

In the Matter of Arbitration:

Tim Murphy,
Claimant,

v.

Central Oregon Intergovernmental Council
(COIC) and the City of Bend,
Respondents.

DSP Case No. 12-13c-04

Issued: August 6, 2014

FINAL DECISION

The Federal Transit Act (the Act) requires as a condition of federal financial assistance that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1). The Act specifically provides:

- Arrangements . . . shall include provisions that may be necessary for –
- (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
 - (B) the continuation of collective bargaining rights;
 - (C) the protection of individual employees against a worsening of their positions related to employment;
 - (D) assurances of employment to employees of acquired public transportation systems;
 - (E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and
 - (F) paid training or retraining programs.

49 U.S.C. § 5333(b)(2). These arrangements are commonly referred to as section 13(c) arrangements or agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307, as amended, 49 U.S.C. § 1609(c).

All section 13(c) arrangements include a procedure for final and binding resolution of disputes over the interpretation, application, and enforcement of the terms and conditions of the arrangement. This procedure, referred to as a “claim for employee protections,” may be utilized when an individual employee, a group of employees, or representative of a bargaining unit believes he or they have been negatively affected as the result of federal assistance. The outcome of the final and binding determination pursuant to a protective arrangement is enforceable in state court as a matter of contract law. *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982).

In this case, as described below, the Unified Protective Arrangement provides for final and binding arbitration of non-represented employees’ claims by the Department of Labor (Department).

ORIGIN OF THE CLAIM

This claim arises under the terms and conditions of the Unified Protective Arrangement, (UPA). The UPA has been certified by the Department as fair and equitable to protect the interests of employees and sufficient to meet the requirements of the Act, and has been made applicable to federal assistance provided to the Central Oregon Intergovernmental Council (COIC) and the City of Bend (City) since 2009.

The terms and conditions of the Department’s certification state:

4. Employees of mass transportation providers in the service area of the project who are not represented by a union designated above, shall be afforded substantially the same levels of protection as are afforded to the employees represented by the union(s) under the above referenced protective arrangements and this certification. Such protections include procedural rights and remedies as well as protections for individual employees affected by the project.

Should a dispute remain after exhausting any available remedies under the protective arrangements and absent mutual agreement to utilize any other final and binding procedure, any party to the dispute may submit the controversy to final and binding arbitration. ... If the employees are not represented by a union for purposes of collective bargaining, the Recipient or employee(s) may request the Secretary of Labor to designate a neutral third party or appoint a staff member to serve as arbitrator and render a final and binding determination of the dispute.

Claimant Tim Murphy was a non-represented employee of Paratransit Services (Paratransit), a contractor charged with operating the Bend Area Transit (BAT) for Cascades East Transit (CET), transit operations for COIC, at the time his claim arose. As a non-represented employee, Murphy is entitled to substantially the same levels of protections as bargaining unit employees. Murphy and COIC made attempts to resolve this claim but were unsuccessful. Murphy thus appeals to the Department to make a final and binding determination.

CLAIMANT'S POSITION

Murphy alleges that on January 31, 2012, his position as Operations Supervisor for Paratransit was eliminated *in response to a reduction in funding*, including federal funding¹ for BAT's Dial-A-Ride (DAR) service, and COIC's renegotiation of the contract with Paratransit that significantly reduced the level of services Paratransit had provided under its contract with the City. Murphy contends that Paratransit's new contract with COIC called for CET to take all dispatch, customer service, and bus washing positions in house, including offering all such represented employees employment with CET. Only represented drivers remained with Paratransit. Further, Paratransit eliminated two management positions, including Murphy's. Murphy cites to the following federal grants as related to his claim: OR-37-X019, a grant for operating assistance and administrative costs for the Oregon Department of Transportation with the City, COIC, and other as subrecipients, certification dated 12/23/10; OR-90-X146 a grant for operating assistance to the City, certification dated 12/15/11; OR-90-X160, a grant for operating assistance to COIC, certification dated 3/6/12. Murphy seeks the protective benefits under the Act, including the dismissal allowance.

CITY'S POSITION

The City acknowledges that it formerly operated BAT but asserts that on September 1, 2010, it entered into a contract with COIC whereby it transferred all responsibility for BAT operations to COIC; assigned all grant funds for BAT to COIC; and assigned the existing contract with Paratransit to COIC. Under the contract, COIC assumed all of the City's obligations to comply with grant requirements and the contract with Paratransit. The City also notes that the grants cited by Murphy arose after the effective date of the City and COIC's contract. The City, therefore, denies any 13(c) obligations in this matter.

COIC'S POSITION

COIC asserts that Murphy is not entitled to 13(c) protections because he was not an employee of COIC, and not a member of a bargaining unit or covered by a collective bargaining agreement. In addition, COIC states that Murphy was in a top level management position and thus not an "intended beneficiary" of the Act. COIC denies that the termination of Murphy's position was the "result of the Project," but rather was the result of an unrelated economy and efficiency that is outside the scope of the UPA. According to COIC, BAT funding reductions were entirely due to a decrease in City and other local funds. Prior to COIC's assumption of BAT from the City in 2010, the City funded BAT operation in the amount of \$1,375,000 in 2008-2009. The City's financial support for BAT was reduced to \$1,100,000 in 2009-2010, and then to \$1,000,000 in 2010-2011. Pursuant to COIC's 2010 contract with the City, the City's support for BAT was to remain at \$1,000,000 for the next five years. However, with regard to federal funds, COIC states it received essentially the same amount of federal funds as it had in previous years: \$704,091 in fiscal year (FY) 2010-11; \$705,913 in FY 2011-12; and \$707,376 in

¹ Murphy specifically cites to a lack of Jobs Access Reverse Commute (JARC) funds.

FY 2012-13. Further, COIC states that JARC funds have no connection to BAT DAR because those funds are not used to fund BAT DAR. Moreover, COIC states, contrary to Murphy's allegations, there was only a \$22,000 reduction in JARC funds for 2011-2013. COIC states the local funding reduction caused it to bring certain BAT functions and all represented employees in those performing those functions in house, to CET, "to achieve economies and efficiencies," which then affected COIC's contract with Paratransit and ultimately resulted in Paratransit's elimination of Murphy's position.² Finally, COIC asserts that Murphy failed to apply for positions with COIC after his termination rendering him ineligible for 13(c) benefits.

DISCUSSION

A. Murphy is Entitled to the Act's Protections

The terms and conditions of the Department's certification (*supra*) provide that Murphy, as a non-represented employee of a COIC contractor, is entitled to substantially the same levels of protections as bargaining unit employees. COIC, as a recipient of federal funds, is responsible for providing those protections. See *Haddad v. Worcester Regional Transit Authority*, DEP Case No. 43 (Digest A-196). Moreover, due to its contract with the City, COIC is also responsible for the protections under the successor and assign provisions of Paragraph 21 of the UPA which explicitly states:

This arrangement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of the arrangements made by or for the Recipient to manage and operate the system.

Any person, enterprise, body, or agency, whether publicly or privately owned, which shall undertake the management, provision and/or operation of the Project services or the Recipient's transit system, or any part or portion thereof, under contractual arrangements of any form with the Recipient, its successors or assigns, shall agree to be bound by the terms of this arrangement and accept the responsibility with the Recipient for full performance of these conditions. As a condition precedent to any such contractual arrangements, the Recipient shall require such person, enterprise, body or agency to so agree in writing. (emphasis added).

In addition, Murphy's position as Operation Supervisor does not place him outside the protections of the Act. While certain top level managers fall outside the Act's protections, decisions as to whether a particular individual qualifies as an "employee" within the meaning of the Act must be based on the actual functions the individual performs. *King v. Connecticut Transit Management, Inc.*, DEP Case No. 78-13c-1 (Digest A-66)(discussion and history of who is considered an employee under the Act). In such a review, attention is focused on the extent to

² Minutes from a COIC February 12, 2012 Board meeting, submitted by Murphy, show that CET had to make service reductions in all areas except Bend, and noted the "challenge" in securing a local match for grants.

which the employee has an impact on management policy and whether the employee exercises independent judgment and discretion of the type generally associated with top level management. *Id.* at A-69. Here, nothing in the job description COIC provided shows that Murphy exercised such authority. See *Giampaoli v. San Mateo County Transit District*, DEP Case No. 77-13c-30 (Digest A-172 & 177)(Transit Supervisor who supervised 70 employees and had hiring and firing authority was an “employee” entitled to protections of the Act). Further, any failure on Murphy’s part to apply for a job with COIC does not render him ineligible for protections under the Act. Therefore, Murphy is a covered employee under the Act. However, as shown below, Murphy has failed to show that his termination was a result of a federally funded project.

B. Murphy’s Layoff Was Not the “Result of a Project.”

The UPA provides protections for dismissed employees. Paragraph(7)(a) states:

Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to his/her employment, the employee shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph.

Murphy seeks this protection and benefit. However, in order to be eligible for it, Murphy must show that his termination was the result of a project receiving federal assistance.³ Under the UPA, paragraph 15, the employee claiming that he was affected by the Project has the obligation to “identify the Project and specify the pertinent facts of the Project relied upon.” It is then the Recipient’s burden to prove that factors other than the Project affected the employee. Under the UPA, the claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee.

Paragraph1 defines the term “Project” stating in part:

The term "Project," as used herein, shall not be limited to the particular facility, service, or operation assisted by Federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided. The phrase "as a result of the Project," shall, when used in this arrangement, include events related to the Project occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about solely by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this arrangement. (emphasis added)

³ UPA, ¶18, also provides that dismissed employees “shall, if the employee so requests, in writing, be granted priority of employment” during the employee's protective period.

An employee covered by this arrangement, who is not dismissed, displaced or otherwise worsened in his/her position with regard to employment as a result of the Project, but who is dismissed, displaced or otherwise worsened solely because of the total or partial termination of the Project or exhaustion of Project funding shall not be deemed eligible for a dismissal or displacement allowance within the meaning of paragraphs (6) and (7) of this arrangement. (emphasis added).

As set forth above, a claim based on an adverse effect as a “result of a project” must be linked to the federal assistance provided. In addition, any worsening “solely” caused by “the total or partial termination of the Project or exhaustion of Project funding” does not entitle an employee to benefits. Here, the only causal connection Murphy has alleged is a lack of local funding to support the same level of services Paratransit provided under its prior contract with the City. This is not sufficient to give rise to a claim under the Act or applicable UPA provisions. See *Clark v. Crawford Area Transportation Authority*, OSP Case No. 94-18-19 (Digest A-455)(to apply protections there must be some connection between the federal assistance and the harm). Even though COIC denies any federal funding shortfalls, Murphy has not pointed to any other link between federal assistance and his termination. Accordingly, Murphy has not established that his termination was the “result of a project.” Therefore, the claim is denied.

C. City of Bend

Based on the above denial and because a claim against the City would also have to be “as a result of a project,” we do not need to address the issue of whether the City is a proper party to this claim.

DETERMINATION

The evidence does not support a finding that Murphy suffered a worsening of position related to employment as a result of a project. 49 U.S.C. § 5333(b)(2)(C).

Therefore, the claim is denied.

This decision is final and binding.

Date _____

Michael J. Hayes
Director, Office of Labor-Management Standards