IN ARBITRATION BEFORE
RICHARD L. AHEARN

OPINION and AWARD

AAA Case No. 01-16-0000-3931
(James Shelton)

WA Public Employees Association,
UFCW 365

Union,

and

State of Washington, Pierce College

Employer.

Appearances:

For the Union

Danielle Franco-Malone
Schwerin Campbell Barnard Iglitzin & Lavitt
18 West Mercer Street, Suite 400
Seattle, WA 98119

For the Employer
Margaret C. McLean
Darcy Elliott
Office of the Attorney General
Olympia, WA 98504 – 0124

OPINION

I. INTRODUCTION

The Employer (or College), a Community College District within the State of Washington, and WA Public Employees Association, UFCW 365 (Union), are parties to a collective bargaining agreement (CBA) that was effective at all times material to this matter. James (Chip) Shelton (grievant) was employed by the College in the Information Technology (IT) department. On May 26, 2015, the Employer issued grievant a Notice of Pending Layoff, and on June 15, 2015, a Notice of Layoff, effective July 15, 2015.[1] On July 14, the Union filed a grievance alleging that the layoff was in violation of Article 36.2 (A) of the CBA.

With no mutual resolution of the grievance, the Parties selected me through the processes of the American Arbitration Association as the arbitrator to decide this matter. At the hearing held on November 29 and 30, 2016, in Tacoma, Washington, the Parties had full opportunity to call witnesses, to make arguments and enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. Following the close of testimony I received timely filed and well-written, comprehensive briefs from the Parties and the record closed effective January 27, 2017.

II. STATEMENT OF THE ISSUE

The Parties stipulated to the following statement of the issue:
Did the College violate the Parties' collective bargaining agreement when it laid off grievant?

---

[1] All dates herein 2015 unless otherwise noted.

If so, what shall the remedy be?

III. RELEVANT PROVISIONS OF THE CBA

ARTICLE 28 DISCIPLINARY PROCEDURES

28.2 Discipline

A. Employers will not discipline any permanent employee without just cause.

ARTICLE 30 GRIEVANCE PROCEDURE

30.2 Filing and Processing

D. Authority of the Arbitrator

1. The arbitrator will:
   a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement;
   b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
   c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement; and

ARTICLE 36 LAYOFF AND RECALL

36.1 A. The Employer will determine the basis for, extent, effective date and the length of layoffs in accordance with the provisions of this Article. A layoff is an employer-initiated action that results in:

1. Separation from service;

B. When it is determined that layoffs, other than a temporary layoff, will occur within a layoff unit, the Employer will provide the Union with:

1. As much advance notice as possible, but not less than thirty (30) days' written notice...
2. An opportunity to meet with affected employees prior to the implementation of the layoff; and
3. An invitation to meet under the provisions of the Labor/Management Communication Committee article of this Agreement.

D. The Employer will explore options including the reduction of hourly employees.

36.2 BASIS FOR LAYOFF

A. The reasons for layoff include, but are not limited to, the following:

1. Lack of funds;
2. Lack of work; or
3. Organizational change.

B. Examples of layoff actions due to lack of work may include, but are not limited to:
   1. Termination of a project or special employment;
   2. Availability of fewer positions than there are employees entitled to such positions;
   3. Employee's ineligibility to continue in a position following its reallocation to a class with a higher salary range maximum; or
   4. Employee's ineligibility to continue, or choice not to continue, in a position following its reallocation to a class with a lower salary range maximum.

36.7 OPTIONS WITHIN THE LAYOFF UNIT

A. Permanent employees will be laid off in accordance with seniority, as defined in Article 35, Seniority, and the skills and abilities of the employee within the layoff unit. The Employer will determine if the employee possesses the required skills and abilities for the position and the comparability of the position.... Employees being laid off will be provided one (1) option within the layoff unit:
   1. A comparable funded vacant position for which the employee has the skills and abilities, within his or her current job classification.
   2. A comparable funded filled position held by the least senior employee for which the employee has the skills and abilities, within his or her current job classification.
   3. A less than comparable funded vacant position for which the employee has the skills and abilities and is within his or her current job classification.
   4. A less than comparable funded filled position for which the employee has the skills and abilities and is within his or her current permanent classification.
   5. A comparable funded vacant position for which the employee has the skills and abilities, at the same or lower salary range as his or her current permanent position, within a job classification in which the employee has held permanent status.
   6. A comparable funded filled position held by the least senior employee for which the employee has the skills and abilities, at the same or lower salary range as his or her current permanent position, within a job classification in which the employee has held permanent status.

B. The layoff option will be determined, as specified above, in descending order of salary range and one progressively lower level at a time.

36.8 INSTITUTION-WIDE OPTIONS

A. In addition to the layoff option offered in Section 36.7 above, permanent

employees being laid off will be offered:

1. Up to three (3) institution-wide comparable funded vacant positions within their district provided they meet the skills and abilities required of the position(s) and the positions offered are at the same or lower salary range as the position from which the employee is currently being laid off.
2. If there are no comparable vacant positions, the Employer will offer less than comparable funded vacant positions.
3. If there are no less than comparable vacant positions, the Employer may offer a temporary appointment per Article 5. The award or denial of an informal option to a temporary appointment is not subject to the grievance procedure.
4. The Employer will determine if the employee possesses the required skills and abilities for the position.

ARTICLE 37 MANAGEMENT RIGHTS

37.1 The Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to, the right to:

A. Determine the Employer's functions, programs, organizational structure and use of technology;

B. Determine the Employer's budget and size of the Employer's workforce and the financial basis for layoffs;

J. Establish, allocate, reallocate or abolish positions and determine the skills and abilities necessary to perform the duties of such positions;

K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer and temporarily or permanently lay off employees;

O. Determine the reasons for and methods by which employees will be laid-off; and

37.2 The Employer agrees that the exercise of the above rights will be consistent with the provisions of this Agreement.

IV. EVIDENCE

Background

Hired by the Employer at the ITS5 level as the customer service manager in the department in January 2013, grievant had substantial experience in information technology (IT). Initially responsible for client services, roughly half the department (15 to 18 employees) and all those at the ITS4 level reported to grievant. Grievant's initial supervisor was Michael Stocke, (Stocke) Chief Information Officer (CIO), who

in January 2014 issued grievant a highly laudatory performance review. Stocke was particularly impressed with grievant's passion for customer service and his well-developed skills.

However, beginning in late 2014, as grievant raised numerous concerns about Stocke's alleged lack of leadership and as Stocke began counseling grievant about his behavior, their relationship became increasingly uncomfortable. One issue of particular contention arose as Stocke expressed displeasure with grievant's hire of Matt Spear (Spear) and especially with Spear's appearance and attire. For his part, Spear testified that Stocke complained about his attire and also that he often swore and was "gunning" for him. Eventually Stocke directed grievant to extend Spear's probationary period for an additional three months. However, prior to the end of Spear's extended probationary period, grievant certified that Spear had successfully demonstrated his fitness for full-time employment. Concluding that grievant had willfully ignored instructions, and had subsequently lied about whether the extension had been reinstated, on August 5, 2014, Stocke issued grievant a written reprimand.

One month later Stocke directed grievant to report to Andrew Glass, formerly a peer of grievant. Under the new supervisory arrangement grievant no longer participated in management meetings as he had in the past. According to Stocke, the reassignment was designed to avoid the difficulties he and grievant had been experiencing and to help grievant succeed.

For his part, Glass testified that his initial involvement as grievant's supervisor was cumbersome because they had been peers. Consequently Glass was forced to conduct around 10 counseling sessions with grievant, both to build trust and to address concerns about grievant's honesty. Eventually Glass felt it necessary to issue several written reprimands, none of which were at Stocke's direction. Indeed,

on the one occasion when Stocke suggested a reprimand to grievant, Glass declined, as he had not been present to observe the behavior in question.

Under Glass grievant received the following written reprimands:

- On November 12, 2014, for an alleged failure to obtain preapproval to alter his work schedule
- On December 4, 2014, for allegedly failing to finish work by the project deadline, and
- On April 29, regarding the designation of another employee's work location and concluding with the admonition that future violations "may result in disciplinary action up to and including termination."

Although at hearing grievant vigorously denied the validity of the reprimands, no grievances were filed over any of them.

In furtherance of concerns about his new reporting arrangement and Stocke's management, in December 2014, accompanied by his shop steward, grievant met with Holly Gorski (Gorski) in Human Resources (HR) and raised issues about being targeted by management. Still unsatisfied, in January 2015, grievant attempted, without success, to arrange a meeting with Denise Yochum (Yochum), the College's President. That attempt drew a rebuke from Glass, who admonished grievant to avoid going around him. At about the same time, apparently fearing retribution, grievant asked Stocke for a general letter of recommendation, which he eventually received on April 3. Finally, on April 14, grievant filed a complaint with the Washington State Auditor under the provisions of the State Employee Whistleblower Act. [2]

The Layoff

[2] The Auditor found no actionable wrongdoing and there is no evidence that the College was informed of the identity of the "whistleblower."

The College implemented grievant's layoff pursuant to the provisions of Article 36 of the CBA. According to Choi Halladay (Halladay), Vice President of Administrative Services, the layoff process is inextricably linked with the College's budget process. Thus each year, following receipt of the Governor's draft budget, advice from the State Board for Community and Technical Colleges and guidance from the Board of Trustees, Halladay initiates a discussion within the College administration concerning the upcoming budget. For the 2015/2016 cycle each department was asked to consider both a 3% and a 6% overall reduction to their operating budgets. Although ultimately the overall budget was not decreased, mandated expenditures did increase, thereby necessitating reductions in other parts of the budget. Significantly, the reductions sought needed to be true structural changes rather than one-time reductions. As is customary, Holladay relied on department heads, including Stocke, to provide the proposed reduction opportunity for their respective divisions. These budget team meetings began in January 2015.

Stocke, who was responsible for the decision to lay off grievant, testified that he does not take a decision to eliminate a position lightly because reinstatement is often difficult. However, as he understood a need to find a large sum of money, Stocke focused on grievant as there were two other employees at his level with over 20 years experience and an individual in an exempt position.[3] In addition, Stocke concluded that he could redistribute grievant's former responsibilities. When Stocke presented the layoff of grievant as an option, the budget committee sought his rationale and the underlying support. According to Stocke, the decision to lay off grievant was unrelated to any behavioral issues or concerns.

Following the tentative layoff decision, Stocke met with grievant and Glass and invited them to review the budget and to make suggestions for alternative permanent cuts that would avoid the necessity to lay off grievant. Although they

[3] There were also in the department less senior employees whose lower salaries, however, offered less savings.

returned with six or seven good suggestions, each represented only one-time savings that did not address the budgetary mandate.

On May 26, grievant and the Union received a Notice of Proposed Layoff, that asserted the decision was based on "the need to restructure services in order to create efficiencies" within the department and to "address the requirement of a 3% budget reduction." It included a description of how the majority of grievant's responsibilities would be distributed among the other employees. The Notice provided the following explanation:

> "The position is proposed to be eliminated with the intended effective date of July 15, 2015 due to lack of funds and organizational change."

Deena Forsythe (Forsythe), Director, Employee Relations and Compliance, testified that in May she became aware of the possible layoff of grievant and a few other employees in other departments as a result of the budget exercise. As a result she met individually with each of the employees who had been identified as possible layoffs. During her meeting with grievant she provided a detailed written description of how his current duties would be distributed among the remaining staff.

That same day Stocke provided grievant written notification that he was reassigned to home with full pay and benefits as a "risk-management practice" that was not discipline. With the remainder of grievant's team assembled in a room from which they could watch the unfolding event, security escorted grievant out of the building. In addition, Stocke explained to employees that they should not answer any phone call they might receive from grievant. According to Spear, Stocke's admonition made him believe that grievant had been discharged.

On June 15, grievant received from Denise Yochum (Yochum), College President, official notification that he was scheduled for layoff effective July 15, 2015. The letter asserted:

"The basis for this reduction in force (layoff) action is organizational change and lack of work."[4]

In addition, grievant was provided until June 22 to accept a position in lieu of layoff by completing the appropriate form and returning it to the HR Office.[5] The letter also advised that Yochum was willing to meet with him on June 17 to discuss his layoff and that she would consider any information that would affect his layoff options or his separation from the Employer. Grievant did not complete the form in time and did not schedule a meeting with President Yochum.

Following June 15, Forsythe engaged in the contractually mandated process of evaluating the vacant funded positions throughout the institution against grievant's resume and employment information to determine whether he qualified for a reassignment.[6] Forsythe concluded that grievant either lacked the necessary degree or experience to qualify for any of the vacant positions.

On August 20, in response to the grievance, and in reliance on Article 37 of the CBA, the College expressed the following:

- "The College has no good-faith obligation for the determination of reorganization."
- " The only requirement for the Management under the CBA is that the Management unilaterally determines there is a need for reorganization."

Yochum's November 12 response to Step 2 of the grievance affirmed the decision to uphold the layoff without mention of the above rationale.

---

[4] The 2 Notices are not consistent in the stated reasons for the layoff. Although both cite "organizational change," the preliminary notice also mentions "lack of funds" but not "lack of work," whereas the final notice asserts "lack of work" but not "lack of funds."

[5] Grievant did not respond until July 6, at which time he was informed that his layoff date of July 15 remained effective.

[6] Forsythe was familiar with this process as she had been involved in approximately 20 layoffs during the past 10 years.

V. SUMMARY OF PARTIES' POSITIONS

Union

The Union contends that grievant's layoff was a ruse in violation of the protections in the CBA against unjust terminations. In support, the Union argues that:

- none of the three conditions set forth in the CBA to justify a layoff (lack of funds, organizational change or lack of work) existed here.
- by resorting to the lay off mechanisms of Article 36.2 to retaliate against grievant for having challenged Stocke's management or to avoid the disciplinary procedures of the CBA, the College violated its duty of good faith and fair dealing
- by failing to offer grievant any of several vacant, funded positions for which he was well-qualified, the College violated Article 36.8 of the CBA
- by transferring some of grievant's responsibilities to Glass, an exempt employee outside the bargaining unit, the College violated the scope of the unit as set forth in Article 1 of the CBA.

The Union seeks a make-whole remedy to include back pay in the amount of approximately $27,648 and interest.[7]

Employer

Article 37 of the CBA confirms the College's inherent authority to exercise wide-ranging discretion in numerous activities, including determining its budget, its organizational structure, workforce size and reasons for layoffs. Layoffs constitute a cumbersome and time-consuming way to remove an employee from employment. The contractually mandated layoff process includes numerous protections, all of which the College rigorously followed with respect to grievant.

In particular,

- grievant bears the burden of establishing that the College violated Article 36 of the CBA

[7] This amount is based on documents in the record, including W2s, unemployment and interim earnings.

- as no grievances were ever filed over the numerous disciplinary actions issued to grievant, the underlying facts of those disciplines are not appropriate issues in this matter
- the relatively mild levels of discipline for grievant's many serious offenses and Stocke's positive letter of reference demonstrate that the College was not attempting to discipline grievant through the layoff process
- grievant's resume reveals that he lacked the qualifications for any of the vacant funded positions
- the permanent reduction in the budget of the IT department constituted a "restructure" within the meaning of 36.2.

Accordingly the layoff of grievant was appropriate under the standards of Article 36.2 and should be upheld and the grievance denied.

VI. ANALYSIS

Preliminary Observations

I agree with the College that the Union, as the moving party in this matter of contract interpretation, bears the burden of persuasion. *WFSE (Burgess) and Washington Dep't of Emp't Security*, 01-16-0000-0950 (Stiteler, 2017) In that regard I follow the majority of arbitrators in relying on a standard of "the preponderance of the evidence." *Canteen Corp.,* 101 LA 925, 929 (Borland, 1993). Another way of expressing that test is that, in order to prevail, the Union must present more than equally weighted competent evidence.

Here I am charged with determining the Parties' mutual intent and understanding with respect to the terms of Article 36 and in particular whether grievant's layoff was compliant with the standards of Article 36.2. It is well established that where the disputed contractual language is clear and unambiguous, arbitrators will give effect to the plain meaning, even if one party considers the result harsh or unexpected. Elkouri and Elkouri, *How Arbitration Works*, 9-8, 7th Ed., 2012. Unless there is evidence that the parties intended some specialized meaning, words are to

be given their ordinary and popularly accepted meaning. Further, the contract should be construed by examining the overriding purpose of the Parties; the meaning of each sentence and each section should be determined in relation to the entire contract. Significantly, my award must be confined to a determination of the rights of the Parties as expressed in the CBA. In particular Article 30.2D limits the authority of the arbitrator to interpreting and applying the terms of the agreement.

The Doctrine of Reasonableness

In addition, arbitrators prefer a "reasonable meaning" interpretation to one that produces unreasonable, harsh, absurd or nonsensical results. One important element of reasonableness is expressed as the doctrine of good faith and fair dealing, a set of principles that can prevent a party from evading the spirit of a bargain. *The Common Law of the Workplace,* 2.12, St. Antoine, (2nd. Ed. 2005). A well established expression of the doctrine teaches that "[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." An inherent and implied covenant of reasonableness that applies to all collective bargaining agreements, the duty...[p]revents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...." *How Arbitration Works,* supra at 9-49. In accord is the analysis by arbitrator Carlton Snow, who recognized that the balancing effect of good faith was necessary "to take the promise out of the realm of illusions." *City of Salem,* 2003 WL 23350890 (Snow, 2003). Relying on the *Restatement (Second) of Contracts* and long-established common law principles, Arbitrator Snow found that absent clearly enunciated limitations in an agreement, discretionary authority must not support objectives at odds with the parties' rights and obligations.

Article 37.2 of the CBA, in which the Employer recognizes that the exercise of the rights enumerated in Article 37.1, (including layoffs), "will be consistent with the provisions of this Agreement" demonstrates that the Parties understood that the

College's discretionary authority is not unrestricted.[8] The just cause requirement for employee discipline set forth at Article 28.2 and the three (3) Article 36.2 conditions represent such restrictive provisions. Such limiting language is inconsistent with a claim that the College may unilaterally exercise layoff determinations unconditionally and with no restrictions.

In light of the foregoing I am persuaded that the "essential objective" of Article 36 reflects the Parties' mutual intent to limit the layoff process to circumstances in which the College's reliance on any of the three (3) expressed conditions arises only following a reasonable, good faith determination.

Application of the Above Principles

The question I must ultimately resolve: Did the College exercise its discretion in a reasonable, good faith reliance on at least one of the reasons expressed in Article 36.2? As explained below, applying the above principles to the Parties' contract language, after careful evaluation of all the evidence and the Parties' cogent arguments, I am persuaded that the answer is no.

Interpretation of Article 36.2 Terms

With respect to the terms "lack of funds" and "lack of work," I am persuaded that each conveys a distinct meaning, expressing a condition in which the College is deficient in or in need of either funds or work. I thus find that no further interpretation of those concepts is necessary.

On the other hand, I do not find the common meaning of "organizational change," and "restructure services," clear and distinct. In that regard I note initially that the CBA contains no definitions for these terms. Further, as I find no extrinsic evidence that the words were used in a different sense from their ordinary or popularly

[8] This conclusion is contrary to the position asserted by the College in its August 20 response.

accepted meaning, I follow the well-settled principle of a "reasonable person" interpretation. As such, I am persuaded that a "reasonable person" would interpret "organizational change" or "restructure" as some action that brought about change in the makeup or structure of an organization. By contrast, the distribution of grievant's duties here to 2 or more individuals would likely appear to a reasonable person to be more akin to a "reassignment" of specific tasks among various employees.

In light of the foregoing I am persuaded the College's action in distributing grievant's duties among two or more individuals in the IT department more closely resembles a reassignment rather than a restructuring or organizational change as those terms are commonly understood and as the Parties intended in Article 36.2.

Application to Lack of Funds

It is well established that employers must rely on the reasons expressed at the time of the questioned event to support their position at arbitration. Here, although the College in its May 26 Notice relied on "lack of funds," that reason was not expressed in the June 15 Notice of Layoff. It thus appears that the College did not rely on "lack of funds" for the ultimate decision.

Moreover, even assuming that lack of funds is properly raised, unlike some prior years, the College did not suffer a reduction in State revenue. Further, accepting the validity of the College's need to adjust expenditures to meet increased mandates, the record fails to adequately demonstrate the scope and extent of any such requirements, and why the IT department was expected to contribute any particular level of savings, especially as it apparently did not experience an apparent decrease in the scope of its required activities. In light of the foregoing I find unpersuasive the contention that "lack of funds" provides a good faith, reasonable basis for the layoff.

Application to Lack of Work

I am also persuaded that the record evidence fails to support a conclusion that the volume of work in the IT Department had diminished from the prior year. Thus there is no evidence that the needs of the customer service desk or any other activities in which grievant was engaged had become less important or had been abolished. Rather it is apparent that grievant's duties continue to be performed by other members of the IT department. Although the College is entitled to a significant amount of flexibility to remain efficient, in light of the foregoing I am persuaded that insufficiency of the evidence supporting a "lack of work" compels rejection of that reason as a good faith, reasonable explanation for the layoff.

Application to Organizational Change and Restructure

As discussed above, on the basis of the singular act here involving only grievant's duties, I am persuaded that the College's actions more closely resemble a reassignment rather than a restructuring or organizational change as those terms are commonly understood and as the Parties mutually intended in 36.2. To find otherwise would permit the College to construe every reassignment of duties as an "organizational change," a result that appears inconsistent with the more restrictive "overall objectives" of Article 36.2. Indeed, had the Parties intended that the reassignment of duties from one employee to another individual or group of individuals would suffice to support a layoff, they could have added "reassignment" to the list of Article 36 conditions. They did not.

Although I am persuaded that a simple reassignment might not normally qualify as an organizational change, a number of factors, including the size of the work unit and whether any tasks were curtailed or discontinued could impact the analysis. Here the IT department is relatively large (apparently at least a couple dozen employees) and there is no evidence that any of its responsibilities were removed or reduced. Alternatively, a sufficient number of reassignments, implemented together, might satisfy the concept of "restructuring" or "organizational change"

contemplated by the Parties. Here, however, the reassigning of grievant's duties involved a singular act.

Finally, I am not persuaded that a reduction in the IT department necessarily constitutes a "restructure" as that term is commonly understood. To hold otherwise, particularly in the context of the factual record here, would allow layoffs virtually without limitation, a result inconsistent with the restrictive conditions of Article 36.2. Under all these circumstances I am persuaded that the evidence does not support "organizational change" and "restructure" as reasonable, good faith bases for the layoff.

The Layoff and 36.2

In analyzing the reasons for the layoff, I recognize that the College undertook lengthy and time-consuming deliberations contemplated in its annual budget process, including representatives of all divisions of the College engaged in multiple levels of review. Known as the Budget Team, they considered proposals from each department and forwarded approved versions to the College's cabinet for final adoption. As with the other employees initially targeted for layoff, the College's Human Resources Department (HR) met with grievant to review potential options. Ultimately the Budget Team settled on two layoffs, including that of grievant. However, compliance with the numerous procedural requirements of Article 36 is distinct from fulfilling obligations to make decisions consistent with reasonable, good faith applications of contractual limitations. Moreover, Stocke, who disciplined grievant and expressed displeasure with his behavior, selected grievant, rather than Halladay or others who were members of the budget team.

I acknowledge that Stocke's April positive letter of reference arguably suggests a level of appreciation for grievant. On the other hand, although at that time grievant had not received the notice of proposed layoff, the decision had been well vetted and grievant was continuing to receive discipline. In addition, I find it reasonable that

Stocke understood a refusal to provide a letter of reference would support a conclusion that discipline was intended. In light of the foregoing I am persuaded that any inferences from the positive reference are too uncertain and inconclusive to be persuasive.

I also recognize that the College has laid off approximately 20 employees in the last 10 years. In addition, Christina Berry (Berry), employed in a different department at the college, was laid off at the same time as grievant. Although these other layoffs demonstrate that the College has arguably properly invoked its Article 36.2 authority in other circumstances, such a secondary consideration cannot be determinative of the issue I must resolve.

It is also apparent that although the College did not suffer a budget reduction for the 2015-16 fiscal year, mandated expenditures did increase. Indeed, grievant's layoff may have helped the College increase efficiency and more readily meet increased obligations in some mandated expenditures. However, I am persuaded that the record evidence fails to adequately reveal the extent of any necessary cost savings, what amount or percentage the IT department was required to bear or why less senior employees in the IT were not chosen instead.[9]

In light of the foregoing, I am unable to conclude that the layoff was consistent with the College's obligation to exercise its discretionary authority reasonably as I find unpersuasive the evidence offered by the College in support of the reasons expressed in Article 36.2.

My above conclusion is also buttressed by reasonable inferences that arise from factors that suggest the layoff was disciplinary in nature. For instance, although grievant initially received effusive and warm praise, by the early part of his second year, he began to clash with Stocke, with numerous counseling sessions and written

[9] I am persuaded that grievant's salary does not sufficiently answer why he was selected.

reprimands to follow, including from his second supervisor, Glass. Despite Grievant's vigorous challenges at hearing to his many reprimands, the absence of grievances precludes me from evaluating their merit. In light of the foregoing, I must accept the reprimands at face value and assume grievant engaged in serious misconduct, required numerous counseling sessions and that he deserved multiple disciplines. The College's displeasure about grievant's attitude was further revealed when Glass expressed dismay after grievant attempted to "go around" him by seeking an audience with the College's President. Manifestly, although the College did not issue progressive discipline, grievant's repetitive misconduct would arguably support successively higher levels of discipline.

In addition, and although the College's notice asserted that it was not a disciplinary action, by placing grievant on home assignment and noting that it was a "risk-management practice," the College indicated concern about grievant's likely behavior.[10] Perhaps more significant, Stocke assembled grievant's team in a conference room from which they could watch him escorted from the facility. Clearly, Stocke's instruction to employees to avoid answering any phone call from grievant suggests a desire to isolate him from his colleagues, an action more consistent with disciplinary suspensions than bona fide economic layoffs. Likewise, Spear's reaction to Stocke's comments indicating that grievant had been fired lend support to an inference that grievant was disciplined.

Further, the timing of the layoff decision in the spring of 2015 coincides with the reprimands grievant had been receiving, including the April 29 reprimand and warning that future violations could result in more severe penalties. Moreover, in determining that grievant did not qualify for any available funded positions, particularly some lower-graded positions he had formerly (and successfully)

---

[10] Prior to these events grievant had understandably believed he was being disciplined when his supervision changed from Stocke to Glass, who had been his peer and when grievant was no longer included in regular management meetings.

supervised, the College demonstrated a rigidity that challenges the appearance of a good faith layoff process. In light of all of the foregoing I am persuaded that the College's layoff decision bears more hallmarks of a discipline-based determination, rather than for any of the reasons set forth in Article 36.2, thereby strengthening my determination that the necessary conditions for a non-disciplinary layoff under the CBA were not met.

VII. CONCLUSION

Based on the rationale and in the circumstances discussed above, I am compelled to conclude that the Union met its burden of demonstrating that the College's layoff of grievant violated Article 36.2 of the CBA.[11] In reaching my above conclusions I addressed only those matters I deemed necessary for a proper resolution, but did consider all the well-expressed arguments of the Parties, including the authorities and evidence on which they relied, even if not specifically addressed in this Opinion.[12]

---

[11] In reaching this conclusion I do not condone or exonerate grievant's past behavior. Rather I am persuaded that the alleged misconduct should have been addressed through the contractual progressive discipline policy rather than through Article 36.2.

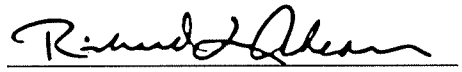
[12] In light of my conclusions, I find it unnecessary to burden the record with a discussion of the Union's arguments that the College's failure to offer grievant other positions violated the CBA or that by the assignment of certain of grievant's duties to Glass the College engaged in a violation of "skimming'" work from the bargaining unit.

AWARD

Based on a careful consideration of the evidence and arguments of the Parties in their entirety, I award the following:

1. The grievance is sustained.
2. The College will offer reinstatement to grievant to his former position.
3. The College will make grievant whole by the payment of $27,648, a sum that includes his lost wages as well as interim earnings and unemployment earnings.[13]
4. For 60 days I will retain jurisdiction to resolve any disputes regarding the implementation of the remedy that the Parties are unable to resolve on their own.
5. The Parties will be responsible for my fees in equal amounts.

Respectfully submitted,



Richard L. Ahearn
Arbitrator
February 15, 2017

[13] I recognize that Arbitrator Lumbly in *Homer Electric Association,* 119 LA 525, 537 (2003) provides well-reasoned support for including interest on back pay awards. However, consistent with the majority view of arbitrators, I will not include interest as requested by the Union as no special circumstances here support deviation from the Parties' traditional expectations. Moreover, Article 30.1 D (1) (c) of the CBA specifically provides that the arbitrator shall not award back pay that exceeds what grievant would have earned had there been no separation from employment.