

Before  
Rex H. Wiant  
Arbitrator

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In the matter of grievance arbitration between: )  
Children, Youth and Families Department )  
State of New Mexico )  
and )  
American Federation of State County and )  
Municipal Employees Council 18 )  
Local 1375 )

Unilateral Language Change

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FMCS #070110-52739-8

For the Employer:

Robert P. Tinnin, Chief Spokesman and Attorney  
Sandra K. Perez, Director State Personnel Office  
Frank Weissbarth, CYFD General Counsel  
Helen Quintana, CYFD Deputy Director  
Dorian Dodson, Cabinet Secretary CYFD

For the Union:

Sam Chavez, Chief Spokesman and Organizer  
Chris Armijo, Organizer  
Jonathon Havier, Member  
Rob Trombley, Organizer  
Frank Blair, Member  
Jackie Brown, Member  
Ed Abreau, Member  
Timothy Deschamps, Member  
Gerald Duran, Member

Sam Blea, Member

Richard Gonzales, Member

Joe Ray Chavez, Member

Issue:

Did the Employer violate Article 18 Section 2 when it unilaterally adopted psychological, polygraph and physical agility tests and applied them to the employees who worked at the Boys School located in Springer, New Mexico?

Jurisdiction:

The parties selected Rex H. Wiant from Kansas City, Missouri to hear and decide the instant grievance from a list provided by the Federal Mediation and Conciliation Service. The hearing was originally scheduled for May 15 and 16, 2007 and was postponed on May 2, 2007 at the request of the Union. The hearing was rescheduled for August 1 and 2 and was postponed at the request of the Employer. The hearing was then rescheduled for October 2 and 3, 2007 and was mutually postponed on August 30, 2007. The hearing was again rescheduled for November 5, 6 and 7, 2007 and the hearing was held on the first two days of that period at a State Office Building in Santa Fe, New Mexico. Both sides had the opportunity to present complete cases. All evidence was subject to cross examination and all witnesses were sworn. The hearing was recorded and transcribed by Cynthia C. Chapman, RMR, CCR #219 of Bean & Associates, Inc. of Albuquerque, New Mexico. At the conclusion of the hearing both sides requested to submit briefs. The Union brief was received on December 20, 2007 and the Employer brief was received on December 21, 2007. Upon receipt of briefs the hearing was declared closed. All notes, exhibits and over 750 pages of transcript were reviewed in writing this decision.

Statement of Facts:

The State of New Mexico (hereinafter the "Employer") employs a variety of professional, para-professional and labor classifications to operate the Boys School. Organizationally it is part of the Children, Youth and Families Department (hereinafter "CYFD") of state

government. Employees are represented by AFSCME Council 18 (hereinafter the "Union").

The citizens of New Mexico have long believed that it was necessary to have a facility to deal with troubled boys. They started the Boys School when New Mexico was a territory and included a specific clause in their Constitution requiring its existence. Originally it was located near the small town of Springer, New Mexico. Springer is located in the northeast part of New Mexico and has historically lagged economically compared to other areas of the state like Santa Fe or Albuquerque. The Boys School (hereinafter "Springer") provided needed stable jobs to the area. Multiple generations of families worked at the school and a sense of pride developed that they were doing something good for the residents and the citizens of New Mexico at the Boys School.

The Boys School was what most other states called a juvenile detention center. It provided a comprehensive system to boys from lower elementary age up to legal age that were sent there by the Justice System. Each boy received housing and some combination of education, rehabilitation or job training either by the School, the local public school, community college or other training facilities. The population peaked at approximately 250 residents and declined to 130 residents in 2005. Over the years the theories changed on how to treat troubled boys and for the most part Springer adjusted and grew. In the late 1990's talk began in political circles that the facility was outmoded. It was difficult to recruit professionals to the rural area and no one could deny the decline in the School's population.

The American Civil Liberties Union threatened to file a lawsuit that would have required Springer to be closed. Top officials in state government took the threat seriously. After some behind the scenes negotiating, the decision to close Springer was made at the very highest levels of State Government in late 2005. The Governor recognized that this would result in a hardship for the larger Springer area and requested that special efforts be made to ease the transition of employees and the area. The constitutionally required Boys School title was transferred to a facility in Albuquerque. Residents were transferred

to other facilities in the State during 2006, except for the final group of less than 20 residents which were moved to a small part of the Boys School called Area I.

Most of the physical facilities were transferred to the State Department of Corrections (hereinafter "Corrections") in December 2006. Corrections converted it to a minimum adult security center. Area I was not transferred but remodeled. The few remaining residents started a targeted program to reintegrate them into society. All residents in this group were a minimum of 18 years of age who had either a high school diploma or equivalent.

The leadership of the CYFD met with the State Personnel Office (hereinafter "SPO") and Corrections to develop a plan to coordinate the transfer of employees from Springer. Part of the plan was to interview each employee to try to match skills up of other jobs in State Government. The Employer also added three new tests that it required nearly all Springer Employees to pass. The three tests were: a psychological screening, a polygraph and a physical agility test. All tests had been used for some time by Corrections and CYFD had recently chosen to implement them. There was one employee who did not have to take the test and still was transferred because of a glitch in processing, though this does not significantly affect this case.

Less than twenty employees moved to the new Area I program. Many employees either moved to other CYFD facilities or moved over to Corrections. Some Employees went to other State and Local government jobs. Less than twenty employees were laid off. Many of those that were laid off turned down job offers and chose to accept the lay off.

A grievance was filed on June 20, 2006 and was processed through to the arbitration stage. A Prohibited Practice Complaint (hereinafter "PPC") was also filed with the Public Employment & Labor Relations Board claiming violations of the Public Employment Bargaining Act. The State agency "Colyerized" the PPC's pending the outcome of this grievance arbitration. The relevant language follows:

Article 14. Grievance and Arbitration Procedure

Section 1 Scope. Allegations of violation, misapplication or misinterpretation of this Agreement except Article 1 and 2 shall be subject to this negotiated grievance procedure...

Article 18. Management Rights

Section 1. Except to the extent specifically modified or limited by this Agreement or by applicable statutory or regulatory provisions, the sole and exclusive rights of management shall include the following:

1. direct the work of, hire, promote, assign, evaluate, transfer, demote suspend, dismiss, or otherwise discipline employees;
2. determine qualification for employment and the nature and content of personnel examinations;
3. determine the size and composition of the work force;
  
9. determine the location and operation of its organization;
10. provide reasonable rules and regulations governing the conduct of employees; and
11. provide reasonable standard and rules for employees' safety.

Section 2. Prior to implementing any change in existing terms or conditions of employment relating to 9,10, 11 of Section 1 above, the Employer shall provide the Union with reasonable notice under the circumstances of such contemplated action and, if requested to do so, shall bargain with the Union in good faith to impasse prior to implementing such changes.

Positions and Major Arguments of the Parties:

Union:

The Union has waited a long time for this hearing. They believe that it is important to sort out what did change, did not change and what was the real goal of the Employer. It is important to remember that the seniority language never changed. The language in the agreement is clear and should have been followed.

Springer never closed. Its program did change or shift but that has happened in the past. Throughout the mission of caring for troubled boys has never changed.

The Employer violated the contract and the law when it refused to negotiate with the Union.

The Employer put together a process and instituted new procedures designed to meet its goal of weeding out employees.

Remedy Requested: Return employees to work for the CYFD. Changes may be made only through negotiations.

Employer:

The Boys School in Springer was closed. Several state departments and offices worked together to transfer employees and ease the transition not only for them but for the entire area.

The Employer has the clean and unambiguous right to determine the qualifications for employment. The qualifications were clearly job related and had been used in other states for facilities similar to Springer but were already used in the New Mexico Department of Corrections. The Union cannot challenge the merits of applicants. There is no evidence that the Employer sought to weed out employees. All employees passed the three tests and the vast majority were placed in new jobs.

The Employer followed the required posting procedure and sound human resource policy in handling this situation.

Discussion:

Grievance arbitration is a peculiarly American invention to resolve labor problems. It gained popularity during and immediately after World War II but was not endorsed by the Supreme Court until the 1960's. It has grown because it provides a narrow carve out

of disputes that are decided, with very limited appeals, by an outside third party. That carve out can be defined as disputes that arise under a collective bargain agreement. It has proven to be efficient and almost universally accepted when the Arbitrator stick to what has become know as the "four corners of the contract". It does not work well when the Arbitrator strays from that area and attempts to serve as a "Lone Ranger" dispensing his "own brand of industrial justice".

In this case the Union has tried to bring in the closure of the New Mexico Boys School in Springer to the Arbitrator. In that argument they claimed it closed and that it did not close. They have argued many things that stray from the limited carve out that arbitration was designed to serve. One witness even indicated that he hope the Arbitrator would order the Schools reopening. That is not going to occur. It is clear to the Arbitrator that the Springer Boys School closed as the result of a political decision made by the very highest decision makers in state government. The Union fights hard to make an argument but it fails to look at some basic facts. First, the Constitutional title was taken away and reassigned to a facility in Albuquerque. Second, the overall facility went from over 100 boys to under 20. It went from a long term campus of multiple buildings where boys spent years growing up in the care of the School to one cabin that was the last stop to freedom. Third, Area I had housed some of the youngest boys and had very little use for over a year before it was significantly remodeled for young men between that age of 18 and 21. Finally, they no longer needed a staff of over 100 employees. While everybody wished to remain there because a move would force families to leave their homes but the work simply was not there. This was a political decision that was made for political reasons. It is best challenged by the Union on a political level and not through grievance arbitration.

The contract dispute here is that the Employer unilaterally changed the collective agreement when it added three tests that employees had to pass before they could go through a process to change jobs. The three tests were a psychological screen, a polygraph and a physical agility test. No employees failed the tests. The Union argues that these tests should have been negotiated and that they were used to eliminate

troublesome members from jobs. The Arbitrator disagrees. First Sections 18.1 and 18.1.2 of the party's agreement states that Employer has the "sole and exclusive rights" to "determine qualification for employment and the nature and content of personnel examinations". There is no room for negotiations. The Employer gets to decide these things. Second, there is a reasonable relationship between the tests and open jobs. In short we do not want pedophiles with criminal records that are out of shape supervising residents in facilities. Third, these are the same tests that have been used for several years by the Department of Corrections and applied to AFSCME members with out complaint. Finally, it is important to remember that everybody passed. No one was culled out by the tests.

Section 18.2 provides for negotiations for previous subsections 9, 10 and 11. Those subsections are not involved in this case. It does seem ironic that while the grievance was to try to compel negotiations, the Employer met regularly with the Union employees, leaders and stewards. There was daily or almost daily communication that solved problems and met the needs of most employees. In particular the State Personnel Office, CYFD Administration and Local Union went well beyond expected performance to make the best out of a bad situation in placing over 95% of employees in new positions.

The grievance is DENIED.

  
Dated on January 2, 2008 in Kansas City, Missouri.