

**THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW**

APPEAL OF:

DIEGO F. PEREZ, Member
UAW LOCAL UNION 12
(Toledo, Ohio),
Appellant,

-vs-

CASE NO. 1493

REGION 2B
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA),
Appellee.

DECISION

(Issued February 10, 2005)

PANEL SITTING: Prof. Theodore J. St. Antoine, Chairperson,
Prof. Benjamin Aaron, Prof. Janice R. Bellace,
Prof. James J. Brudney, Prof. James E. Jones,
Jr., Prof. Maria L. Ontiveros, and Prof. Paul C.
Weiler.

We consider whether the Regional Representative's decision to withdraw a grievance protesting Diego Perez's permanent layoff lacked a rational basis.

FACTS

Diego F. Perez worked as a nurse practitioner at St. Vincent Mercy Medical Center in Toledo, Ohio. Nurses at the St. Vincent Mercy Medical Center are covered by a collective bargaining agreement between the Center and UAW Local 12. Section 11.4(a), of that agreement gives the Employer the right permanently to lay off bargaining unit members.¹

On August 27, 2002, Perez received a notice that he was being permanently laid off effective September 2, 2002. UAW Local 12 filed a grievance on the following day claiming that Perez was replaced with a medical doctor in violation of Section 17.1 of

¹ Section 11.4(a), of the Collective Bargaining Agreement provides, in pertinent part, as follows:

"Permanent Layoff. The Employer shall determine when a permanent layoff is appropriate and in which unit and classification such layoff shall occur. ..." (Record, p. 2)

the collective bargaining agreement.² In addition, the grievance charged that Perez was laid off in retaliation for having filed a grievance against his former Manager, Dr. Susan Parkins. The grievance states:

“Diego also feels he is being laid off (terminated) in retaliation for bringing to the forefront Dr. Parkins’ behavior R/T her speaking with his private physician about stress leave without his permission. She tried to influence his MD to not allow this leave.”³

Manager Marilyn Stoner responded to Perez’s grievance on September 5, 2002. Stoner maintained that the decision to eliminate the nurse practitioner position at the Medical Center was based on business considerations. She acknowledged that a physician, Dr. Angela Walter, was recently hired at the Center, but she asserted that Walter was hired to fill an opening created by the resignation of one of the Center’s physicians.⁴

Labor Relations Director R. Kent Murphree issued a decision in response to Perez’s grievance at step three of the grievance procedure based on a hearing that was conducted on October 16, 2002.⁵ Murphree reported that Perez argued at the hearing that Management’s decision to eliminate the nurse practitioner’s position was not based on financial or business related considerations. Murphree wrote that Perez pointed out that he was the most profitable member of the department and argued that his position was actually eliminated in retaliation for a grievance he had filed against Dr. Parkins.⁶ Murphree’s report states:

“...Specifically, he claimed that he complained to Management and Administration about Dr. Parkins placing a telephone call to his physician immediately prior to him seeking a leave of absence. He also pointed out that he has utilized the grievance process to his benefit in that he has

² The applicable portion of Section 17.1 states:

“The Employer and the Union recognize that management employees, contingent leased employees, per diems, temporary employees, contingent employees not meeting the department’s requirement to maintain contingency status, students, interns, other employees outside of the bargaining unit, physicians, residents, vendor technical representatives, and volunteers may perform work which overlaps the work of employees covered by the Agreement, and agree that this Agreement does not in any way restrict such persons from performing such work...” (Record, p. 33)

³ Record, p. 16.

⁴ Record, p. 18.

⁵ Record, pp. 19-21.

⁶ Record, p. 19.

filed, and prevailed on, a grievance against Management. He opined that his complaint against Dr. Parkins coupled with his success in the grievance process caused Management to retaliate against him by eliminating his position.”⁷

Murphree reported that Manager Stoner submitted minutes of a physician staff meeting held on March 6, 2002, during which the decision to eliminate the nurse practitioner position was considered. The minutes of the March 6 staff meeting indicate that the group mentioned a number of economic disadvantages to the Occupational Health Department resulting from the employment of a nurse practitioner rather than a physician. These included the fact that many clients request that their employees be seen only by physicians and that a physician is required to be present in the clinic when the nurse practitioner is seeing patients.⁸ Minutes of a staff meeting held on May 21, 2002, indicate that Dr. Parkins once again raised the issue of eliminating the nurse practitioner position. At this meeting, Manager Stoner reported that the rate of reimbursement received by the Department for patients seen by the nurse practitioner is less than that received for patients seen by a doctor. The minutes of the May meeting indicate that the group decided to eliminate the nurse practitioner position, but to delay the action until a replacement could be found for a physician who had resigned.⁹ Murphree noted that Perez challenged the authenticity of these minutes.¹⁰

⁷ Record, p. 19.

⁸ The minutes of that meeting state:

“...Some of the concerns with having a nurse practitioner are that more and more clients are requesting physicians only for their employees. Also mentioned and of concern is that the physicians must co-sign the paperwork initiated by the nurse practitioner and many find this inefficient and time consuming. Additional limitation with a nurse practitioner is that it is required to have a physician present to collaborate with the NP during clinic hours. Another concern mentioned is the limitation of the nurse practitioner not being able to cover at plant sites and only OHS. The question of reimbursement was raised and Marilyn will look into the rate of reimbursement for services provided by the nurse practitioner with BWC and report back to group.” (Record, p. 12)

⁹ The minutes state with respect to the nurse practitioner issue:

“Dr. Parkins then opened up discussion with the group revisiting the elimination of the nurse practitioner position. Marilyn mentioned that per the Ohio BWC the rate of reimbursement is lower for any patients seen by the nurse practitioner as compared to a physician. Also the nurse practitioner cannot sign for any wage loss submitted on behalf of the patient. This includes a C-84 form and the physician must sign this. This is per BWC law. Discussion followed and approved action to eliminate the nurse practitioner position will be delayed or postponed until a replacement is hired for Dr. Growney’s position.” (Record, p. 13)

¹⁰ Record, p. 20.

Murphree also reported that Occupational Health Vice President William Sutton testified that he made the decision to eliminate the nurse practitioner position. According to Murphree, Sutton explained his decision as follows:

“...He also indicated that the decision was based upon the directive to make specific cuts (which was given to him after he convinced Administration to give him the opportunity to make the Department more profitable/cost effective, rather than close it as had been announced sometime in November of 2001.) Part of the edict to him, when permitted to keep the service open, was to make drastic cost/labor cuts. Among that downsizing process, it was determined that given the overlap in physician and nursing duties with the grievant’s position, and the fact that he could not work independently, it was more cost effective to eliminate his position than any other (physician or nurse) in the department. ...”¹¹

Murphree decided that the section of the collective bargaining agreement cited in Perez’s grievance did not prohibit non-bargaining unit employees from performing bargaining unit work, but in fact, specifically permitted it. He further maintained that Perez had not established that the decision to eliminate his position had any connection to grievances he had filed in the past. Murphree wrote:

“...There is also no doubt that an unfortunate result of an economic circumstance in the Occupational Health Department was visited on the grievant, but most importantly, without regard for any of the factors he has alleged. In other words, the elimination was based upon legitimate nondiscriminatory reasons. Therefore, his Section 28.1 claim (i.e. discrimination) necessarily fails.”¹²

On December 18, 2002, Region 2B Representative Catherine Booher notified Perez that the Union had decided to withdraw his grievance from the procedure. Perez appealed the decision to withdraw his grievance to the International Executive Board (IEB) on January 22, 2003. In support of his appeal, Perez argued that Booher’s decision to withdraw his grievance made no sense in light of the evidence he had produced. Perez attached to his appeal monthly revenue reports to support his contention that he was actually the most productive and profitable member of his department.¹³ He wrote:

¹¹ Record, p. 20.

¹² Record, p. 21.

¹³ Record, pp. 28-32.

“...When my ‘layoff’ occurred, I was the only one who had his position eliminated. I was the most senior person in my position. I was the only Hispanic. I was the only gender minority in my position in my work group. I was the only bargaining unit member in my work group. And, I was the most productive member of my work group, as evidenced by figures produced by management themselves. ...”¹⁴

Perez went on to state that when he produced evidence of his productivity during the step three hearing, Vice President Sutton responded that it was, in fact, Dr. Parkins who had convinced him that Perez was a liability to the Department.

Perez insisted that ethical breaches by Dr. Parkins, which he brought to light through the grievance procedure, were the real motivation behind the decision to eliminate his position. He explained that Dr. Parkins had called his personal physician in an attempt to interfere with his application for medical leave. He reported that he received notice of the elimination of his position one day after he returned from his approved medical leave. Furthermore, Perez stated that while he was on medical leave, a non-bargaining unit employee was hired and given his work.

Perez also charged that the Local Unit Chairperson did not represent him aggressively. He wrote:

“...Chairperson Sandy Lawson of the RN Bargaining Unit of St. Vincent Mercy Medical Center, Toledo, OH, admitted to me that she had very little confidence and experience in the role and process she was assigned to; that she felt frustrated and overwhelmed by my case; and that oftentimes [she] felt as if the Union had abandoned her and failed to support her in her work as Chairperson of the RN Bargaining Unit. ...”¹⁵

Perez claimed that after he was laid off, Chairperson Lawson informed him of an internal posting of his position. He stated that he tried to schedule an interview for the position, but was told that the position had become unavailable and that the hiring was on hold. He wrote that when he informed Chairperson Lawson of this, she told him that there was nothing she could do. Perez concluded:

“...If the Union is to allow Management to terminate any Bargaining Unit member at any time for any reason, legal or not, and then report their action as a “layoff,” based on “a

¹⁴ Record, p. 25.

¹⁵ Record, pp. 25-26.

business decision,” what job security will Union members have? ...”¹⁶

Representative Catherine Booher explained her decision not to take Perez’s grievance to arbitration in a memorandum addressed to President Gettelfinger on March 7, 2003. Booher stated that Management had clearly explained the reasons for its decision to eliminate the nurse practitioner classification, as it had a right to do under the collective bargaining agreement. She noted that even if Perez could prove that he had been replaced by a non-bargaining unit employee, the collective bargaining agreement did not prohibit this.¹⁷

Booher further stated that Management had convincingly refuted Perez’s claim of retaliation. She referred to the minutes of the staff meeting in March 2002, during which the staff considered eliminating Perez’s position, and pointed out that these minutes pre-dated the grievance that Perez claimed motivated his layoff. Furthermore, she noted that the Vice President of hospital operations testified at the third step hearing that the decision to eliminate the position was his alone. Booher stated that she was convinced that Perez had not been the victim of discrimination. She wrote:

“Having knowledge that approximately 50 Registered Nurse positions have been eliminated at the hospital over the past eighteen months; individual nurses have lost jobs and entire, profitable departments have been closed. While none of us like the fact, we do not, as a Union, have the negotiated power to participate in that business decision-making process. With this knowledge and experience, I cannot claim that Mr. Perez was ‘singled out.’”¹⁸

Ed Hardeman and Frank Howe conducted a hearing on Perez’s appeal on behalf of President Gettelfinger and prepared a report for the IEB based on their findings. The hearing officers concluded that Perez’s layoff did not violate any provision of the collective bargaining agreement between Local 12 and the Medical Center. They noted that a recent arbitration decision upheld the Medical Center’s right to assign bargaining unit work to members of Management as necessary.¹⁹ The hearing officers held that Representative Booher’s assessment that Perez’s grievance could not be sustained before an arbitrator was not devoid of rational basis.²⁰

¹⁶ Record, p. 27.

¹⁷ Record, p. 39.

¹⁸ Record, p. 41.

¹⁹ Record, p. 60.

²⁰ Record, p. 61.

The IEB adopted the report of the hearing officers as its decision and notified Perez on August 27, 2004. Perez has now appealed to the Public Review Board (PRB).

ARGUMENT

A. Diego F. Perez:

The report attached to the IEB's decision has been altered to conceal important information relevant to my appeal. A representative of the International President's office reported to me that they edited what had been a very straightforward, concise and compelling condemnation of the Regional Representatives' decision not to take my grievance to arbitration. The President's staff by means of this editing withheld critical information from the IEB. Then, after a most unreasonable delay, it issued a hasty and hurried denial of my appeal without giving consideration to the most important contract violations.

B. International Union, UAW:

The record reveals that appellant's entire department was slated to close in November 2001, and was saved at the eleventh hour when Vice President Sutton convinced Medical Center administration to let him try to make the department more profitable. The minutes from two occupational medicine physician staff meetings that were submitted by the Medical Center show that the decision to eliminate the nurse practitioner position had been considered and adopted prior to appellant's grievance over Dr. Parker having contacted his physician.

Under the collective bargaining agreement, the Employer has the right to determine when layoffs are appropriate and in which department, unit and classification such layoffs should occur. Based on these facts, it cannot be said that the International Representative's decision to withdraw the grievance was without a rational basis. There is no evidence of fraud, discrimination or collusion with management on the part of the Union.

C. Diego Perez, rebuttal:

The collective bargaining agreement recognizes that non-bargaining unit employees may sometimes perform work which overlaps the work of employees covered by the agreement. As I explained in my appeal to the IEB, the non-bargaining unit employee who was hired to replace me was given my exact job in its entirety. This was not the kind of overlap situation recognized by the agreement. This employee's name is Irma Santiago. She was given my work assignment in front of my very eyes, and I was told she was to see my patients by the department Manager on the day that I was walked out of my department by Management. This was a violation of the agreement.

DISCUSSION

Perez insists that the record we have is incomplete in that it does not contain a draft of the report prepared by hearing officers Hardeman and Howe that was more favorable to his position than the version that was eventually adopted by the IEB. Even assuming *arguendo* that the International President's hearing officers were more sympathetic to appellant's position, that sympathy has no bearing on the issues presented by the instant appeal. Representative Booher's memorandum to President Gettelfinger explaining her decision to withdraw Perez's grievance reveals that she also regarded the hospital's decision as extremely unfortunate. She recognized the merits of Perez's claims, but also acknowledged that the Union lacked the bargaining power to alter the hospital's decision. She withdrew Perez's grievance based on her conclusion that the language of the collective bargaining agreement did not provide the Union with a strong enough case to persuade an arbitrator to overturn the Medical Center's decision to eliminate his position.

The collective bargaining agreement specifically allows the Employer to lay off employees permanently when appropriate. Perez argues that the Employer's discretion in this regard is qualified by Section 17.1 of the agreement. He maintains that Section 17.1 prohibits the replacement of a bargaining unit employee by a non-bargaining unit employee. The language of the contract dealing with bargaining unit work does not state this unequivocally, however. Section 17.1 of the collective bargaining agreement recognizes that many different categories of unrepresented employees will occasionally perform work covered by the agreement. This language does not limit the right of non-bargaining unit employees to perform bargaining unit work to those situations where job descriptions overlap. On the contrary, the section states that the agreement does not in any way restrict such persons from performing such work. The Section does limit the right of a Manager or Supervisor to perform bargaining unit work to emergencies, but it then goes on to define the term "emergency" in extremely open-ended language as follows:

"...provided that, an Administrative Director/Manager or Supervisor shall generally only perform such bargaining unit work in emergencies, including when bargaining unit employees are not at work and immediately available to do the work, in the instruction or training of employees while the employees being instructed or trained are present, in the performance or necessary work when difficulties are encountered, or when necessary at any time due to patient safety or care."²¹

The Union would have been unlikely to persuade an arbitrator that this highly qualified restriction on the performance of bargaining unit work by Management was intended to

²¹ Record, p. 33.

limit the Medical Center's right permanently to lay off employees that is stated so unequivocally in Section 11.4(a), of the collective bargaining agreement.

Perez argues that the Union could have challenged his layoff on the grounds that it was in retaliation for a grievance he filed against his Manager, Dr. Susan Parkins. He maintains that the evidence does not support the hospital's claimed economic reasons for his layoff, because its own records demonstrate that he was the most productive member of his group. Perez was not laid off for being unproductive, however. The minutes of the two staff meetings in March and May show that the disadvantages to the Occupational Health Department in maintaining the nurse practitioner position resulted from government regulations and the preferences of the Department's clients, rather than any deficiency in Perez's performance. The reasons reported in the staff meeting minutes were confirmed by the Vice President of the Occupational Health during the third step hearing on Perez's appeal. The Union had no basis for challenging the validity of the business reasons for Perez's layoff cited by Vice President Sutton.

Our jurisdiction over collective bargaining grievances is limited to the question whether fraud, discrimination or collusion with management influenced the Union's disposition of the matter or whether the action taken by the Union was devoid of any rational basis.²² There is no allegation that the Union's decision was influenced by improper motivations. The record demonstrates that Representative Booher's decision to withdraw Perez's grievance was based on a realistic evaluation of the Union's case. Her determination that the case could not be successfully arbitrated cannot be said to lack a rational basis.

The decision of the IEB is affirmed.

²² Article 33, §4(i), of the Constitution states as follows:

"GRIEVANCE AND RELATED APPEALS.

In any appeal to the Public Review Board, under §3(f), of this Article, concerning the handling of a grievance or other issue involving a collective bargaining agreement, the Public Review Board shall not have jurisdiction unless the appellant has alleged before the International Executive Board that the matter was improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis."