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To: NBAs, Regional Coordinators, and Resident Officers

From: Vance Zimmerman
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Date: April 24, 2017

RE: Arbitrator Goldberg Decision
Case No. Q10C-4Q-C 15174956
Clerk Craft Jobs MOU – Paragraph 4

On April 21st Arbitrator Goldberg issued a favorable award on Paragraph 4 of the 2010 CBA Clerk Craft Jobs MOU. Goldberg ordered the Postal Service to fill the 362 administrative and technical positions still owed to the Clerk Craft "...as soon as reasonably possible...." Arbitrator Goldberg also ordered that affected employees—directly or indirectly—be made whole for all salary and benefits. The directly affected employees are those who will ultimately receive the bid. The indirectly affected employees are those who would have been awarded or converted into vacancies created by the directly affected employees. The arbitrator acknowledged, "*There may be more than one employee indirectly affected in this fashion since each vacancy filled later that it should have been may lead to another – all the way down to a PSE whose conversion to career status is delayed by the original violation – and the Postal Service shall be required to make each such employee whole for any loss in pay and benefits sustained as a result of that violation. CF. General Electric Company, 296 NLRB 844 (1990).*" (p.14)

The issue before Arbitrator Goldberg was remedy. The Postal Service admitted its failure to provide all the 800 administrative and technical job promised to the Union in Paragraph 4 of the Clerk Craft Jobs MOU (2010 National Agreement at p.379). By July 2013 the Postal Service returned 319 Level 7 Address Management Systems Specialist positions and 119 Level 8 Mail Flow Coordinator positions. After July 2013, the Postal Service failed to return any other jobs leaving 362 jobs yet to be returned. Arbitrator Goldberg acknowledged in citable language that the goal in the 2010 National Agreement of the Union was regaining and growing career bargaining unit work. On page 5 he stated:

“It is . . . undisputed that the Union’s central objective in the negotiations for the 2010 Agreement was work protection. ...the Union sought to protect existing bargaining unit work from being assigned outside the unit, and to regain bargaining unit work that had, over time, been assigned to outside contractors or to Postal Service employees who were not part of the bargaining unit.

Among the work protection/work recapture provisions that the Union obtained in 2010 was the Clerk Craft Jobs...”

The parties took very opposite views of what an appropriate remedy would be. The Postal Service, raising new arguments at hearing, generally contended that only losses to the individual employees eventually placed in the 362 jobs would be appropriate. (p.7-8.) The Union urged that the Arbitrator take a more expansive view of the violation and remedy. (p.8-9.) The Union urged that the Postal Service should, in effect, be ordered to pay back the bargaining unit for the full value of each of the jobs the Postal Service had failed to provide. (p.9.) Alternatively, the APWU argued that if the Arbitrator looked at remedy on an individual-by-individual basis, he should remedy any losses to all of the employees who missed out because these jobs were not provided. Each administrative or technical job could, Clerk Craft Director Clint Burelson explained, lead to job movement, including PSE conversion, for far more than just the one person who gets awarded the new job. This “ripple effect”, one endorsed by the NLRB, the Union urged, should be remedied as well. (p.6.)

Arbitrator Goldberg began the award with the directive that the Postal Service provide the 362 jobs “as soon as reasonably possible.” (p.3&18.) In stating his directive, he admonished the Postal Service that it “should not be taken lightly.” (p.11.) The Arbitrator recognized that while he could remedy “loss of financial advantages,” but that since these jobs and schedules would be preferred by those who bid “...the loss of the quality of work life benefits for the years during which employees who were entitled to those benefits did not receive them cannot be so remedied.” (p.11.) The Arbitrator concluded by repeating that it is “...an appropriate and meaningful element of the Award that the Postal Service provide the remaining 362 positions as soon as reasonably possible.” (p.11.)

Turning to the monetary remedy, Arbitrator Goldberg found a broad remedy less appealing than a more individualized remedy. Noting a preference in arbitral precedent and the parties’ past practice under other National Agreements, Arbitrator Goldberg declined to award a financial remedy premised on harm to the bargaining unit as a whole. (p.10.) He noted that it was not an issue of the amount of liability the Union’s theory yielded but the imprecision that the estimated wages and benefits of 362 administrative and technical jobs correlated to the financial loss to the bargaining unit of its concessions negotiated in the 2010 collective bargaining agreement. (p.11.)

But he also rejected the Postal Service’s conservative remedy proposal, and ordered that monetary remedies be paid on a rolling basis, “as each position is filled.” (p.11.) Exercising his authority to set a remedy formula to be applied in specific employees’ cases, he directed that “[t]he monetary award to each affected employee is to be determined, consistent with the Postal Service position, on an individual, case-by-case basis, but the formula to be applied in doing so shall be that here established.” (p.12.)

Before elaborating on which employees are eligible for a remedy, Arbitrator Goldberg addressed an ancillary argument raised by the Postal Service for the first time at hearing. (See footnote p.13.) The Postal Service argued that the sales retention team positions the Union recently won should count against the 362 administrative and technical jobs. (p.12.) Arbitrator Goldberg rejected this argument, finding that the Postal Service’s obligations under the Jobs MOU “are separate” from other job provisions such as Article 1.5 (new work) and Article 37.3.A.1 (new career duty assignments). (p.13.)

Even though applying an individualized remedy, Arbitrator Goldberg took an appropriately expansive view of who are affected individuals. (p.13.) He noted that “[o]ne group of employees clearly affected by the Postal Service failure to comply with the MOU consists of those who would have successfully bid on one of the 362 administrative or technical positions at the time that position should have been filled.” (p.13.) Those employees are entitled to “all pay and benefits they lost” from when they should have filled one of the jobs and “the date on which they are actually awarded one of” the jobs. (p.13-14.) But Arbitrator Goldberg recognized that there might be other “indirectly affected” employees entitled to relief. (p.14.) Noting again Director Burelson’s testimony about the ripple effect among multiple employees from the opportunity created by one new job, Arbitrator Goldberg held that all of those employees are due a remedy. (p.14.) He concluded that “[t]here may be more than one employee indirectly affected in this fashion since each vacancy filled later that [sic] it should have been may lead to another – all the way down to a PSE whose conversion to career status is delayed by the original violation – and the Postal Service shall be required to make each such employee whole for any loss in pay and benefits sustained as a result of that violation.” (p.14.)

Next Arbitrator Goldberg turned to the question of when the Postal Service’s liability began. (p.14.) The Postal Service had argued for its liability to begin on the date the 2015 National Agreement commenced (July 2016) on the theory that it had the entire term of the 2010 National Agreement to provide the last 362 jobs. (p.14.) The Union suggested that the Arbitrator could justify going back to January 2012 which would have given the Postal Service a reasonable eight months to provide the jobs. (p.14.)

Arbitrator Goldberg ruled August 1, 2013 as the date from which the Postal Service’s liability began to run. (p.15.) He rejected the Postal Service’s contention that it had four years to

find 362 administrative or technical jobs. (p.14.) He noted that “it is unlikely that the parties would have contemplated that a promise made when the 2010 Agreement was entered into need not be fully acted on until that Agreement had expired, and could not be enforced until a successor Agreement had been entered into.” (p.14-15.) By a similar token, he noted that the Union not filing a grievance on the date when the Union said liability could run from “suggests that the Union believed that the Postal Service was making a good faith effort to comply with the MOU as promptly as could reasonably be expected.” (p.15.) Arbitrator Goldberg found, however, that any good faith effort from the Postal Service ended on the date it made no further effort to provide jobs under the MOU. Noting that there was no “...evidence that, subsequent to July 2013, the Postal Service was engaged in a good faith effort to provide additional positions” to the ones it already had, the Arbitrator found that the Service’s non-compliance had started. (p.15.) Taking into account the Postal Service’s admissions that it did not actively do anything to find the last 362 jobs, the Arbitrator concluded that “...in view of the Postal Service failure to provide any administrative or technical positions to the Clerk Craft after July 2013, and the lack of evidence that the Postal Service was engaged in a good faith effort to provide additional positions after that date, I conclude that Postal Service liability for failure to comply with the MOU begins on August 1, 2013.” (p.15.) Importantly, the Arbitrator clarified that his holding “...should not be viewed as impliedly holding that good faith efforts to comply with a contractual commitment are a substitute for actual compliance.” (See footnote p.7.)

Finally, the Arbitrator addressed an issue the Postal Service first raised in its post-hearing brief about whether application of the Award to individual cases should be done at the national level or the local level. Because it was not an issue the Union was able to adequately address, Arbitrator Goldberg remanded “the question of the level at which those amounts should be determined to the parties...” (p.17.) Arbitrator Goldberg retained jurisdiction over any issues related to the Award including the remand issue. (p.3&19.)

Arbitrator Goldberg’s Clerk Craft Jobs MOU Award establishes many principles significant to the APWU’s ability to enforce the jobs provisions first established in the 2010 National Agreement. He awarded monetary relief to all employees losing out from job opportunities growing out of the new agreements in the 2010 National Agreement, but also very important is that he gave good dicta we can cite to regional arbitrators on the ripple effect.

Vance Zimmerman
Industrial Relations Director