IN THE MATTER OF ARBITRATION BETWEEN:

MICHIGAN COUNCIL 25, AFSCME, AFL-CIO

AND

GRAND RAPIDS HOME FOR VETERANS

Case No.: Log Number: C28021-261-12 Local Ref. #: 2013-26
Gr: Grievant/Issue: Local 261/Severance Pay

ARBITRATOR'S OPINION AND AWARD

This arbitration took place under the October 1, 2012 - September 30, 2014 Economic Provisions of the Collective Bargaining Agreement (CBA) between the State of Michigan, referred to herein as "Employer," and Michigan Council 25, AFSCME, AFL-CIO, referred to herein as "Union." Under this Agreement Ildikó Knott was selected to serve as Arbitrator.

The hearing took place on March 27, 2015, at the offices of the Union at 1034 N. Washington Avenue, Lansing, Michigan. It was conducted in accordance with the parties' CBA and arbitration rules of the American Arbitration Association that it incorporates. The parties were afforded the opportunity, of which they availed themselves, for examination and cross-examination of witnesses, for introduction of relevant exhibits, and for argument. The parties submitted post-hearing briefs which were received in a timely manner. Upon receipt of the briefs, the record was closed.

Appearances

For the Employer:
- Jeanmarie Miller, Esq., Asst. Attorney General
- Joseph Froehlich, Esq., Asst. Attorney General
- Valerie Hill, State Asst. Administrator

Also Present:
- Noelle Rouse, Human Resources Director

For the Union:
- Kenneth J. Bailey, Esq., Staff Attorney
- Myrtel Brown, Witness
- Robyn Price, Council 25 Staff Representative
- Mark Williams, Local 261

Also Present:
- Mary Openlander, Staff Representative
- Tammy Porter, Local 261

BACKGROUND

The Union and the Employer have a long-standing bargaining relationship extending over several decades and numerous contracts. One of the benefits covered by many of the more recent contracts has been severance pay.

Prior to 1994, the parties' collective bargaining agreements limited such pay only to employees from the Department of Mental Health (now Department of Community Health/DCH) who had been laid off as a result of the State's decision to deinstitutionalize resident patients of mental health care facilities. In the 1989-92 Agreement (Union Exhibit 6), severance pay is covered in Article 22, Section Q. The opening paragraph of this Section specifically states the relationship of this benefit to the Department's deinstitutionalization of its resident population. This preliminary paragraph is followed by eight (8) numbered subsections detailing specifics of the benefit. Subsection 2, Eligibility, specifically limits "[t]he provisions of this Section … to Department of Mental Health Agency-based employees with more than one year of service who have been laid off because of a reduction in the resident population in state institutions."

However, in the 1994-1996 Agreement (Union Exhibit 7), the parties added a Subsection 9 to Article 22, Section Q. Subsection 9 was untitled and stated:

> Effective October 1, 1994, a special severance pay fund of $750,000 will be established. Employees who are indefinitely laid off after January 1, 1994, will be eligible for severance payments from the fund in accordance with this section, on or after October 1, 1995. The provisions of this subsection will not apply to Department of Mental Health employees entitled to severance pay under this section and severance payments to those employees not paid from this fund.
>
> a. On October 1, 1995, an additional $56,250 will be added to the fund.
>
> b. On October 1, 1996, an additional $56,250 will be added to the fund.

c. Money remaining in the fund on September 30, 1997, will not be carried over into the next fiscal year.

(Subsection 9 also contains a Severance Pay Schedule and an Example of Severance Pay for Less Than Full Time Employee both of which were previously contained in subsection 8 of the 1989-1992 Agreement.)

Thus the parties created a separate second track for severance pay, both under Article 22, Section Q.

For the February 28, 1997–September 30, 1999 Agreement (Union Exhibit 8), the relevant language of Article 22, Section Q, Subsection 9 became:

> Effective October 1, 1994, a special severance pay fund of $750,000 was established. Employees who are indefinitely laid off after January 1, 1994, are eligible for severance payments from the fund in accordance with this section, on or after October 1, 1995. The provisions of this subsection will not apply to Department of Mental Health employees entitled to severance pay under this section and severance payments to those employees not paid from this fund.
>
> a. On October 1, 1996, an additional $56,250 will be added to the fund.
>
> b. Money remaining in the fund on September 30, 1997, will not be carried over into the next fiscal year.
>
> c. Effective October 1, 1997, a fund of $300,000 will be established, with money remaining in the Fund on September 30, 1999 not carried over into the next fiscal year.

The apparent changes from the prior Agreement, other than grammatical, were the deletion of language about a 1995 contribution to the fund, and the continuation of the fund at the reduced level of $300,000 starting October 1, 1997.

In the next contract, Economic Provisions effective October 1, 1999-September 30, 2002 (Union Exhibit 9), Subsection 9 was given the title Special Severance Fund. The language of the subsection remained essentially the same reflecting only the renaming of the Department, the deletion of past funding requirements, and establishing the funding level at $400,000 for the terms of the life of the economic provisions of the

contract. Specifically, the relevant language of Article 22, Section Q, Subsection 9 states:

> 9. Special Severance Pay Fund
>
> Effective October 1, 1994, a special severance pay fund of $750,000 was established. Employees who are indefinitely laid off after January 1, 1994, are eligible for severance payments from the fund in accordance with this section, on or after October 1, 1995. The provisions of this subsection will not apply to Department of Community Health employees entitled to severance pay under this section and severance payments to those employees not paid from this fund.
>
> a. Effective October 1, 1997, a fund of $300,000 was established, with money remaining in the Fund on September 30, 1999 not carried over into the next fiscal year.
>
> b. Effective October 1, 1999, a fund of $400,000 will be established, with money remaining in the Fund on September 30, 2002 not carried over into the next fiscal year

In the following contract, Economic Provisions effective October 1, 2002-September 30, 2005 (Union Exhibit 10), Subsection 9 became:

> 9. Special Severance Pay Fund
>
> Employees who are indefinitely laid off after January 1, 1994, are eligible for severance payments from the fund in accordance with this Section, on or after October 1, 1995. The provisions of this Subsection will not apply to Department of Community Health employees entitled to severance pay under this Section and severance payments to those employees not paid from this fund.
>
> Effective October 1, 2002, a fund of $500,000 will be established, with money remaining in the Fund on September 30, 2005 not carried over into the next fiscal year.

Along with the minor changes of deletion of historical data and capitalization, the only significant change was the continuation of the fund at the new level of $500,000 for the life of the economic provisions of this contract.

During 2003, however, the State of Michigan experienced severe fiscal problems. In an attempt to alleviate these, the State sought to bargain concessions from the Union

and others. In order to avoid permanent layoffs of its members, the Union agreed to certain cost saving measures. One of the concessions negotiated by the parties related to severance pay. That concession is found in a Letter of Understanding dated February 12, 2004. It states:

LETTER OF UNDERSTANDING

Article 22, Section Q.9 Severance Pay

And

Article 22, Section DD. Employee Education and Resource Fund

> In light of the State's current budgetary situation, the parties agreed that following the processing of applications for severance pay received by the Employer not later than November 30, 2003 and reimbursement from the education and resource fund for courses concluded by January 30, 2004, any remaining dollars shall be withdrawn from the funds in Fiscal Year 2003-2004 to be applied toward the current budget deficit. Applications for tuition reimbursement must be submitted and complete by February 28, 2004.
> (Union Exhibit 12, 8th Letter of Understanding)

One of the Union negotiators, Ms. Myrtel Brown testified that the Union "surrendered the fund for one year" to avoid layoffs. Union Staff Representative Robyn Price testified that approximately $475,000 of unused funds from the Special Severance Pay Fund was returned to the Employer as a result of this concession.

In the negotiations leading to the Agreement with Economic Provisions effective October 1, 2005–September 30, 2008 (Union Exhibit No. 16), the Union's initial proposal regarding Article 22, Section Q, Subsection 9, was to continue the language from the 2002-2005 Agreement but changing the dates to be applicable to the life of the proposed new contract. That is, change 2002 to 2005 and 2005 to 2008 (Union Exhibit 13, Union proposal dated 9/30/04). The Employer's counter states, "No changes proposed. We do not agree to extend or recreate the Special Severance Pay Fund." (Union Exhibit 14, Employer proposal dated 10/6/04) The parties maintained these

respective positions through another exchange of proposals on October 7, 2004. However, by October 22, 2004, the parties had apparently had discussions that led to movement on the issue. The Employer's package proposal of that date states, in relevant part: “The Union accepts the Employer's conceptual proposal to pay severance in all departments just as DCH employees are paid, up to a limit of $500,000 over the term of the agreement.” (Union Exhibit 14, Employer proposal dated October 22, 2004, p. 2)

Ms. Price testified that she served as second chair for the Union in these negotiations. She recalled that there were extensive discussions at the bargaining table regarding this conceptual proposal of the Employer. She specifically recalled that the Employer’s Chief Negotiator, Ms. Bethany Beauchine, had explained the State’s reluctance to set aside a fund earmarked solely for special severance pay because it would then be inaccessible for other purposes and proposed to fund special severance pay instead from unencumbered funds just as severance pay was funded for DCH employees. Ms. Price also stated there was no discussion at the table about tying eligibility for special severance pay to a layoff resulting from by “deinstitutionalization” as in the DCH.

The Union’s proposal of October 27, 2004, states, “22, Q: Severance pay for all other departments as is for DCH with a $500K cap; 4.b. If the employee is hired for any position by **~~an Employer~~** **the State**:” (Bold, underlining and strikethrough in original) (Union Exhibit 14, Union proposal dated October 27, 2004)

The Employer’s formal proposal on the matter is also dated October 27, 2004. It states:

> **9. Special Severance Pay ~~Fund~~**
>
> Employees who are indefinitely laid off after January 1, 1994, are eligible for severance payments **~~from the fund~~** in accordance with this Section, on or after October 1, 1995. The provisions of this Subsection will not

> apply to Department of Community Health employees entitled to severance pay under this Section and severance payments to those employees not paid from this fund. **Cumulative payments shall not exceed $500,000 during the term of this agreement and shall not be payable after September 30, 2007.** ~~**Effective October 1, 2002, a fund of $500,000 will be established, with money remaining in the fund on September 30, 2005 not carried over into the next fiscal year.**~~ (Bold, underlining and strikethrough in original) (Union Exhibit No. 14, Employer proposal dated October 27, 2004).

This identical language with identical emphasis became Article 22, Section Q, Subsection 9, in the parties' tentative agreement document (Union Exhibit No. 15). Upon ratification, this proposal became part of the 2005-2008 Agreement (Union Exhibit 15) except the year of the date after which the special severance pay would no longer be payable was changed to 2009, the final year of the contract.

In the 2008-2010 Agreement, the date after which the special severance pay would no longer be payable was changed to September 30, 2011 (Union Exhibit 17, p.144) and in the 2012-14 Agreement, the current CBA, that date became September 30, 2014 (Union Exhibit 18, p. 158).

In 2011, the Department of Military & Veterans Affairs initiated a process to privatize the services provided by Residential Care Aides (RCAs) represented by the Union at the Grand Rapids Home for Veterans (GRHV). The Union unsuccessfully opposed this attempt filing a Technical Complaint with the Michigan Civil Service Commission alleging, among other things, that the Employer had not accurately calculated the savings that would be generated by the outsourcing. The document does not mention a potential cost for special severance pay. (Employer Exhibit C)

Likewise, in 2013, the Employer initiated an outsourcing of food service workers in the Department of Corrections. Again, the Union unsuccessfully opposed this outsourcing by filing a Technical Complaint. Again, its costing analysis does not include a potential cost of special severance pay. (Employer Exhibit D)

Ms. Shirley Maroulis was a CNA at GRHV who was laid off as a result of the outsourcing. In a letter dated September 20, 2013, to Ms. Noelle Rouse, DMVA's Human Resource Director, she requested "Special Severance Pay as outlined in the Collective Bargaining Agreement … Article 22 Section Q Page 158. (Union Exhibit 1) Ms. Rouse responded in a letter dated September 30, 2013. In relevant part, that letter states: "The Department of Military and Veterans Affairs was advised by the Office of the State Employer that the severance fund identified in article 22 Section Q of the AFSCME Collective Bargaining Agreement has not been funded. Accordingly, your request for severance pay is denied." (Union Exhibit No. 2) In a letter dated September 30, 2013, laid off CNA Djua Gillespie also made a similar request for severance pay (Union Exhibit 3) and, by letter dated October 3, 2013, received that same response from Ms. Rouse (Union Exhibit 4).

On October 8, 2013, the Union filed a grievance at Step 3 stating, "Employees are requesting severance pay according to the AFSCME Contract and are being denied." As a remedy the Union requested the Employer to cease the practice, follow the CBA, and make employees whole for all losses. (Union Exhibit 5, p. 1) Director Rouse responded on November 19, 2013 stating, in relevant part:

> SUMMARY OF FACTS
>
> Effective March 13, 2013, the DMVA eliminated all of its Resident Care Aide (RCA) positions at the GRHV. This change resulted in the permanent layoff of 132 RCAs.
>
> The Union argues that Article 22 Section Q, Subsection 9, is clear and unambiguous, and entitles laid off employees, choosing to severe his/her employment relationship, to severance pay.
>
> Many contract terms ago, the word "fund" was removed from the title in Subsection 9 of Article 22, Section Q of the collective bargaining agreement (CBA). Both the Union and the Employer agreed to this change. Prior to then, appropriated dollars were allocated for the "fund" each contract term. However, since that time the previous Special

Severance Pay "Fund," has not been funded. Accordingly, the DMVA has denied all requests for severance pay.

CONCLUSION

The Employer has denied all requests for severance pay because there is not, nor has there been funding, for special severance pay for many, many years. The Union has failed to establish a violation of the CBA.

DECISION

Based on the discussion above, the grievance is denied.

(Union Exhibit 5, p. 3)

The matter remained unresolved and the Union advanced the matter to arbitration in accordance with the CBA. No procedural or jurisdictional challenges were raised and the matter is now properly before the Arbitrator for resolution.

SUMMARY OF THE UNION'S POSITION

It is the Union's core contention that the language of Article 22, Section Q, Subsection 9 creates a clear contractual obligation to pay severance pay to eligible employees. It argues that the language is clear as to purpose and intent and stresses, citing numerous arbitral sources, that an agreement should be interpreted to reflect the parties' intent.

The Union asserts that, prior to the arbitration hearing, the Employer has relied solely on the removal of the word "fund" from the title of Subsection 9 as its contractual justification for denying the severance pay. The Union claims that this change reflects only the parties' agreement to eliminate the necessity of a single-purpose earmarked fund for severance pay due under Subsection 9 and shifts instead to the general fund for that source of funding as it was done for the severance pay for DCH employees who were laid off as a result of deinstitutionalization. It points to the testimonies of two of its negotiators in support of this claim and the absence of any contrary testimony by the

Employer's Chief Negotiator who was not called to testify. The Union also argues that the Employer's position should be rejected because it would render the entire subsection meaningless and again cites arbitral authority to this end.

The Union also argues that the Employer's position that severance pay is only available to employees who have been laid off as a result of deinstitutionalization should be rejected for several reasons. First, the Union states that the Employer raised this argument for the first time at the arbitration hearing. Second, it points out that the Employer offered no testimony from its negotiators in support of this position whereas Union negotiators testified that the concept of deinstitutionalization has only been applied to DCH. Also, the Union asserts that the definition of "deinstitutionalization" supports the concepts applicability solely to DCH.

Finally, the Union argues that the Employer's evidence regarding employees who were laid off from non-DCH facilities and who have not received severance pay and the Union's Technical Complaints regarding the outsourcing of CNAs at GRHV and food service workers at DOC do not support the argument that the parties agreed to eliminate the requirement to pay severance pay under Article 22, Section Q, Subsection 9. Regarding the RIF list of laid-off AFSCME employees from 2008-2013 (Employer Exhibit A), the Union avers that this is at best a list of employees who may have been eligible for severance pay under Subsection 9; however, the document does not provide information relating to a number of contractual factors which may have rendered them ineligible for the severance pay or led to their decisions not to accept it. Similarly, regarding the Technical Complaints (Employer Exhibit C and D), the Union asserts it did not include information regarding the cost of severance pay in these because it could not possibly forecast the number of employees who would choose to accept severance payments and forfeit their seniority rights as opposed to the number who would wish to retain their State seniority.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer argues that the plain language of the Collective Bargaining Agreement demonstrates that the grievants are not entitled to severance pay. It points out that the grievants were both employed as Resident Care Aides by the Michigan Department of Military and Veterans Affairs (DMVA) and were laid off due to the privatization of their positions, and not due to any reduction in resident population or deinstitutionalization. It emphasizes that Subsection 2, Section Q states "the provisions of this Section shall apply only to Department of Community Health Agency-based employees with more than one year of service who have been laid off because of a reduction in resident population in State institutions." It concludes that because they were DMVA employees who were laid off due to privatization, the grievants simply do not qualify for "deinstitutionalization" severance pay under the plain language of Subsections 1 through 8 of Section Q.

The Employer argues that the only other avenue for the grievants to claim eligibility for severance is to claim special severance pay under Article 22, Section Q, Subsection 9, and the plain language of that subsection, likewise, renders them ineligible for severance because when the special severance pay fund was eliminated, special severance was eliminated.

It explains that until 1994, the AFSCME collective bargaining agreements provided that severance pay was only available to DCH Agency-based employees under Subsections 1 through 8 of Article 22, Section Q. In 1994, Subsection 9 of Article 22, Section Q, was added to the collective bargaining agreements, which created special severance pay and the special severance pay fund. It emphasizes that prior to 2005, under the plain language of Subsection 9, special severance payments under Subsection 9 were paid solely from the special severance fund.

The Employer points out that in 2005, Subsection 9 of Article 22 Section Q was amended to eliminate the special severance fund. It argues that the elimination of the fund had the practical effect of eliminating special severance all together or, in other words, without a source of funds to make special severance payments, there could be no special severance. It notes in that the current collective bargaining agreement, and every agreement since 2005, Subsection 9 continues to make reference to "this fund," even though the special severance fund no longer exists and urges that without the special severance fund, there can be no special severance, or, stated another way, payments cannot be made from a fund that does not exist. It claims that Subsection 9 cannot confer the entitlement to special severance pay because the plain language is nonsensical and urges that the current plain language of Subsection 9, read in the context of the changes in 1994 and 2005, leads only to the conclusion that the elimination of the special severance fund eliminated special severance pay.

In support of its arguments, the Employer asserts that the Union's own course of conduct since 2005 has been consistent with the interpretation that the elimination of the special severance pay fund eliminated special severance pay. It argues that since the special severance fund was abolished, the Union has not sought severance pay on behalf of the over eighty members who have lost their positions due to reductions in force. Furthermore, when challenging the lay-offs in the present case in proceedings before the Michigan Civil Service Commission, the Union challenged the Employer's cost savings calculations but did not address the alleged $500,000.00 in special severance fund liability. It concludes that the Union has, through its action and inaction, acted consistent with the proposition that special severance payments are no longer available.

In summary, the Employer concludes that the language of the contract and the conduct of the parties make it clear that special severance pay no longer exits. Thus, it

urges that the grievants are not entitled to severance pay under Article 22, Section Q, Subsection 9, and the grievance should be denied.

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 22 COMPENSATION AND BENEFITS

* * * * *

Section Q. Severance Pay.

In recognition of the fact that the deinstitutionalization of the Department of Community Health resident population has resulted and will continue to result in the layoff of a large number of State employees, and in recognition of the fact that such layoffs are likely to result in the permanent termination of the employment relationship the parties hereby agree to the establishment of severance pay for certain employees.

1. Definitions

* * * * *

2. Eligibility

The provisions of this Section shall apply only to Department of Community Health Agency-based employees with more than one year of service who have been laid off because of a reduction in the resident population in State institutions. Further, the following employees shall not be eligible to receive severance pay:

a. Employees who are in unsatisfactory employment status. However, if an unsatisfactory service rating is removed for any reason, such employees shall be considered eligible for severance pay in accordance with other provisions in this Section. The provisions of this Subsection (Q2a) shall not apply to employees with 10 or more years of seniority.

b. Severance pay will not be denied due to retirement status. Offsets may be made in accordance with federal law (ADEA/OWBPA).

c. Employees with a temporary or limited term appointment having a definite termination date.

3. Time and Method of Payment

After an employee has been laid off for six (6) months in accordance with the provisions of this Section, he/she shall be notified by the Agency in writing that he/she has the option of remaining on the recall list(s) or of accepting a lump sum severance payment and thereby forfeiting all recall rights. The employee must notify the Agency in writing of his/her decision either to accept the severance payment or to retain recall rights. An employee who does not notify the Agency in writing of his/her decision shall be deemed to have elected to retain recall rights.

If the employee chooses to remain on recall and rejects the payment, the employee has the option at any time within the next six (6) months of accepting the lump sum severance payment and thereby forfeiting all recall rights. An employee who reaches such decision during the second six (6) month period shall notify the Agency in writing of his/her decision.

An employee who has been laid off for thirty-six (36) months shall be notified by the Agency in writing that he/she must choose either to accept the lump sum severance payment or to reject such payment. By rejecting such payment, the employee shall retain recall rights in conformance with the provisions of this Agreement and shall have no further opportunity to receive severance payment. The employee must notify the Agency in writing of his/her decision within fourteen (14) calendar days of receipt of the Agency's notification. An employee who does not notify the Agency in writing of his/her decision to accept the severance payment shall be deemed to have permanently rejected such payment and to have retained recall rights in accordance with Article 13. If an employee elects to accept the lump sum payment, the employee's name shall be removed from all recall lists and such payment shall be made by the Agency within sixty (60) calendar days of receipt of the employee's decision.

4. Disqualification

An employee laid off as defined in this Section who has not elected in writing to accept severance payment shall be disqualified from receiving such payment under the following conditions:

a. If the employee is deceased.

b. If the employee is hired for any position by an Employer outside of the classified service and the initial base hourly rate for the

position is 75% or more of the employee's final base hourly rate in the position from which the employee was laid off:

(1) If such employment requires a probationary period, upon successful completion of such period.
(2) If no probationary period is required, upon date of hire.
(3) If a probationary period is required and the employee does not successfully complete such required probationary period and is therefore separated, such time of employment shall be bridged for purposes of the time limits in Subsection 3 above.

An Employee who has notified the Employer by the time the Employee is laid off that he/she is engaged in supplemental employment shall not be disqualified under the provisions of this Subsection.

c. An employee who refuses recall or a new State employment hiring within a seventy five (75) mile radius of the Agency from which he/she was laid off.

d. An employee permanently recalled to another job in State government.

5. Effect of Recall

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6. Effect of Hiring

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7. Payment

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8. Effect on Retirement

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9. Special Severance Pay

Employees who are indefinitely laid off after January 1, 1994, are eligible for severance payments in accordance with this Section, on or after October 1, 1995. The provisions of this Subsection will not apply to Department of Community Health employees entitled to

severance pay under this Section and severance payments to those employees not paid from this fund.

Cumulative payments shall not exceed $500,000 during the term of this agreement and shall not be payable after September 30, 2014.

SEVERANCE PAY SCHEDULE

* * * * *

EXAMPLE OF SEVERANCE PAY FOR LESS THAN FULL TIME EMPLOYEE

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DISCUSSION AND FINDINGS

The issue to be decided is whether the Employer violated the CBA when it failed to pay severance pay to eligible employees under Article 22, Section Q, Subsection 9.

Both parties claim that the clear language of the Agreement supports their position. However, they read that supposed clear language in contradictory ways, each emphasizes selected language, and each relies on historic changes to the language to support their respective interpretations of the parties' intent. It is function of the Arbitrator to determine as reasonably as possible the mutual intent of the parties in adopting certain contractual terms.

In the instant matter, part of the problem arises because the parties, in the 1994-1996 Agreement, chose to append a second system of severance pay, special severance pay, to existing severance pay provisions negotiated for an altogether different purpose. The original benefit, as specified in Article 22, Section Q, Subsection 1–8, of pre-1994 agreements, was expressly limited to employees of one department, Mental Health, who were laid off for one reason, a reduction in the resident population

or deinstitutionalization. Further, these provisions said nothing about the source of the funding for the benefit and expressed no limitations on the total cost of the benefit.

With the advent of Subsection 9 in the 1994-1996 Agreement, what has become know as "special severance pay" was offered to other employees not previously covered by "pre-1994" severance pay.

While it is clear that the "Special Severance Pay" was to be distinct from "Severance Pay" as it had originated for deinstitutionalized DMH employees, the parties elected to say only, "Employees who are indefinitely laid off after January 1, 1994, will be eligible for severance payments from the fund in accordance with this section, on or after October 1, 1995." That is, eligibility requirements and other details for the "special" severance pay must therefore be presumed to be the same as specified in the rest of Section Q for the "pre-1994" severance pay. That, of course, created a logical inconsistency because accord with Subsection 2 of Section Q would eliminate everyone except employees from the Department of Mental Health who were laid off because of deinstitutionalization. And, the very next sentence of subsection 9 states, "[t]he provisions of this subsection will not apply to Department of Mental Health employees entitled to severance pay under this section …." This sentence clearly supports that the employees covered under 9. Special Severance Pay were those not affected by deinstitutionalization in the DCH. However, a strict reading of the entire language of Article 22 would suggest that the parties had created a new special benefit, made only certain employees eligible for it, and then specifically disqualified those very employees. Clearly the parties did not intend such an absurd result.

To support the conclusion that the parties intended to have certain employees eligible for "special" severance pay, it is telling and relevant that Subsection 9 also created a source of funding, a special funding, thereby placing a cap on the total cost of the benefit, and specific language preventing the carry-over of unused proceeds of that

fund into a successor contract. And, this pattern of establishing a special severance pay amount for the duration of a contract continued until it was no longer payable after September 30, 2014, according to the current Agreement. Although the parties did not have records of how many employees have received "special" severance pay, and were unwilling to offer any estimate of that number, suffice it to say that neither party asserted that the benefit has never been paid.[1]

Therefore, I must conclude that the intent of the parties in their negotiations and renegotiations of Article 22, Section Q, Subsection 9 was to determine eligibility for "special" severance pay in accordance with the rest of Section Q except for that part which would render the entire subsection a nullity, i.e., the statement in Subsection 2 that limits the provisions of the entirety of Section Q to "Department of Mental Health Agency-based employees with more than one year of service who have been laid off because of a reduction in the resident population in state institutions."

The Employer is, of course, correct in its argument that the grievants are not eligible for "deinstitutionalization" severance pay. But that is not determinative; the Union does not claim they are. The Union has protested a denial of "special" severance pay to employees in violation of Subsection 9 of Article 22, Section Q. And, the Employer, in its Post-Hearing Brief, recognizes that another "avenue for the Grievants to claim eligibility for severance is to claim special severance pay under Article 22, Section Q, Subsection 9." I now turn to that issue which is the essence of the matter at hand.

The core of the Employer's argument is that when the special grievance fund was eliminated, special severance pay was eliminated. That is, the elimination of the fund is tantamount to the elimination of the benefit. I cannot agree with this line of reasoning for several reasons.

[1] The Arbitrator had asked the parties to provide her with this information; however, they were unable to do so as the records apparently do not exist or are not otherwise available.

First, and foremost, the benefit still remained in the Agreement. If the parties had intended to eliminate special severance pay as a benefit, the clear and obvious way to do that would have been to eliminate Subsection 9 of Article 22, Section Q. It is significant that even the Employer's initial negotiation position on the issue did not propose elimination of Subsection 9 and the benefit it established but rather represented a refusal to "extend or recreate the Special Severance Fund. (Union Exhibit 14) In fact, none of the Employer's proposals in the negotiations leading to the current language in Subsection 9 specifically proposed an elimination of the benefit of special severance pay. To the contrary, the parties agreed to retain Subsection 9 with the clear provision, in the subsection's opening sentence, that "employees", under certain conditions, "are eligible for severance payments."

Further, it was the Employer's own proposal to delete previous language from the end of the first sentence in Subsection 9 that formerly required the severance payments to come "from the fund." This clearly implies that the parties agreed to retain the severance payments but eliminate the requirement that they must be paid "from the fund." Thus, while the fund ceased to exist, there is no indication of contract language or intent to abolish severance pay itself. Finally, it is equally clear and significant that the parties contemplated that such payments would be forthcoming because they expressly agreed to limit the cumulative total of such payments to $500,000 during the life of the contract. The fact that the second sentence of the paragraph ends with a reference to the eliminated "fund" is unfortunate and potentially confusing, but the purpose of the sentence is clear when read in the context of the entire paragraph. That purpose is to insure that payments to employees laid off from the Department of Community Health as a consequence of "deinstitutionalization" should not come from or be counted against the $500,000 limitation established by the next sentence. Underscoring that severance pay would continue is the inclusion of a Severance Pay

Schedule and an Example of Severance Pay for Less than Full Time Employee in Subsection 9.

Again, it is important that these changes were based on an Employer proposal and drafted by the Employer. Although its clear language is the best indicator of the parties' intent, both the deletions and the language retained in the proposal are consistent with Ms. Price's unrebutted testimony that the Employer's Chief Negotiator had explained the State's reluctance to continue an earmarked fund for special severance pay. That reluctance is understandable and gives convincing explanation as to what transpired in the negotiations and why: the Employer did not want to set aside an otherwise inaccessible fund for the duration of the contract but preferred to come up with the funds on an as-needed basis as it did for other severance pay. It is significant that the Employer does not deny that such an explanation was given in negotiations and the Employer's negotiators offered no contrary explanation. It is, therefore, further compelling evidence that Subsection 9 means precisely what it says and what the parties intended it to say.

Clear language is found when an obvious and reasonable meaning is apparent form the language in the context of the rest of the contract. Here, that clarity is provided not only by reading the contested language of Subsection 9 in its context, but also by considering the bargaining context in which the language arose. The two provide a consistent and mutually reinforcing interpretation. It is incumbent on the Arbitrator to give effect to the parties' clear intent and sound contract interpretation precludes upsetting that which the parties bargained and clearly expressed.

The Employer points to the absence of any mention by the Union of the potential cost of severance pay obligations pursuant to Article 22, Section Q, Subsection 9 in its Technical Complaints file with the Michigan Civil Service Commission in opposition to outsourcing of certain services performed by its members. It argues that this should be

construed as a tacit admission by the Union that the Employer was no longer obligated to pay severance pay pursuant to Subsection 9. The Union, however, maintains persuasively that the extent of such costs is dependent on the individual decisions of members and consequently would have been highly speculative and impossible to determine with specificity. I note the testimony of Employer witness State Assistant Administrator Valerie Hill that even if the entire $500,000 had been accepted as a cost of the outsourcing, the total would still have been insufficient to reduce the projected saving to less than the 5% threshold. Suffice it to say that there are numerous potential reasons for the Union's actions, or inactions, in this respect. All are highly speculative and offer insufficient support to reach the conclusion the Employer urges.

Likewise, the Employer provided list of over eighty employees who have been laid off without seeking severance pay and without protest by the Union cannot be given sufficient weight to conclude that it constitutes knowing conduct acknowledging the correctness of the Employer's position. The decision to apply for severance pay is that of the individual employee, not the Union. The list does not, for example, indicate whether some of the individuals were still employed by the State or may have rejected severance pay to retain the seniority right to recall. Further, the list was not thoroughly investigated as to the present eligibility status of employees listed thereon. Once again, this evidence is highly speculative and offers insufficient support to reach the conclusion the Employer seeks.

In sum, there is no dispute that both grievants Shirley Maroulis and Djua Gillespie are eligible for special severance pay under Article 22, Section Q, Subsection 9. Therefore, based on the reasons given in detail above, I conclude that the Employer did violate the Agreement when it denied them severance pay. Since the grievance was filed by Local 261 Union President Mark Williams on behalf of all Resident Care Aids (RCAs) at the Grand Rapids Home for Veterans (Union Exhibit 5), other

employees similarly situated, i.e. who were eligible, applied for severance pay, and were denied, shall also be made whole.

The Union has requested severance pay with interest primarily because a "growing number of arbitrators" have adopted the reasoning that, "interest is the normal way to compensate the injured party for delayed payment." I do not dispute the basic philosophic underpinning of this approach, and I have granted interest in federal cases and cases where unions presented compelling and specific reasons for doing so. I do not agree that interest rate on all delayed payments is at this point in time the "normal" way to compensate the injured party in labor arbitration. Additionally, here the request for interest was not made as part of the original remedy in the grievance and only surfaced in the post-hearing brief. Therefore, interest on the severance pay owed the grievants is not granted.

AWARD

Therefore, for the reasons detailed in the Discussion and Findings, the grievance is granted. Grievants Shirley Maroulis and Djuna Gillespie shall be made whole. They and other RCAs similarly situated, as explained above, shall be paid the severance pay they are due in accordance with the provisions of Article 22, Section Q, Subsection 9. The computation of individual severance pays due is remanded to the parties.

The Arbitrator will retain jurisdiction solely for the purpose of the implementation of the remedy.

Ildikó Knott

June 17, 2015
Date