's employment. Even if Oberon's student population decreased from 2019/20 to 2020/21, the school ended up with additional funds. First, the District Board of Education allocated more money to Oberon in November 2021, which was earmarked to cover salary increases. Second, there is no evidence that

Principal Conner's fear of required repayment of budget dollars due to lost enrollment ever took place. Last, when Ms. Dunning asked why she was being fired, she was told it was due to "budget reductions". The assistant principal echoed that. Neither one said they really meant it was due to salaries consuming a larger percentage of the school-based budget, or the fear of required budget paybacks. The logical and reasonable conclusion is that the excuses were manufactured after it was clear that no budget reduction occurred in the relevant period. The District's shifting explanations for its action render those excuses unworthy of belief.

There is no procedural barrier to consideration of the merits of this matter. Arbitrators recognize a presumption of arbitrability. Further, the District misconstrues May 22, 2020 as the grievable event. In fact, the earliest date the grievance occurred was June 17, 2020. And, it is not clear that date was the one on which Ms. Dunning or the Association became aware of the grievance event.

Ms. Dunning was not an "at will" employee; she was entitled to the job protections provided by the CBA. Even if Principal Conner had "legitimate reasons" for eliminating Ms. Dunning's position, there was no legitimate basis for the District to terminate her employment altogether.

VII. Analysis and findings

A. Procedural Arbitrability

The District argues for denial of this grievance based upon a "late" filing of the grievance. I disagree. While ". . . arbitrators strictly enforce contractual limitations on the time periods within which grievances must be filed, responded to and carried through the steps . . . *where the parties have consistently enforced such requirements*"¹³ in this proceeding it would be inappropriate to do so. First, there appears to be time limit processing inconsistency within this grievance. The Step One Grievance Form is dated July 2, 2020. By the terms of Article 12-2-2, a "meeting to resolve the grievance will occur within five (5) workdays". The meeting, according to the July 31, 2020 Step One Grievance Response (Dist 039) was on July 24, 2020, well beyond the five-workday period. Simple fairness and the objectives of "mutual trust, respect, understanding, cooperation and support"¹⁴ are inconsistent with, at the arbitration stage, denial of the grievance on these procedural grounds. Further, if the "parties allow a grievance to move from step to step in the procedure without making objections of untimeliness" the right to object at arbitration can be considered waived.¹⁵ That principle is applicable herein.

JESPA argues that the date of the "incident" giving rise to this matter is, at earliest, June 17, 2020, rather than the May 22 date from which the District calculates timelines under Article 12.¹⁶ "Where the date of discovery of the event giving rise to the grievance is debatable,

¹³ *How Arbitration Works*, 6th edition, Elkouri & Elkouri (May, ed.) p. 217 (emphasis mine)

¹⁴ As required by the CBA Preamble

¹⁵ *How Arbitration Works*, 6th edition, Elkouri & Elkouri (May, ed.) p. 219

¹⁶ JESPA Br, at p. 19

arbitrators generally uphold arbitrability."¹⁷ Where a disagreement, and a viable argument exist as to the timelines, "all doubts should be resolved against forfeiture of the right to process the grievance."¹⁸

B. Substantive Arbitrability and Due Process

The District argues that this matter is not arbitrable under Article 10 because the termination was not disciplinary. I agree that the termination was not for disciplinary reasons; such was supported by clear and unambiguous evidence and testimony. Thus, Article 10 provisions and the due process guarantees *under Article 10* are not applicable in this proceeding. However, due process is a broad concept, not necessarily limited to its provision as a contract guarantee.¹⁹ A central element of due process is the requirement that persons be treated fairly, and pursuant to consistent rules or procedures. Notably Joel Hirschboeck referred to due process (albeit with regard to the review itself) in his Step Two Grievance Finding Report.²⁰ Surely if a grievant is entitled to due process in the "steps" review of a grievance, the fairness afforded by due process should attach to the mechanisms of the decision to terminate employment. Due process in an after-the-fact review does not "fix" the absence of prior due process, whether substantive or procedural.

C. Management Rights

There is no doubt of the breadth of the management rights preserved for the District in Article 2 of the CBA. Even in circumstances where a CBA has not defined or enumerated rights reserved to management, most arbitrators recognize their ability and duty to identify the employer's "inherent" rights to manage an organization. However, arbitrators are "reluctant" to uphold "arbitrary, capricious, or bad faith" management acts when actions "adversely affect bargaining unit members." "Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith."²¹

There are a number of identifiable concerns regarding the nature and the handling of Ms. Dunning's employment termination. Admittedly, none of the individual circumstances alone rose to the level of "arbitrary, capricious, or in bad faith." But, taken in total, those concerns create inconsistency with the "environment that includes mutual trust, respect, understanding, cooperation, and support" as intended by the JESPA/Jeffco District partnership pursuant to the CBA preamble.

First, the stated reasons for Ms. Dunning's employment termination varied. Examples include that as described in the Step Two Grievance Findings Report, "The timing of associated written

¹⁷ *How Arbitration Works*, 8th edition, Elkouri & Elkouri (May, ed.) p. 5-30

¹⁸ *How Arbitration Works*, 6th edition, Elkouri & Elkouri (May, ed.) p. 221

¹⁹ Due process is of particular concern in public sector employment. See *How Arbitration Works*, 8th edition, Elkouri & Elkouri (May, ed.) Chap 19

²⁰ Dist 042

²¹ *How Arbitration Works*, 8th edition, Elkouri & Elkouri (May, ed.) p. 13-7

communications were *unfortunate* and they did not cover the subsequent music department staffing issue." ²² Moreover, if the music position staffing was "subsequent,"²³ it should not or could not have been a basis for Ms. Dunning's employment termination. Also disconcerting is the statement in the Summary of District's Argument, that it was "unfortunate that Principal Conner may have misspoke (sic) when he told Gillian that COVID-19 was to blame for his budgetary decision." ²⁴ If Principal Connor's stated rationale was a mistake, then what was the foundation for his decision? Similarly, the Step One Grievance Response includes "While the reason for elimination of Gillian's position was perhaps not communicated in the most accurate way . . . there were legitimate business reasons not related to COVID-19, which justify the elimination of Gillian's position." ²⁵ While I respect the District's concern for how the circumstances were communicated to Ms. Dunning, the "what" of the foundation for her termination is more important than whether or not the communication " . . . could have been handled in a more sensitive manner."²⁶

Shifting explanations for taking an action that adversely affects an employee's status, in discipline/discharge matters, lead to arbitration decisions in favor of the employee.²⁷ "Arbitrators usually decline to uphold discipline based on a ground that the employer failed to rely upon at the time of discharge. Admittedly, this case is not a discipline/discharge matter. However, the rationale is nevertheless relevant. How can an employee in a "management rights" based termination properly make a decision about filing a grievance and/or formulate his or her basis for a grievance if the reason(s) for the termination are unclear?

Also inconsistent with the CBA, specifically with Article 12-3-5, is Principal Connor's testimony at hearing regarding his willingness to reemploy Ms. Dunning. When asked if he would have objections to Ms. Dunning coming back to Oberon, he said that he would have to "think through that." He further explained that a grievance filing has a "very big impact on the climate and culture of our building." Mr. Connor wrote a glowing recommendation letter for Ms. Dunning, dated May 21, 2020. In his email to Ms. Dunning ²⁸ Mr. Connor told Ms. Dunning she would be "a preferred internal candidate for Oberon" for a SPED position. The Step One Grievance Form is dated July 2, 2020. Something changed, apparently from and after July 2. Beyond the fact that by his own admission, Ms. Dunning's status was affected by her use of the CBA Grievance process, one can surmise that Mr. Connor's unwillingness or inability to keep an eye out for opportunities to assist Ms. Dunning in her efforts to be reemployed at Jeffco was not because it would be "too time consuming".²⁹

²² Dist 043, p 2 of the document, under "Just Cause" (emphasis mine)

²³ Dist 043, p 2 of the document, under "Just Cause"

²⁴ Dist 043, p 2 of the document, under "Summary of District's Argument, 2nd paragraph

²⁵ Dist 040, p 2

²⁶ Dist 043, p 2

²⁷ *Discipline and Discharge in Arbitration*, 2nd ed., Brand & Biren editors, BNA books, p. 50

²⁸ Dist 050

²⁹ JESPA Br. p.12, at "b"

D. Avoidance of Harsh or Absurd Results

Neither of the parties herein specifically argue that relevant provisions of the CBA are ambiguous. I agree that the provisions at issue are not inherently ambiguous. Thus, it is not necessary to resort to any of the typical aids for interpreting contract language that is ambiguous. However, for the sake of discussion, it is useful to point out that *if* an ambiguity existed, one guideline is to avoid an interpretation that would produce a harsh result.³⁰ JESPA points out³¹ that the District's actions and the argument supporting those actions could, if applied in other situations, lead to harsh or absurd results. I agree with JESPA's analysis³² of the hypothetical potential for misuse of Article 2-2-2 if the elimination of an employee's position is deemed to trigger "lack of work". The "in the alternative" District argument³³ is consistent with what appears to be a shifting rationale for Ms. Dunning's employment termination, as addressed in "Management Rights", above.

VIII. Summary

In seventeen years of arbitration practice, in labor contract disputes I have infrequently been in the position of recommending a resolution to a dispute, rather than possessing the authority for what amounts to the "last word". Thus, herein I do not hold the authority to determine with finality whether Ms. Dunning's termination from employment as the Restorative Practices Liaison at Oberon Middle School was contrary to the CBA. However, I can and do recommend such a finding to the District and JESPA.

In summary, first, the philosophy and underlying purpose of labor agreement grievance and arbitration mechanisms, to effectively and efficiently resolve disputes that arise under the agreements, is best served by allowing parties to have their "day in court" if doubt exists concerning arbitrability. Further, regardless of the claimed untimely JESPA grievance filing(s), Jeffco allowed the grievance to be fully processed, and should not now be allowed to deny arbitrability. Second, due to the concerns stemming from failure to abide by Article 12-3-5, as well the shifting nature of the explanations given for termination of Grievant Dunning's employment, and lack of common due process, termination of employment was inappropriate and inequitable.

³⁰ *How Arbitration Works*, 8th edition, Elkouri & Elkouri (May, ed.) p. 9-42

³¹ JESPA Br, at 18-19

³² JESPA Br. at 17, paragraph 3

³³ Dist Br., at 8, (B)

IX. Recommendation

For the reasons stated above, I recommend that the District and JESPA find the May 2020 termination of Ms. Dunning's employment was inconsistent with the tenets, objectives, and purposes of the CBA, as outlined above.

If this had been a discipline/discharge matter, under CBA Article 10, a traditional arbitration resolution in favor of Ms. Dunning would include a return to employment, and a backpay award. If the District and JESPA accept the recommendation to find in favor of Ms. Dunning, I also recommend her return to employment in the District as soon as practicable, in a position of like status and pay compared to her previous Restorative Practices Liaison position. Further, compensation for lost pay and benefits is appropriate, and the amount should be negotiated between the parties. I stand ready to assist with a backpay determination, either by making a specific recommendation, or by assisting the parties in their negotiations.

Respectfully Submitted,

Ruth M. Robinson

date: September 7, 2021

Ruth M. Robinson

Attached: Certification of Mailing

CERTIFICATION of MAILING

I hereby certify that on the 8th day of September 2021, I served the foregoing Opinion and Award on the following representatives, by email attachment at their email addresses as noted below; and further, “hard” copies (with original signature) were served on them at their respective mailing addresses, by USPS mail with appropriate postage prepaid on _____, 2021.

/s/ _____

Ruth M. Robinson

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