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**IN THE MATTER OF ARBITRATION BETWEEN**

UNIVERSITY OF CENTRAL FLORIDA

and

Grievance:  
Lay-off of William Leigh, Ph.D

UNITED FACULTY OF FLORIDA

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**APPEARANCES**

**FOR THE EMPLOYER:**

**Advocate for Employer**

Youndy C, Cook, Esq.  
Associate General Counsel  
General Counsel's Office  
University of Central Florida

**Witnesses for Employer**

Foard Jones, Ph.D.  
Michael Johnson, Ph.D.

**FOR THE UNION**

**Advocate for Union**

Michael L. Moats  
Service Unit Director  
United Faculty of Florida

**Witnesses for Union**

James Gilkeson, Ph.D.  
Claudia Schippert, Ph.D.

**I. STATEMENT OF THE CASE**

**Background**

The University of Central Florida, Board of Trustees [UCF or Employer] and the United Faculty of Florida (UFF or Union) are parties to a Collective Bargaining Agreement (CBA) which governs the terms and conditions of employment of a bargaining unit composed of faculty and staff employees. The CBA contains a grievance procedure which terminates in final and binding arbitration when the parties are unable to otherwise resolve a dispute. The UFF filed a grievance on behalf of William Leigh, Ph.D. (Grievant) and invoked the arbitration provision of the CBA when the grievance procedure did not result in a resolution of this dispute. The undersigned arbitrator was selected by mutual agreement of the parties. The grievance before this arbitrator concerns disputes about the proper interpretation and/or application of the CBA. This

matter came on for arbitration on March 30, 2010 at the University of Central Florida Campus in Orlando, Fl. During the arbitration, both parties were provided the full opportunity to present evidence and to cross examine witnesses. The Union introduced ten exhibits into evidence, UCF introduced six exhibits into evidence, and joint exhibits into evidence. A court reporter transcribed the arbitration and a copy of the transcript was provided to the arbitrator. Upon receipt of post-hearing briefs, the record was closed pending issuance of this opinion and award. The arbitrator has fully considered all the evidence presented and all arguments presented in the parties' post-hearing briefs.

### **History of the Dispute**

This dispute began on August 5, 2009, when Michael Johnson, Ph.D., Assistant to the Provost for Faculty Relations, sent a notice of lay-off letter to the William Leigh, Ph.D. which stated:

August 5, 2009

...

Dear Dr. Leigh:

This letter is to notify you, in accordance with the BOT-UFF 2004-2007 University of Central Florida Collective Bargaining Agreement that you will be laid off from your position as a Professor in the Department of Management Information Systems effective the close of business on May 7, 2010. The reason for this action is the decision by the Board of Trustees on July 23, 2009 to abolish the Management Information Systems programs. This action is no reflection on your service, and does not reflect negatively on your employment record with UCF.

Please note the following:

- As an employee notified of layoff, you will be given preference for appropriate alternative or equivalent employment should you apply for such positions that become available within the university. It is your responsibility to apply for appropriate positions at <https://www.jobswithucf.com>, selecting the box indicating that you have received notice of layoff from UCF.
- You have recall rights for two years following layoff. If within the two year period you are not employed in an equivalent full-time position, you are eligible for reemployment in the same or a similar position should one become available. You are encouraged to apply to such positions at <https://www.jobswithucf.com>, selecting the box indicating that you have received notice of layoff from UCF.

Should you be offered reemployment, you must accept it within 15 days or your recall rights will end.

- You have the right to grieve this layoff through the procedure in Article 20 of the Collective Bargaining Agreement. You must grieve within 30 days of this notice and must demonstrate that your layoff violated a specific term or provision of the Collective Bargaining Agreement.

The attached benefits statement and FAQ provide some important information about health insurance and other benefits. I strongly encourage you to contact the Benefits section of Human Resources to review your benefits on an individual basis (contact April Edwards, Benefits Manager, at 407-823-5189).

If you have any questions, please call me at (407) 823-3401.

Sincerely,

Michael D. Johnson  
Faculty Relations  
Cc: ...

On September 4, 2009, Grievant responded with the following letter to Dr. Johnson with copies to various persons including the Foard Jones, Ph.D., Management Department Chairperson.

9/4/2009

...

Dear Dr. Johnson:

I received my notification of layoff letter dated August 5, 2009, stating that I will be laid off from my position as a Professor in the Department of Management Information Systems effective on May 7, 2010.

Concurrent with “closing” MIS, the College of Business administration is seeking to hire 3 faculty members in the Management Department (position numbers 33287, 36110, 32173).

As I am a tenured employee who has been informed of layoff, I have recall rights for positions with the university for which I am qualified. I was tenured in the Management Department at UCF and was promoted to Full Professor in the Management Department at UCF. My tenure has not been transferred from the Management Department.

I am hereby informing you that I am qualified for these positions and I am activating my recall rights in claiming these positions at the same status that I am holding at the time of layoff.

Please confirm in writing within 10 days (by 9/14/2009) that I have been given one of the above mentioned positions as re-employment/recall.

Sincerely,

William Leigh Employee ID: 011524

cc: ...

## **The Grievance**

Also on September 4, 2009, a grievance was filed by the UFF on the Grievant's behalf by Union representative, Claudia Schippert, Ph.D. In pertinent part, the grievance stated:

### **Grievance of William Leigh Filed 9/4/2009**

#### **Articles(s) Allegedly Violated:**

CBA Article 13.1, 13.2, 13.3, 13.4, 13.5 and Article 15.1 and 15.10.

#### **Statement of Grievance:**

The grievant received a letter on 8/7/2009 informing him that he was being laid off from his position as Professor in the Department of Management Information Systems effective May 7, 2010. The stated reason is the decision by the BOT to "abolish the Management Information Systems Programs" (letter attached).

- Violation of Art 13.1. (b)  
The University failed to properly specify the layoff unit in the letter received by the grievant. Art. 13.1 (b) requires identification of the layoff unit (*singular*). That unit must be broad enough to cover all those being laid off. It is public knowledge that employees in four different Departments and Colleges received layoff notifications, which can only mean that the layoff unit is the University.
- Violation of Article 13.2  
As "Management Information Systems programs" cannot meaningfully be the layoff unit(see above) and as it appears, although not properly defined by the University, that the layoff unit is the university, the University failed to properly apply the criteria as to who should be laid off, as the grievant is a tenured employee with 21 years of service to UCF, having earned tenure in Management. "No tenured employee shall be laid off if there are nontenured employees in the layoff Unit."
- Violation of Article 13.1 (a):  
The only reason for layoff stated in the letter is the 7/23/09 decision by the Board of Trustees. Written statements and discussion at the BOT meeting in question

demonstrate, and publically available documents further indicate, that the sole reason for the layoff action taken was the alleged financial crisis of the University. The university has failed to demonstrate that it lacks sufficient resources to avoid layoffs. The purported reason for a layoff action thus does not exist and the layoff action taken is in violation of Art 13.1 and by implication a violation of Art. 13.4.

- The College of Business administration retains undergraduate (required course and general business major advanced course and graduate (daytime MBA, part-time MBA, PMBA, and EMBA) requirements for MIS coursework requiring at least 2 full time faculty and possibly more. This means that the university has not eliminated the MIS programs, but is in fact maintaining MIS programming. Consequently, the layoff notice is flawed as it does not relate to an actual abolition of the department.
- Violation of Article 13.3  
Concurrent with the alleged ‘abolishing’ of the MIS ‘programs,’ the university is currently hiring three faculty members in Management. According to Art. 13.3 the university is obligated to (“shall”) make a reasonable effort to locate appropriate alternate or equivalent employment for the laid-off employee within the University and to make known the efforts to the employee. As the grievant is tenured in Management and is qualified for each of the three positions currently advertised, and as the university did not offer one of these positions to him, the university violated Art. 13.3.
- Violation of Article 13.5  
As the newly opened positions mentioned above are in Management and as the grievant is qualified for and holds tenure in Management, the grievant has recall rights to these position. The University has not made the offer of re-employment in these positions nor has the university attempted to determine if these positions are equivalent positions that would fall under the grievant’s recall rights.
- Violation of Article 15.1 and 15.10  
The grievant is a tenured employee. His tenure was earned in the Department of Management. Tenure guarantees annual reappointment. No tenured employee is to be laid off before non-tenured employees in the layoff unit. The Department of Management was not closed.

### **Remedies Sought:**

To make the grievant whole, which includes, but may not be limited to:

- Rescinding the layoff notification and assuring the grievant in writing of his continuing employment in his current position as Full Professor in the College of Business Administration, as afforded through his tenure in Management.

## **Response to Dr. Leigh's Letter of September 4, 2009**

On September 9, 2009, Dr. Johnson responded to Dr. Leigh's letter of September 4, 2009. That letter reads:

September 9, 2009

...

Dear Dr. Leigh:

This is in response to your letter dated September 4, 2009 in which you state a claim to one of the posted faculty openings in the Department of Management. You describe this as an activation of recall rights.

Re-employment/recall rights are governed by Article 13.5 of the UCF BOT-UFF Collective Bargaining Agreement. These rights begin following layoff, i.e., after termination of employment. As a person notified of layoff, but not yet laid off, these rights do not apply to you at this time. They will begin at the point of layoff, without any need to activate them. The university will comply with the requirements of the Collective Bargaining Agreement with respect to layoff.

Until the point of layoff, the university will, as required by Article 13.3, continue to make a reasonable effort to seek alternative/equivalent employment. Employees given layoff notices will be given preference for available positions for which they qualify. Your August 5, 2009 notice of layoff explains what you must do to seek preference for such positions.

In your letter you also discuss the location of your tenure in relation to the notice of layoff. Since this matter is the subject of a pending grievance, I cannot address it here.

Sincerely,

Michael D. Johnson

...

## **Step Two Answer to the Grievance**

On October 21, 2009, following a grievance hearing at Step 2, Dr. Johnson submitted a comprehensive twelve page answer to the grievance. Pages one to eleven contain his "Grievance Discussion" on each aspect of the grievance and pages eleven and twelve contain his "Grievance Decision". In the interest of brevity, only his discussion of the parts concerning Article 13.3 and 13.5 are recaptured below along with his "Grievance Decision."

Beginning on page 7 of Dr. Johnson's written answer to step 2 of the grievance procedure, it reads:

#### **D. Article 13.3**

The grievance statement alleges a violation of Article 13.3 as follows (see Appendix A):

“Concurrent with the alleged ‘abolishing’ of the MIS ‘programs,’ the university is currently hiring three faculty members in Management. According to Art. 13.3 the university is obligated to (‘shall’) make a reasonable effort to locate alternate or equivalent employment for the laid-off employee within the University and to make known the efforts to the employee. As the grievant is tenured in Management and is qualified for each of the three positions currently advertised, and as the university did not offer one of these positions to him, the university violated Art. 13.3.”

At the Step 2 meeting, the Grievant said that one of the three positions is very general and he would be qualified, and that the others were very specific and that many would think he did not meet the qualifications.

Article 13.3 reads as follows:

“Alternative/Equivalent Employment. The University shall make a reasonable effort to locate appropriate alternate or equivalent employment for laid-off employees within the University and to make known the results of the effort to the person affected.”

Several key items in this Article are not defined:

- when this obligation begins and ends;
- “appropriate alternative or equivalent employment”: and
- “reasonable effort”

I will consider the first two of these and then examine whether the University's approach to seeking appropriate alternate or equivalent employment constitutes a “reasonable effort.”

Because Article 13.3 says that the effort in question is on behalf of “laid-off employees,” one might conclude that the University's obligation begins after an employee is actually laid off, that is, terminated after receiving notice of layoff. However, a later section, Article 13.5, deals with re-employment/recall rights after actual layoff. Therefore, in an excess of caution, the University decided to assume that Article 13.3 deals with the period of time between receiving notice of layoff and the layoff itself (for the Grievant, August 5, 2009 through May 7, 2010). This, however, means that violation could not occur before May 7, 2010: the University has until that date to seek alternative employment and make the results known to the Grievant.

(Footnote here by Dr. Johnson reads: If instead Article 13.3 should be read as applying to employees after they are actually laid off, then it would not even take effect for the Grievant until May 8, 2010.)

Next consider “appropriate alternate or equivalent employment.” The latter term, “equivalent employment,” seems clear; e.g., for a tenured professor with a given salary and a certain assignment in teaching, research, and service, an equivalent position would be tenured, at the rank of professor, and have a very similar salary and distribution of effort. However, the meaning of “appropriate alternate” employment is not at all clear; different employees or observers would likely come to different conclusions. For example, one employee might well be interested in alternate employment that differed significantly from his or her current position, or even a position that paid much less. Another employee might have no interest in such a position. For the University to seek to satisfy its obligation under this Article by offering such a position to an unwilling employee seems unfair.

In light of the above considerations, the University determined to implement this provision as follows. First, before layoff notices were issued, the University sought to locate positions that could be offered to affected employees instead of giving notice. Success would permit retention of employees in the layoff unit in accordance with Article 13.2. No such positions were located for employees in the MIS layoff unit. Second, the University developed a procedure whereby it would extend a hiring preference to employees notified of layoff when they apply for appropriate alternative or equivalent employment. The preference is extended when (i) the employee meets the minimum posted qualifications and (ii) the position is equivalent, or could reasonably be considered a “lower” position. For example, an associate professor notified of layoff who chose to apply for (and was qualified for an instructor position would be granted preference; the same person applying for a professor position would not be given preference but could compete. Thus “appropriate” here is determined by three factors: the employee notified of layoff finds the position appropriate (and indicates this by applying); the applicant meets the minimum qualifications; and the position is equivalent or lower. Anyone granted this preference must be interviewed, but is not guaranteed the position.

The University informed employees notified of layoff, in writing, that they should look at the University’s on-line employment site to identify appropriate positions, and then apply for them. The requirement to apply ensures that the position in question is one that the employee believes is appropriate alternative employment. This addresses one of the considerations above; for example, the University could satisfy its obligation under Article 13.3 by offering a lower-paying job, but only if the employee indicated a desire for it by applying. Requiring an application moreover ensures that the University is provided the up up-to-date information necessary to assess the employee’s qualifications for the position. In my judgment, requiring an application is in compliance with Article 13.3’s requirement that the University make a “reasonable effort” to locate employment.

At the Step 2 meeting, the grievance representative objected to the requirement that employees examine the on-line employment site to identify appropriate positions. However, in my judgment this complies with Article 13.3’s “reasonable effort” requirement. However, even if Article 13.3 should be interpreted as requiring the University to identify appropriate positions and notify the employee, in this case the Grievant has suffer no harm from the absence of notification; the Grievant already knows

about the open positions in management. It remains for the Grievant, if he views any as appropriate, to apply.

The grievance statement implies that Article 13.3 requires the University to offer one of the open Management positions to the Grievant. This is clearly not correct. The Article does not give an employee rights to any specific position. Moreover, this would be equally true for all nine MIS faculty who received layoff notices, and not only the Grievant. With only three open positions in Management, this is obviously impossible. Article 13.3's requirement of a "reasonable effort" certainly must be interpreted as permitting the University to define an orderly process, such as requiring applications. Such a process can make it possible to decide whether any of the nine MIS employees notified of layoff might be an appropriate match for one of the Management positions. If more than one qualified, it would provide a rational process for selection.

In my judgment the University's approach to locating appropriate alternate or equivalent employment constitutes a "reasonable effort" in compliance with Article 13.3. I do not find that the existence of open positions in Management represent a violation of this Article, since the Grievant would, if he applied (and was found to be qualified), be given preference. Moreover, there are many months remaining during which alternate or equivalent employment may yet be found before his layoff; hence this portion of the grievance is premature. I find no violation of Article 13.3.

While I conclude that requiring employees to examine the on-line vacancy posting does not violate Article 13.3, it would nonetheless more fully meet the spirit of that Article for the University to inform employees of available positions that may be appropriate. Therefore, the appropriate University staff will be directed to inform those notified of layoff of any postings that may represent appropriate alternate or equivalent employment. If an employee views any as appropriate and applies, he or she may receive preference, as explained above.

#### **E. Article 13.5**

The grievance statement alleges a violation of Article 13.5 as follows:

“As the newly opened positions mentioned above are in management and as the grievant is qualified for and holds tenure in Management, the grievant has recall rights to these positions.”

The relevant portion of the Article 13.5 reads as follows:

“Re-employment/Recall.

- (a) For two years following layoff, an employee who has been laid off and who is not otherwise employed in an equivalent full-time position shall be offered re-employment in the same or similar position at the University should an opportunity for such re-employment arise”

The rights described by Article 13.5 commence after an employee is laid off – that is, after employment terminates following a layoff notice. (Thus the article discusses ‘re-employment’ for an employee who is “not otherwise employed,” language that makes no sense if applied to an employee whose employment has not yet ended.) At the Step 2 meeting the grievance representative agreed that these rights will begin for the Grievant in May 2010.

The grievance representative argued that Article 13.5 was nonetheless relevant because the open positions in the Department of Management have a start date of August 2010 – after the Grievant is scheduled to have been laid off. This argument has no merit. Before layoff, the “appropriate alternate or equivalent employment” provision of Article 13.3 is in effect and could in principle apply to these positions. However, Article 13.5 does not take effect until the Grievant’s employment ends, and therefore no violation of Article 13.5 is possible before then.

## **GRIEVANCE DECISION**

The Grievant asserts that Articles 13.1(a), 13.1(b), 13.2, 13.3, 13.4, 13.5, 15.1, and 15.10 were violated.

I find that:

- The reason for the layoff (abolition of programs) is explicitly mentioned in Article 13.1(a), and was stated accurately in the notice of layoff in compliance with Article 13.4;
- The layoff unit affecting the Grievant was determined in accordance with Article 13.1(b);
- The Grievant’s notice of layoff complied with Article 13.2, since all non-tenured employees in the unit also received notices of layoff;
- The University has until the end of the Grievant’s employment (May 7, 2010) to inform him of the outcome of its efforts to seek appropriate alternate or equivalent employment, and a violation of Article 13.3 therefore cannot occur before that date;
- The university’s approach to locating appropriate alternate or equivalent employment is in accordance with Article 13.3;
- The re-employment/recall rights in Article 13.5 commence after employment ceases following layoff notice and therefore are not yet in effect;
- The Grievance’s tenure resides in the Department of Management Information Systems, a department in accordance with Article 15.1, and his employment will end as a result of layoff in accordance with Article 15.10.

Therefore, in my judgment, there is not violation of the Articles grieved above.

If Article 13.3 is interpreted to require the University to notify the Grievant of certain open positions such as those in the Department of Management, the Grievant has even so suffered no harm: he is already aware of the open positions and has been encouraged to apply if he believes any would be appropriate alternate or equivalent employment.

Nonetheless, hereafter employees who have been notified of layoff will be informed by the University of any open positions that may represent appropriate alternate or equivalent employment. This will permit the employees to take advantage of the opportunity to receive a hiring preference, if appropriate.

For the reason provided herein, this grievance is denied.

### **March 26, 2010 letter to Grievant**

Dr. Johnson sent a letter to Dr. Leigh, dated March 26, 2010 and received March 29, 2010, the day before commencement of the arbitration hearing. It reads as follows.

March 26, 2010

William E. Leigh  
Management Information Systems Department

Dear Dr. Leigh,

As part of the MIS teach out plan, the university has been able to locate alternate employment for you as a nine-month, non-tenure-earning professor for the coming summer and academic year, at your current salary. This employment will end effective the close of business on May 7, 2011. Your specific assignment will be determined by the college.

Please note that acceptance or rejection of this alternate employment will not affect the hiring preference for potentially permanent positions, nor your recall rights:

- As an employee notified of layoff, you will be given preference for appropriate alternative or equivalent employment should you apply for such positions that become available within the university. It is your responsibility to apply for appropriate position at <http://www.jobswithucf.com>, selecting the box indicating that you have received notice of layoff from UCF.
- You have recall rights for two years following layoff. During this period, you are eligible for reemployment should a position become available that is the same or similar to the position from which you have been laid off, if you are not otherwise employed in an equivalent full-time position. You are encouraged to apply for such position at <https://www.jobswithucf.com>, selecting the box indicating that you have received notice of layoff from UCF. Should you be offered reemployment, you must accept it within 15 days or your recall rights will end.

If you choose to accept this alternate employment, please sign the attached Employment Agreement(s) and return them to your college. Please also sign below and return.

If you have any questions, please call me at (407) 823-0676.

Sincerely,

Michael D. Johnson  
Faculty Relations

CC: ...

\_\_\_\_ Acceptance of alternate employment      \_\_\_\_ Refusal of alternate employment

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## II. ISSUE

The parties stipulated to the following issue:

Whether the University's action to lay off the Grievant violated the CBA.<sup>1</sup>

## III. RELEVANT CONTRACT PROVISIONS

### ARTICLE 13 LAYOFF AND RECALL

13.1

(a) Layoff. When a layoff is to occur as a result to adverse financial circumstances; reallocation of resources; reorganization of degree or curriculum offerings or requirements; abolition of one or more programs or functions; the University shall notify the local UFF Chapter and the UFF state office no less than thirty (30) days prior to taking such action. UFF may request a consultation with the president or president's representatives pursuant to Article 2 during this period to discuss the layoff.

(b) Layoff Unit. The layoff unit may be at an organizational level of the University, such as a campus, division, college/unit, school, department/unit, area, program, or other level of organization as the University deems appropriate.

13.2 Layoff Considerations. The selection of employees in the layoff unit to be laid off will be determined as follows:

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<sup>1</sup> The parties did not submit at the arbitration a remedy issue for the arbitrator's decision. This may have been an oversight because the Union stated in its post-hearing brief the additional issue "If so, what shall be the remedy?" Article 20.8(f)(3)a. of the CBA in part reads: "Arbitration shall be confined solely to the application and/or interpretation of this Agreement **and the precise issue(s) submitted for arbitration.**" (emphasis added) Yet, Art. 20.8(f)(3) b. in part reads, "If the arbitrator determines that the Agreement has been violated, **the arbitrator shall direct the University to take appropriate action.**" (emphasis added)

(a) No tenured employee shall be laid off if there are non-tenured employees in the layoff unit. No non-tenured but tenure-earning employees shall be laid off if there are fixed renewable employees in the layoff unit. ...

(d) Where employees are equally qualified under (a) or (b) above, those employees will be retained who, in the judgment of the University, will best contribute to the mission and purpose of the University, including its commitment to diversity. In making such judgment, the University shall carefully consider employees' length continuous University service, and shall take into account other appropriate factors, including but not limited to performance evaluation by student, peers, and supervisors, and the employee's academic training, professional reputation, teaching effectiveness, research record or quality of the creative activity in which the employee may be engaged, and service to the profession, community, and public.

13.3 Alternative/Equivalent Employment. The University shall make a reasonable effort to locate appropriate alternate or equivalent employment for laid-off employees within the University and to make known the results of the effort to the person affected.

13.4 Notice. Employees should be informed of layoff as soon as practicable and, where circumstances permit, employees with three or more years of continuous UCF service should be provided at least two (2) full semesters notice (or one year's notice for employees with an assignment greater than academic year); those with less service, with at least one full semester's notice (or six (6) month's notice for employees with an assignment greater than an academic year). Employees who have received notice of layoff shall be afforded the recall rights granted under Section 13.5. Formal written notice of layoff is to be sent by certified mail, return receipt requested, or delivered in person to the employee with written documentation of receipt obtained. The notice shall include effective date of layoff; reason for the layoff; reason for shortened period of notification, if applicable; a statement of recall rights; the expiration of recall rights; a statement of appeal/grievance rights and applicable dates for filing; and a statement that the employee is encouraged to view the University Vacancy listing and instruction on how to access it.

13.5 Re-employment/Recall.

(a) For two years following layoff, an employee who has been laid off and who is not otherwise employed in an equivalent full-time position shall be offered re-employment in the same or similar position at the University should an opportunity for such re-employment arise. If an employee is laid off from a fixed renewable appointment, the employee shall be eligible for re-employment in the same or similar position at UCF, should such a position become available within one year following the layoff or before the expiration date of the employee's last employment agreement, whichever is shorter. Employees appointed to a fixed renewable appointment who are recalled shall be offered re-employment not to exceed the time remaining on their employment agreement at the time of layoff. Any offer of re-employment pursuant to this section must be accepted within fifteen (15) days after the date of the offer and shall take effect no later than the beginning of the semester following the date the offer was made. If an employee rejects an offer of re-employment, the employee shall

receive no further consideration pursuant to this Article. The University shall notify the local UFF chapter when an offer of employment is issued to a laid-off employee.

- (b) An employee shall resume the same status upon recall, as applicable.

...

## ARTICLE 15 TENURE

- 15.1 Eligibility. Employees with the rank of Associate Professor and Professor shall be eligible for tenure. Tenure shall be in a department/unit or other appropriate administrative unit. Tenure shall not extend to administrative appointments in the General Faculty or Administrative and Professional classification plans.
- 15.7 Transfer of Tenure. When a tenured employee is transferred as a result of a reorganization or program curtailment within the University and is employed in the same or similar discipline in which tenure was granted, the employee's tenure shall be transferred to the new department.
- 15.10 Termination/Layoff. Tenure/permanent status guarantees annual reappointment for the academic year until voluntary resignation, retirement, removal for just cause, or layoff.

## ARTICLE 20 GRIEVANCE PROCEDURE AND ARBITRATION

- 20.1 Policy/Informal Resolution. The parties agree that all problems should be resolved, whenever possible, before the filing of a grievance but within the time limits for filing grievances stated elsewhere in this Article. The parties encourage open communications between administrators and employees so that resort to the formal grievance procedure will not normally be necessary. The parties further encourage the informal resolution of grievances whenever possible. At each step in the grievance process, participants are encouraged to pursue appropriate modes of conflict resolution. The purpose of this Article is to promote a prompt and efficient procedure for the investigation and resolution of grievances. The procedures hereinafter set forth shall be the sole and exclusive method for resolving the grievances of employees as defined herein.
- 20.3 Definitions and Forms. As used herein:
- (a) the term "grievance" shall mean a dispute filed on a form referenced in Section 20.3 (c) concerning the interpretation or application of a specific term or provision of this Agreement, subject to those exclusions appearing in other Articles of this Agreement. A Step 1 Grievance is a grievance alleging that one or more violations of this Agreement have occurred at, or within, a college-level unit. A Step 2 Grievance is a grievance that has either
1. continued from the Step 1 college or unit level to the University level or
  2. been filed alleging that one or more violations of the Agreement have occurred at the University level.

(b) the term “grievant” shall mean an employee or group of employees who has/have filed a grievance in a dispute over provision of this Agreement which confers rights upon the employee(s). The UFF may file a grievance is a dispute over a provision of this Agreement which confers rights upon the UFF. A grievance filed by the UFF which alleges a violation of its rights by the University shall be initiated at Step 2.

20.4 Burden of Proof. In all grievances except disciplinary grievance in accordance with Article 16, Disciplinary Action and Job Abandonment, the burden of proof shall be on the employee. In disciplinary grievances, the burden of proof shall be on the University.

20.8 Formal Grievance Procedure.

(a) Filing.

(1) ... The grievant may amend the Appendix “C” form one time, either prior to the Step 1 meeting for all grievances filed at Step 1, or prior to the Step 2 review for all grievances filed directly at Step 2.

20.8(f) Step 3 Arbitration.

(3) Authority of the Arbitrator.

a. The arbitrator shall neither add to, subtract from, modify, nor alter the terms or provisions of the Agreement. Arbitration shall be confined solely to the application and/or interpretation of this Agreement and the precise issue(s) submitted for arbitration. The arbitrator shall refrain from issuing any statements of opinion or conclusions not essential to the determination of the issues submitted.

b. Where an administrator has made a judgment involving the exercise of discretion, such as decisions regarding tenure or promotion, the arbitrator shall not substitute the arbitrator’s judgment for that of the administrator. Nor shall the arbitrator review such decision except for the purpose of determining whether the decision has violated this Agreement. If the arbitrator determines that the Agreement has been violated, the arbitrator shall direct the University to take appropriate action. ...

#### **IV. DISCUSSION AND DECISION**

This grievance concerns the interpretation and/or application of the collective bargaining agreement. Therefore, the arbitrator will adhere to Article 20.4 of the CBA which places the burden of proof upon the employee.

The ultimate goal of contract interpretation is to ascertain the intent of the parties. Labor arbitrators typically do not resort to principles of contract interpretation unless the contract

language is first deemed to be ambiguous. According to one widely recognized treatise “A contract is ambiguous if it is reasonably susceptible to more than one meaning.”<sup>2</sup> In the present dispute, the parties have maintained at least two opposing interpretations and applications of the language in Article 13.3 and 13.5 therefore making the contract language ambiguous.

It is helpful in contract interpretation cases to keep in mind various applicable concepts that have been traditionally followed for decades by labor arbitrators. Some of those applicable here are:

- (a) Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.<sup>3</sup>
- (b) It is only when no reasonable meaning can be given to a word or clause, either from the context which it is used or by examining the whole agreement, that it may be treated as surplusage and declared to be inoperative.<sup>4</sup>
- (c) If the arbitrator can determine the principle purpose of the parties, contract interpretation favors that meaning.
- (d) An interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces an unreasonable, harsh, absurd, or nonsensical result.
- (e) Good faith is an element of reasonableness as an interpretive aid, arbitrators use rules drawn from arbitral jurisprudence to fill gaps in collective bargaining agreements.
- (f) Forfeitures are not favored by arbitrators in the interpretation of collective bargaining agreements.
- (g) To ascertain the meaning of a contractual term, arbitrators give appropriate weight to all relevant circumstances of the parties’ continuing relationship.
- (h) To better understand the intent of the parties, interpret an agreement as a whole.
- (i) When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning.<sup>5</sup>

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<sup>2</sup> St. Antoine, Theodore J., ed., *The Common Law of the Workplace*, § 2.4, Washington: BNA (1999)

<sup>3</sup> Elkouri & Elkouri, *How Arbitration Works*, 6<sup>th</sup> ed. 478, Washington: BNA 2003

<sup>4</sup> *Ibid.* at 464.

<sup>5</sup> St. Antoine, Theodore J. ed., *The Common Law of the Workplace*, §§ 2.5, 2.10, 2.11, 2.12, 2.13, 2.21, Washington: BNA (1999).

Initially, the arbitrator will address UCF's preliminary arguments.

UCF's first preliminary argument is that the Grievant failed to meet his burden of proof to offer any evidence regarding the 'action' of the University to lay off the Grievant. In support of this argument, UCF states that the Grievant: (1) offered no evidence regarding the action to lay off the Grievant; (2) offered no evidence regarding the University's reason for the layoff; and (3) offered no evidence regarding the selection of the layoff unit or his placement in it.

This argument misconstrues the stipulated issue. The seven grievance allegations and UCF's answers thereto all pertain to the University's action to lay off the Grievant. The stipulated issue encompasses all these allegations. The grievance allegations are: (1) violation of Article 13.1(b) (failure to properly specify the layoff unit); (2) violation of Article 13.2, (failure to properly apply the criteria as to who should be laid off); (3) violation of Article 13.1(a) (the University failed to demonstrate that it lacks sufficient resources to avoid layoffs); (4) the University has not eliminated the MIS course work; (5) violation of Article 13.3 (failure to make a reasonable effort to locate appropriate alternate or equivalent employment for the laid-off employee within the University and to make known the efforts to the employee); (6) violation of Article 13.5 (exercise of recall rights to open positions); and (7) violation of Article 15.1 and 15.10 (Grievant's tenure is in the Management Department and no tenured employee is to be laid off before non-tenured employees in the layoff unit.) The arbitrator determines that the stipulated issue, (i.e. Whether the University's action to lay off the Grievant violated the CBA.) pertains to all seven of the grievance allegations.

It is correct that the Union did not pursue at arbitration allegations numbered 1, 2, 3, and 4, as above numbered. Accordingly, the arbitrator now determines those alleged violations are no

longer before him and have been abandoned. Further, allegation numbered 7 above, (i.e. Grievant's tenure resides in the Management Department) is also now not an issue for the arbitrator to decide because it was conceded by a Union witness, Dr. Gilkeson, during the arbitration, that the Grievant's tenure did reside in the Management Information Systems Department. Thus, allegations numbered above as 5 and 6 remain to be decided. The arbitrator determines they are within the scope of the stipulated issue because: (1) they pertain to the action to lay off the Grievant; (2) the action to lay off the Grievant remains an ongoing process; (3) Dr. Johnson's Step 2 answer to the grievance responded to those allegations; and (4) both parties presented evidence about those allegations at the arbitration.

UCF's second preliminary argument is that the Grievant expanded the issue at the arbitration beyond the original three posted management positions by including additional positions and by attacking the idea that the University could establish a procedure that might require him to exert any effort to avoid loss of employment.

The arbitrator construed the additional open employment positions as examples of further instances claimed by the Union that the University did not comply with Article 13.3's ongoing requirement to make a reasonable effort to locate appropriate alternate or equivalent employment for laid-off employees within the University and to make known the results of their effort to the person affected. This was not an issue change. Instead, it is construed as supporting evidence of the Grievant's original issue in above number 5.

UCF's third preliminary argument is that the grievance should be dismissed as either not ripe or moot. This argument raises procedural concerns.

The CBA in Article 20.8(f)(4) provides a specific bifurcated arbitration process to be followed in cases where arbitrability is an issue. That process was not employed or sought in this

dispute even though the University took the position in its Step 2 answer that Article 13.3 deals with the period of time between receiving notice of layoff and the layoff itself (for the Grievant August 5, 2009 through May 7, 2010). It then asserted: “This means that a violation could not occur before May 7, 2010.” The University further stated in that same answer pertaining to Article 13.3: “Moreover, there are many months remaining during which alternate or equivalent employment may yet be found before his layoff; hence this portion of the grievance is premature.” Thereafter, the Union sought arbitration. No evidence has been placed before this arbitrator that either party sought to have the possible arbitrability issue of ripeness or mootness decided by a different arbitrator before the case was submitted to this arbitrator. Neither party raised any objection to this arbitrator’s “jurisdiction” to hear and determine this case at any time before the record was closed. Accordingly, this arbitrator now determines that if there is an arbitrability issue that should have been first decided by a different arbitrator, the parties have waived that requirement by their conduct in going forward with the arbitration without objecting or otherwise informing the arbitrator of any procedural imperfection. By the conduct of the parties, they have vested this arbitrator with jurisdiction to decide the stipulated issue.

### **Article 13.5**

The arbitrator now moves to the Grievant’s allegation that UCF violated Article 13.5.

The arbitrator must first determine the intent of the language in Article 13.4’s second sentence in relation to Article 13.5(a)’s first sentence.

Article 13.4, second sentence, reads: “Employees who have received notice of layoff shall be afforded the recall rights granted under Section 13.5.” Article 13.5(a)’s, first sentence, reads: “For two years following layoff, an employee who has been laid off and who is not otherwise

employed in an equivalent full-time position shall be offered re-employment in the same or similar position at the University should an opportunity for such re-employment arise.”

The University, in its answer denying the grievance, concluded: “The re-employment/recall rights in Article 13.5 commence after employment ceases following layoff notice and therefore are not yet in effect.” It reasoned that because the Article 13.5 discusses “re-employment” for an employee who is “not otherwise employed,” the language makes no sense if applied to an employee whose employment has not yet ended.

The Union argues that clear intent of the above language of Article 13.4 is to add to Article 13.3’s alternative/equivalent employment rights the recall rights contained in Article 13.5 for an employee like the Grievant who has received notice of layoff but is still employed.

To adopt the University’s reasoning would have the effect of rendering the second sentence of Article 13.4 to be mere surplusage. This arbitrator declines to do so because all words used in an agreement should be given effect unless no reasonable meaning can be given to them, either from the context in which they are used or from examining the whole agreement. The context of Article 13 deals with the reasons, methods, sequences of layoffs of employees and the attendant rights the employees have in that process. A reasonable meaning can be given to the two provisions which avoids relegating Article 13.4’s language to surplusage.

Article 13.4’s language reads only about “recall rights,” not re-employment. It uses the word “Employees” and therefore contemplates that the person(s) is still employed.

Article 13.5, addresses re-employment and recall rights. It reads “For two years following lay off, an employee who is not otherwise employed in an equivalent full-time position shall be offered ‘re-employment’ .... This language contemplates a person whose notice of layoff has expired, has been laid off, and has not been re-employed in an equivalent full-time position.

This is different from the Grievant's current circumstances. Therefore it is not necessary to declare the language in Article 13.4 to be surplusage. It has a separate meaning from the language in Article 13.5.

This arbitrator therefore determines that the intent of the disputed language in Article 13.5 is to afford "recall rights" granted under Section 13.4 to employees, like the Grievant, who are still employed but have received notice of layoff, but have not yet been laid off.

The Union has met its burden of proof to establish by the greater weight of the evidence that Grievant, as an employee under notice of layoff but whose employment had not ceased, is entitled by Article 13.5 to recall rights.

### **Article 13.3**

Article 13.3 reads:

Alternative/Equivalent Employment. The University shall make a reasonable effort to locate appropriate alternate or equivalent employment for laid-off employees within the University and to make known the results of the efforts to the person affected.

UCF's answer denying the grievance pertaining to Article 13.3 reads:

The University has until the end of the Grievant's employment (May 7, 2010) to inform him of the outcome of its efforts to seek appropriate alternative or equivalent employment and a violation of Article 13.3 therefore cannot occur before that date.

The University's approach to locating appropriate alternate or equivalent employment is in accordance with Article 13.3.

The arbitrator will separately address the two-part UCF response to the grievance, beginning with the first.

The University's answer that a violation of Article 13.3 cannot occur before May 7, 2010 is not consistent with this arbitrator's determination of the intent of the parties drawn from the language in the CBA. There is nothing in Article 13 which suspends an employee's right to file a grievance pursuant to the grievance procedure found in Article 20.8. It is this arbitrator's

strong belief that if the Union had agreed to suspend a bargaining member's right to file a grievance over any term in the contract, it would be included in the contract.

Furthermore, Article 20.8 provides that a grievance must be filed within thirty days of the "act or omission giving rise thereto." If an employee believes that the University is not making a reasonable effort to locate appropriate alternative employment, not making known to him the results of any such effort, or not providing him with recall rights, he must file a grievance within thirty days of that omission or otherwise be time barred from later doing so. Under the University's theory that he can only file after the layoff period is over, the employee would only be able to challenge the University's failure to make reasonable effort for the last thirty days of his notice of layoff work.

In response to which, it is predictable that the University would maintain that since he is no longer on notice of layoff therefore his only option is to re-employment/recall, which is a much more narrow selection of employment opportunities.

The arbitrator determines that the University's answer that a violation cannot occur until the expiration of the layoff period is not correct. The Union has proven by the greater weight of the evidence that the University's answer that a violation cannot occur under Article 13.3 before the expiration of an employee's lay off period is a violation of the contract.

The arbitrator will next address the second response offered by the University, to wit:

The University's approach to locating appropriate alternate or equivalent employment is in accordance with Article 13.3.

This arbitrator understands how, from the University's point of view, the process Dr. Johnson developed makes sense. It is orderly, easy to understand, easy to explain, and no doubt saves much administrative time and money. The problem with it is that it is also a passive process and, as such, violates Article 13.3 of the contract which requires an active reasonable effort.

The arbitrator's examination of Article 13.3 reveals the intent of the parties was to assist a laid-off employees to find appropriate alternate or equivalent employment within the University, (and the to have recall rights during the period the employee is under a notification of layoff) before employment ceases. Good faith and fair dealing, as applied to Article 13.3, leads this arbitrator to the conclusion that it was the parties' intent by the language they used to make it the mandatory obligation of the University to make a reasonable effort to locate appropriate alternate or equivalent employment for laid-off employees within the University. Further, this arbitrator also concludes that it was the intent of the parties' language that if appropriate alternate or equivalent employment (which includes being qualified) for the Grievant was located, the employment would be offered to him. In addition, the intent of the language was for the University's effort to be a continuous process.

Each party to this CBA owes the other the duty of good faith and fair dealing. The obligation of good faith and fair dealing under the language of Article 13.3 means more than merely informing an employee who has received a notice of layoff to go to a website, locate his own potential job, apply for it, and, if first deemed qualified, the University would give him a "preference" which is to assure he would get an interview but with no assurance he would get the position. This process reverses the contractual roles of the parties and does not comply with Article 13.3.

In her post-hearing brief, council for UCF provided the arbitrator with dictionary definitions of the significant words in both Article 13.3 and 13.5 which are included below but with additional dictionary definitions of some words that were left out. To illustrate what the intent of the parties must have been with this contract section, the arbitrator has inserted those definitions into the language of Article 13.3.

“shall”—Verb, “will have to: must.” (Source: *Webster’s Ninth New College Dictionary*)

“Reasonable” – Adjective, “using or showing reason, or sound judgment; sensible” or “not extreme, immoderate, or excessive” (Source: *Webster’s New World College Dictionary, 4<sup>th</sup> Edition, 2002.*)

“Effort” – Noun, “conscious exertion of power: hard work:” (Source: *Webster’s Ninth New College Dictionary.*)

“Appropriate” – Adjective, “right for the purpose; suitable; fit; proper.”

“Equivalent” – Adjective, Equivalent means “equal in quality, value, force, meaning, etc.”

“Alternate” versus ‘similar’ –Adjective, “being one of two or more choices.” Similar means “nearly but not exactly the same or alike; having a resemblance.”

“Employment” and “position” –Noun. Employment and “position” –Nouns. Employment means “an employing or being employed” or “the thing at which one is employed; work; occupation; profession; job.” “Position” means “a post of employment; office; job” and is described as “appl[ying] to any specific employment for salary or wages, but often connotes white-collar or professional employment.”

“Locate” versus “offer” –Verbs, Locate means “to discover the position of after a search.” Offer means “to present for approval or acceptance; proffer; tender” or “to present for consideration; suggest; propose.”

The Article 13.3 language reads, (with words inserted):

“The University shall (must) make a reasonable (sensible) effort (hard work) to locate (to discover a position after a search) appropriate (suitable) alternate (being one of two or more) or equivalent (equal in quality) employment (work) for laid-off employees within the University and to make known the results of the effort to the person affected.

The Union has proven by the greater weight of the evidence, that the University has not fulfilled its contractual obligations to the Grievant. The posting of open positions on the website does not rise to its obligation to “make a reasonable effort to locate appropriate alternative or equivalent employment” nor does it comply with its obligation to “make known the results of its effort.” In fact, Article 13.4 already required the University to encourage employees to view the University Vacancy listings and instructions on how to use it. There was no “reasonable effort

made by the University to locate a position for the Grievant beyond what the University did for an outside applicant.

Accordingly, the grievance is sustained

**RETENTION OF JURISDICTION**

Because a remedy issue was not submitted to the arbitrator, the arbitrator will retain jurisdiction for 20 days in the event the parties mutually decide that they want this arbitrator to hear and decide a remedy. The parties are encouraged to meet and seek to agree upon a remedy

**AWARD**

In accordance with the foregoing opinion and for the reasons set forth therein, the grievance is sustained.

**June 22, 2010**

**Tampa, Florida**

**S/ Cary R. Singletary**

Cary R, Singletary  
Arbitrator