IN THE MATTER OF ARBITRATION

Before Jeanne Charles, Esq., Arbitrator

Between

HES FACILITIES MANAGEMENT,
Employer,

and

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, FLORIDA, COUNCIL 79, AFL-CIO
Union.

______________________________________/

FMCS Case No.: 210903-09755
Issues: Seniority/Successorship

UNION'S POST-HEARING BRIEF[1]

INDEX

Authorities

Court Cases

1. *Allied Chem. & Akali Wrkrs. Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971)

2. *American Federation of State, County and Municipal Employees, Local 1184 v. Miami-Dade County Public Sch.,* 95 So.3d 388 (Fla. 3rd DCA 2012)

Arbitration Cases

1. *Advanced Graphite Materials,* 2021 BNA LA 229 (Franckiewicz, 2021)

2. *Carrolton Bd. Of Ed.,* 126 BNA LA 783 (Allen, 2009)

3. *City of Maron, Ohio,* 91 LA 175 (Bettel, 1988)

4. *Fire Fighters (IAFF)*, 112 LA 663 (Lubic, 1999)

[1] The hearing was heard over three days. My references to the transcript will identify the page number, line number, and day of the hearing. (ex. Tr. 25;32-34 Day 1)

5. *John Deere Tractor Co.,* 5 BNA LA 631 (Updegraff, 1946)

6. *State of Florida (Department of Health) And LaTonya Polite (AFSCME Florida Council 79),* Case No.: 17-36739 (Charles 2018)

7. *State of Florida (Department of Corrections) and Charlie Burnett (AFSCME Florida Council 79), Case Nos: 19-39342; 19-39674 & 19-39675* (Charles 2020)

8. *South Peninsula Hospital,* 133 BNA LA 1003 (Landau, 2014)

9. *Transit Mgt.,* 2019 BNA LA 107 (Zack, 2019)

10. *Universal Mack Sales & Svc.,* 87 BNA LA 391 (Chance, 1986)

11. *Varied Prods. Of Ind*., 95 LA 1264, 1269-70 (Witney, 1990)

Secondary Sources

1. "*How Arbitration Works*" Elkouri & Elkouri, (online 2020) - *Farnsworth, Contracts* §§7.2, 7.3 (3rd, 1999)

2. "*How Arbitration Works", Interpreting Contract Language* Elkouri & Elkouri, (online 2020)

Attachments

A – *"The Most Common Procurement Fraud Schemes And Their Primary Red Flags"*

B – Wikipedia "You Can't Have Your Cake And Eat It"

I. ISSUES[2]

AFSCME presented the issues as follows:

Is the Company, HES Facilities Management in violation of the Collective Bargaining Agreement between GCA/ABM (hereinafter "GCA" or "Predecessor Contractor")and AFSCME Florida Council 79 when they:

> (1) placed the bargaining unit employees employed by the predecessor contractor (GCA) on a ninety (90) day new hire probationary period;
>
> (2) abolished the bargaining unit employees employed by the predecessor contractor hire dates with the two predecessor contractors GCA and ABM for certain benefits;
>
> (3) denied the bargaining unit employees employed by the predecessor contractor insurance, vacation, sick leave, and other benefits in the first ninety days of HES assuming the Duval County School Board (DCSB) Service contract ; and
>
> (4) denied the bargaining unit employees employed by the predecessor contractor accrued vacation, sick leave and other accrued benefits and CBA entitlements which they previously held with GCA/ABM

and if so, what are the appropriate remedies?

II. ARGUMENT

A. The Traditional Norms of Contract Interpretation

This arbitrator has historically held that the key to the resolution of any dispute interpreting contract language is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, an arbitrator will first examine the language used by the parties. If the language is ambiguous, an arbitrator will assess comments made when the bargain was reached,

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[2] AFSCME Argues that many of the violations are a continuing violation.

assuming there is evidence on the subject. However, if the language is clear, there is no need to resort to rules of contract interpretation. *State of Florida (Department of Health) And LaTonya Polite (AFSCME Florida Council 79),* Case No.: 17-36739, pgs. 7-8 (Charles 2018); *State of Florida (Department of Corrections) and Charlie Burnett (AFSCME Florida Council 79), Case Nos: 19-39342; 19-39674; & 19-39675, Pg. 8* (Charles 2020). This arbitrator also held "Where the language is ambiguous, rules of contract interpretation must be applied. Rules to aid in the interpretation of contract language include giving words their normal or technical meaning; custom and practice of the parties; giving effect to all clauses and words; avoidance of harsh, absurd, or nonsensical results; public policy; reason and equity; and duty of good faith and fair dealing, among others." *Id. at pgs. 9&10.*

Arbitrators decide as best possible to render decisions which are reasonable and equitable where one party does not receive an unfair and unreasonable advantage over the other. *Varied Prods. Of Ind.*, 95 LA 1264, 1269-70 (Witney, 1990). Arbitrators are also inclined historically to adopt interpretations which will prevent forfeitures. *City of Maron, Ohio,* 91 LA 175 (Bettel, 1988). In instances where it appears to be a possible interpretation different from the Union's interpretation of the CBA, the "Scales of Justice" supports choosing an interpretation that would give effect to the entire CBA. *Fire Fighters (IAFF)*, 112 LA 663 (Lubic, 1999). Arbitrators, as far back as 1946 hold to the determination that any interpretation of a CBA which nullifies or would render meaningless any part of the CBA should not be chosen over an interpretation which gives meaning and effect to other provisions. *John Deere Tractor Co.,* 5 LA 631, 632 (Updegraff, 1946). The ordinary meaning of a term is the best evidence of the party's intent. "*How Arbitration Works*" Elkouri & Elkouri, (online 2020) - *Farnsworth, Contracts* §§7.2, 7.3 (3rd, 1999)

B. The Arbitrator can Draw from the Essence of the CBA that AFSCME's Position does not Contradict the CBA, While the Company's Position Does

Under the plain meaning rule, whether a contract is ambiguous "must be determined from the 'four corners of the instrument' without resort to extrinsic evidence of any kind." " *How Arbitration Works," Interpreting Contract Language* Elkouri & Elkouri, (online 2020)

i. AFSCME's Position

HES' Past Practice Argument

The Company argument that a past practice existed with respect to stripping employees of their hire dates is without merit. First, a practice must exist between two parties; HES and AFSCME have no prior CBA or working history. HES has not shown where AFSCME consented to any stripping employees of their hire dates. The company position lacks mutuality and joint understanding. *Transit Mgt.,* 2019 BNA LA 107 at pg. 5 (Zack, 2019). It appears in the year 2007 that GCA misled its employees into believing their Aramark time was still being used. *Tr. 153 – 157- Day 1.* Testimony of Mrs. Patterson was that she was not sure that she was placed on a new hire probationary period when GCA took over the DCSB contract from Aramark. *Tr. 157:1 – 17 – Day 1.*

In the past, during GCA time on the DCSB service contract in the year 2017, AFSCME became aware of a pay issue which stemmed back to 2007. AFSCME filed a grievance challenging that continuous violation. *Un. Reb. Ex. 7.* We became aware of the violation in the year 2017 during bargaining. We made proposals in an effort to resolve the outstanding issue, but GCA rejected our wage proposals during bargaining which would have settled the grievance. *Un. Reb. Exs. 3, 4, & 5.* The issue involved in that grievance was that GCA was improperly applying language in the CBA to support its position that the starting rates for Custodians was $8.45 hr. and had been so since the year 2006. GCA argued the grievance was untimely, but AFSCME prevailed in the grievance. HES' never informing AFSCME in advance of its position in defining District seniority is like the GCA wage issue that stemmed back to 2007; had GCA informed us of the wage discrepancies we would have filed it back in

2007. Union Rebuttal Exhibit 7 shows we are willing to challenge a violation of the CBA when we become aware. When ABM took over GCA operations, there was no issue with the successorship language, nor hire dates.

Union Rebuttal Exhibit 7 is the grievance which AFSCME prevailed where the arbitrator addressed the timeliness issue. Here AFSCME discovered in the year 2017, that there was a violation of the CBA which occurred back around 2006. The arbitrator found in favor of AFSCME and allowed the grievance to he heard on its merits. Union Rebuttal Exhibit 8 is the substantive hearing where the issue of wages was heard because GCA was not paying the proper starting rate for its employees. Both, Union Rebuttal Exhibit 7 and 8 are the grievances which Mr. Whitaker mistook for another arbitration hearing. Union Rebuttal Exhibit 9 follows Rebuttal Exhibits 7 & 8. Union Rebuttal Exhibit 10 is AFSCME's Petition to the Court to enforce the Arbitrator's award. Union Rebuttal Exhibit 11 is GCA's response to our Petition. Union Rebuttal Exhibit 12 is the Court's Report and Recommendation. All of Union Rebuttal Exhibits 7 – 12 rebut Mr. Whitaker's testimony about the nature of the arbitration. Mr. Whitaker had his arbitration confused. He referred to the Arbitrator Plant grievance (Union Exhibit 11) when he was intending to refer to the Arbitrator John Lee hearing.

When HES assumed control of the DCSB service contract, it became a party to the then CBA in effect, and thereby assumed responsibility of conducting all the benefits of the CBA. The crucial role of recognizing the GCA/AFSCME collective bargaining agreement is that HES must fulfill that role in the context of the understandings of GCA and AFSCME and not merely abide by the language. In considering successorships, the new company is obligated to interpret and apply the contract terms in the context of what the negotiating parties had understood it to be. *Transit Mgt., at pg. 7.* HES cannot show where AFSCME ever accepted the stripping of employee's hire dates. *Id. at pg. 8 & 9.* A Union can sit on their rights to file a grievance and that will not constitute a past practice either. It would be absurd to

think that AFSCME knew employees lost their seniority hire dates and never attempted to change that language in the CBA in subsequent negotiation years. The GCA/AFSCME agreement has a wage reopener and two articles reopener every year of the agreement. For a practice to be binding, it must be shown to have been applied consistently in comparable situations. *Advanced Graphite Materials,* 2021 BNA LA 229 at pg. 19 (Franckiewicz, 2021). A single instance does not amount to a past practice, *Id.* at pg. 22.

None of the company witnesses could produce evidence that they participated in day-to-day collective bargaining process, neither are any of their names included as signatories to the GCA CBA. *Tr. 237:19-23 Day 2.* Ironically, Mr. Decker indicated that he compared the current CBA with the 2007 CBA which was in effect during the time he was employed with GCA. *Tr. 238:2-4 Day 2,* but the Company never introduced this CBA into evidence. All their testimony in this area is inadmissible hearsay. They also cannot speak on any practices after they left GCA. *Tr.238:7-10.*

Contrary to the Company's position that if the GCA employees lost their seniority hire dates back in 2007 when GCA assumed the service contract from Aramark, this is not a past practice. *Tr. 133:17-21 – Day 1.* Company witness Phillip Gilbert testified that if the union failed to file a grievance on a matter and it reoccurred, the Union has a right to file a grievance on the matter if it is a new issue. *Tr. 156:16-157:7 Day 2.* The Company's interpretation and definition of "past practice" is not the true definition of what constitutes a past practice under a collective bargaining agreement. HES is considering a past practice period for which they were not the contractor for the DCSB. *Tr. 122:25-123:18 Day 2.* Testimony of Supervisor Lakisha Boyd was that she was a Custodian back when she lost her hire date to GCA after Aramark (in 2007) lost the DCSB service contract. Ms. Boyd also testified that she was a bargaining unit employee during that time and that she was unaware that she could have filed a grievance

challenging that action, and that if she had known, she would have filed a grievance on that action. *Tr.19:15-20:2 Day 3.*

Testimony of Mr. Steve Gritzuk was that he has no knowledge of the practices and issues which took place between GCA and AFSCME from the year 2015 until the time GCA left the DCSB service contract. *Tr. 196: 19-23 Day 2.* Mr. Gritzuk testified on cross contradictory that he is familiar with the GCA CBA processes because they are extremely like the time when he was working for GCA and not shortly after that, he testified that he is unsure if the intent and purposes of the language have changed due to arbitral precedent of which he is unaware. *Tr. 197:15-21 Day 2; Tr. 198:17-21 Day 2; Tr. 200:3-5 Day 2.*

The AFSCME-Represented Employees Loss of CBA Benefits Due to Being Placed on an Improper Probation.

Mr. Cross filed the grievance after becoming aware that employees were not paid for their holiday. *Un. Ex. 1, 2, & 3; Tr. 45:2-10-Day 1.* HES stripped the employees of their vacations. *Tr. 81:3-13-Day 1* and their hire dates with GCA/ABM. *Tr. 82:14 – 17-Day 1.* Although the Company denied employee Ms. Lanell Oldham Funeral Leave because she was stripped of her GCA/ABM hire date and now considered a probationary employee, she was nevertheless still entitled to Funeral Leave per the CBA. *Tr. 61:14 – 62:9 – Day 1.* Mr. Gilbert's and Whitaker's testimony was that the CBA does not prohibit a probationary employee from being paid Funeral Leave. *Tr. 107:8-14 Day 2: Tr. 124:24-125:7 Day 3.* In Union Exhibit 5, Company witness Lacey Henderson denied Ms. Oldham Funeral Leave because she was on probation, but she testified that the GCA employees should have never been denied Funeral Leave during a probationary period implemented by HES. *Tr. 63:24 – 64:3 Day 3; Tr. 64:21-25 Day 3.*

HES denied the employees the right to pay Union dues claiming the employees were on probation. The CBA does not prohibit probationary employees from paying membership dues. *Tr. 66:13 – 25-Day 1; Tr. 67:19-23-Day 1; Co. Ex. 1 –Article 5, pgs. 13 – 15.* Ironically, HES began deducting dues in September, 2021 although its position was the employees were on probation until October 1, 2021. *Un. Ex. 6.*

HES' Argument that AFSCME is Limited To The Articles Listed in The Grievance

The Company argued that AFSCME should be limited to the articles it stated in the grievance, yet they never gave a full explanation of their reasons for denying the grievance. They gave an extremely limited reason *(Tr. 45: 11-14 – Day 1)* and in the arbitration hearing they gave a more in-depth argument. The company is arguing against itself because they failed to provide all their reasons for denying the grievance. *Un. Ex. 1, pg. 2.* We explained our position during the hearing and that the other articles violated all hinge on the company's stripping the employees of their seniority hire dates.

The denial of the employees their original hire date spawned violations throughout the CBA. The premise of the grievance involved the stripping of the GCA hire dates, all other violations of the CBA flowed from that violation of Article 7 as Mr. Cross listed in his grievance. Mr. Cross also used the term "and other articles which may apply." Mr. Cross also listed several articles which stem from the grievance. Ironically, HES would not give AFSCME any reasons why they denied the grievance, but during the hearing gave all their reasons why they feel the grievance should be denied. *Un. Ex. 1, Pg. 2.*

Article 7 of the CBA speaks of probationary period and the eligibility for benefits. *Co. Ex. 1 – Article 7 & Tr. 88:13-20 Day 2.* The Company agrees that the nature of the grievance extends to the denial of benefits also. *Tr. 88:21 – 90:23 Day 2.* All the Company's grievance response gave was a blanket statement of denial "After further review of all the information the grievance is denied." Yet during the arbitration hearing, Mr. Gilbert argues against their position by stating that during Step three

grievance meetings and in arbitration hearings, you want to make sure you are putting everything forward. *Tr. 84:20-25 Day 2.* Ironically, Mr. Gilbert then agrees that the grievance is written to point to other affected areas of the CBA by its use of "and other contractual benefits." *Tr.87:16 – 88:12 Day 2.* The grievance lists articles which were violated and included others which also are violated that may not be in the Union's knowledge at the time of the filing of the grievance. Once a grievance is filed AFSCME then begins its investigation of the grievance and often during the investigation stages of the grievance, additional violations are found. AFSCME cannot grieve violations of the CBA which we are not aware of at the time of filing a grievance, but to preserve our right to include additional violations, we use the phrase "and others which apply.

HES is a Successor Employer Subject to Article 30

Contrary to HES's position that they are not a successor employer, they are a Successor contractor; they took over the current inventory of GCA when they began operations on the DCSB service contract. *Un. Reb. Ex. 13; Tr. 168:8-169:4 Day 3.* GCA is the Predecessor Contractor. *Tr. 48:11-14 – Day 2.* HES did not purchase any new buildings but maintained the current buildings GCA/ABM had. *Tr. 207:11-208:1 Day 2.* They also did not purchase any new furniture or vehicles to operate on the DCSB contract, nor did they provide evidence to rebut the testimony of Mr. Cross in this area. *Tr. 141-143 – Day 1.* HES employees are using equipment which they used while working for GCA. *Un. Reb. Ex. 13: Tr. 185:20-25.* The employees did not require any training or on-the-job training as a new hire employee would require. *Tr.151:1-4 – Day 1.* The GCA/ABM employees would have no need to be placed on probation because they have been performing the work for decades, prior to HES formation as a corporation. Probationary periods are for new employees to be observed to determine if the employer should keep them. In this instance, HES was required to hire all employees and accept the CBA. Mr.

Gilbert testified that the CBA does not give a definition of who is considered a "new employee." *Tr. 130:2-11 Day 2.*

The GCA/ABM employees were not moved by HES from the schools they worked while working under GCA/ABM. *Tr. 151:5-7 – Day 1.* The employees were never informed by HES that they were on a new hire probationary period. *Tr. 152:5-8 – Day 1.* Other than a Company name change, the employees continued to work as they did with GCA with no change in the working conditions. *Tr. 151:12-15 – Day 1; Tr. 151:16 - 18.* There was no change in first and second level management. *Tr. 151:19 – 25 - Day 1.* Although HES considered the employees as probationary employees, none of the employees required being evaluated nor did management have to provide any on-the-job training. *Tr. 151:8-11 – Day 1; Tr. 152:1 – 4- Day 1.* Management never informed the employees whether they successful or unsuccessfully completed their probationary period. *Tr. 152:9 – 12-Day 1.* Mrs. Patterson testified uncontroverted that HES did not require drug testing, interviews, and background checks for the GCA/ABM employees. *Tr. 157:18-23- Day 1.* Yet, HES is required to perform background checks on all its employees pursuant to the Jessica Lunsford screening requirements. HES employment advertisement prior to assuming the DCSB service contract refers to a mandatory background check/screening requirements pursuant to the Jessica Lunsford screening requirements. *Un Ex. 7, pg. 5.* According to the CBA, drug testing, background checks, fingerprinting, and other screenings would be provided at no cost to non-probationary employees. *Co. Ex. 1 – Article 9, pg. 25.* HES did not require the GCA/ABM employees to pay for any of these processes. *Tr. 157:18-23- Day 1.* HES is aware that the GCA/ABM employees were not new hire/probationary employees when they (HES) transitioned into the DCSB service contract, in fact, they consider the GCA/ABM employees as "Grandfathered" Employees. *Un. Reb. Ex. 1; Tr. 57:3-9 – Day 2.* The CBA also mentions "Predecessor Employer" in the Wage Article, meaning any employer after the predecessor must be a successor employer according to the CBA.

HES presented no evidence to support its position in company policy to support stripping the employees of their GCA/ABM hire dates, nor does it handbook mention successor employees or that a successor employee is considered a new hire. *Co. Ex 3; Tr. 90:7-14-Day 1; Tr. 18:22-19:2 Day 3.* In fact, the DCSB interprets Article 30 Successorship as the Union presents it. The DCPS informed HES representatives during the bidding process of their obligation of successorship during the service contract talks with bidders. *Co. Ex. 11, pg.475, #55.* HES also during this same meeting with DCSB and other bidders asked for a roster of ABM employees wage/pay rates, benefits, etc. *Co. Ex. 11, pg.476, #59.* This further supports the Union's position that HES was aware of its obligation to honor the CBA entirely which included wages and benefits. HES would have no need to request benefit levels of the GCA employees if they were truly intending them to be new hires which would have them ineligible for benefits according to their position. The DCSB provided all bidders with the GCA employees' wages and <u>benefits accruals</u>. Bidder 3H Systems asked questions of the DCSB during the bidders meeting and the DCSB replied on at least two occasions to the bidders that the DCSB provided all bidders with a list of GCA employees' wages and <u>benefit calculations.</u> *Co. Ex. 11, pg.463, #6 & 7.* There is no doubt that not only did AFSCME and the CBA dictate that benefit accruals should have carried over from one contractor to the HES, but the DCSB made this clear to all bidders of this same obligation. *Co. Ex. 11, pg.505 (C).* The use of the term "Otherwise" in Article 30 supports our position that with the changing of employers on the DCSB service contract, the successor article applies to those change of controls on the DCSB service contract. HES attempted to argue away the Union's use and intent of the use of the term, but they were not a party to any of the negotiations which led to the drafting of the article. *Tr. 67:10-13 Day 2; 265:4-266:1 Day 2; Tr. 266:15-24 Day 2.* HES produced no evidence to support the word "otherwise" does not apply to changes of contractors. The intent of the Successor language is designed to protect the employees and the CBA in the event of change of a company. The use of

"otherwise" leaves open protection for any other unidentified way a company change occurs on the DCSB service contract.

Company witness Bernie Decker testified the words "otherwise" as used in the Successorship article refers to a change of control and some other method other than what is listed in the CBA specifically. *Tr. 241:22-25 Day 2.* Mr. Cross testified to the word "otherwise" to reference the Change in control of the DCSB service contract between contractors, which Company witness Mr. Gritzuk also states other methods of change of control can be define as "otherwise." Mr. Decker acknowledge through further testimony that there was a change in control on the DCSB service contract between GCA and HES. *Tr. 242:18-25 Day 2.*

The CBA does not Permit Seniority Employees to be Placed on a Second Probation

Article 7 of the CBA does not give the successor employer the right to place the successor employees on probation. *Co. Ex. 1 – Article 7; Tr.48:3-9 – Day 1; Tr. 55:19 – 23-Day 1.* In fact, the CBA does not permit the Employer to place any employee on a second initial-hire probationary period. *Co. Ex. 1 – Article 7, pg. 18.; Tr. 89:17-22-Day 1; Tr. 106:23-107:16- Day 1.* Probationary period is used to determine eligibility for benefits. *Co. Ex. 1 – Article 7, pg. 18.* Once an employee is eligible for benefits, he/she remains eligible. The GCA/ABM employees already had benefits prior to HES assuming the CBA, and therefore no determination needed to be made on eligibility for benefits for this group of employees. The Successor language intent is to preserve the employee's seniority and existing benefits along with securing their CBA in effect.

The former GCA/ABM employees were not new hires, they are successor employees. *Tr. 48:18-20 – Day 1.* On cross, Mr. Cross testified that the CBA does not state the employer cannot place employees on a second probation, which further supports that the company cannot place seniority employees on a second new hire probationary period. *Co. Ex. 1 – Article 7, pg. 18; Tr.107:11 – 20 – Day*

1. Despite being on the alleged probation, the GCA employees should have received their longevity pay accrued from GCA. *Tr. 55:10-18 – Day 2.* Company witness Matthew Johns agrees with our position. *Tr. 146:3-16 Day 3.* According to Mr. Decker, HES is not honoring the GCA hire dates because he believes HES has no obligation to do so and the obvious language of the CBA says they do not have to. *Tr. 247:18- 248:18 Day 2.* Mr. Decker failed to acknowledge at minimum the language in the wage article regarding Longevity pay. *Co. Ex. 1 – Pg. 41.* Mr. Decker testified further on cross that longevity pay is GCA's obligation and not HES' and that GCA is liable for longevity pay. *Tr. 251:17 – 253:1 Day 2.* Mr. Decker then testifies contradictory that he does not believe Aramark should be liable in the GCA contract for certain actions regarding hire dates and their stripping of dates. *Tr. 256:3-7 Day 2.* Despite Company Exhibit 14 that mentions GCA has no independent knowledge of HES hiring plans for the employees and that GCA cannot guarantee employment with HES to any of its employees, Mr. Decker still believes that GCA should be liable for Longevity pay. *Co. Ex. 14; Co. Ex. 15; Tr. 254:4-255:11 Day 2.* Company witness Jason Whitaker gave extensive testimony on the Longevity pay and his familiarity with GCA in the CBA between GCA and AFSCME and its application. *Tr. 86:6-87:10 Day 3.* Here we have two HES management employees (Decker and Whitaker) saying conflicting testimony regarding the Longevity pay; Mr. Decker believes GCA should be liable for paying longevity bonuses, even though they are no longer the contractor, which means as long as the language in the CBA exist for longevity pay, Mr. Decker believes GCA should be liable forever whether they are the contractor or not. Mr. Whitaker also a former GCA Manager oversaw the longevity payments during his tenure with GCA, but somehow has not informed his new employer of their obligation to pay longevity pay. Mr. Whitaker also believes, despite the plain language of the CBA that the GCA employees are not entitled to longevity pay. *Tr. 118:6-17 Day 3.*

HES Denied Two Pay Increases to the Employees

The Company owes the bargaining unit employees all the Pass-along pay increases; it denied the employees when they transitioned onto the DCSB service contract. The CBA addresses the pass-along and does not state that the pass along increases cannot be given to the bargaining unit employees. *Co. Ex. 1 – Article 18, pg. 42; Tr. 135:17-136:10.* This includes probationary employees also. *Un. Ex. 11 – Arbitrator Plant's Award, pg. 43.* Even applying the Company's position that the GCA/ABM employees are new hires subject to probation, they are still entitled to the pass along pay increases negotiated between the Duval County School Board and AFSCME because they were all employed on June 30, 2022 on the DCSB service contract. Company witness Supervisor Lakisha Boyd was a bargaining unit employee when this grievance settlement was paid out and she remembers receiving a pay increase because of this grievance filed against GCA. *Un. Reb. Ex 7; Tr. 25:16-26:3*

The GCA/ABM employees lost two pay raises because HES placed them on probation. *Tr. 73:16-19-Day 1.* It is unimaginable why HES would not pay the employees the two pay increases they are entitled to because the DCSB would reimburse them for doing so. Mr. Cross elaborated and explained to Company counsel in detail how the HES employees were entitled to the pay increases. *Tr. 173 – 174.* Mr. Cross stated that if in fact the DCSB informed HES not to pay the increases, then that is not HES fault. *Tr. 177.* However, the DCSB never indicated to AFSCME that it was not paying this negotiated increase to the HES employees and in the DCSB service contract with HES, it makes it clear that these negotiated increases will be paid and reimbursed. *Co. Ex. 11, pg. 505, Section D. (The Contractor shall match any raise percentage negotiated by the district and the district custodial employees via the CBA. The Contractor shall be compensated for the wage increase and/or bonus payments for qualifying, current employees.)* That language does not in any way imply the District will not reimburse HES, it says the DCSB <u>shall</u> compensate HES. If the DCSB failed to reimburse HES for any negotiated pass-along wage increases, HES would have a contractual action of some sort of Breach or otherwise, against the

DCSB. AFSCME and the DCSB negotiate the Pass-along wages in their CBA. *Un. Ex. 12, pg. 54, Section A.*

There is a process in place where HES could request a change in pricing if an error were found. *Tr. 132:1-6 Day 2.* In other words, HES can go back to the District and be reimbursed for any violations of the CBA it made an error with. He also acknowledges that any wage increases passed along to HES are those negotiated by AFSCME and the DCSB. *Tr. 147:22-25 Day 2.* The intent of the language is clear that it refers to the HES employees because DCSB no longer hires employees directly, all newly hired custodians are hired by HES and work for HES. All employees currently employed with the DCSB have worked for the DCSB at least fifteen (15) years and therefore there would be no need to use the June 30, 2021 eligibility date for that group of employees. This June 30, 2021 eligibility date is there and negotiated between DCSB and AFSCME to determine the cutoff date for eligible contractor (HES) employees who are eligible to receive the pass along wage increase for that fiscal year. To ensure further the distinction, AFSCME and the DCSB included a sentence in section A into the CBA that distinguished the supplemental pays addressed in the article; that they applied only to the DCSB employees only. *Co. Ex. 16.* Mr. Thomas Cross gave testimony on company exhibit 16 language does refer to the HES unit. *Tr. 164-165.*

Although HES considered the GCA employees new hires and the CBA has starting rates of pay for new hires, GCA paid the GCA employees their current rates of pay they held with GCA; they considered the employees new hires but paid them at the rate of pay from the predecessor contractor (GCA). *Tr. 57:18 – 58:4 – Day 2.* Assuming for the sake of argument here HES position that the employees were new hires and that they followed the dictates of the CBA, by HES allowing the employees to keep their pay rates form the predecessor contractor, they acquiesced their position and argument in this hearing when they state that they followed the agreement but paid the GCA higher pay

rates which is not the starting rates. HES started all employees at a new hire day one for benefits, but not for pay. HES should also be required to honor the seniority and benefits of the predecessor employees just as they did for the rates of pay. *Tr, 58:5 – 24 Day 2.* Mr. Gilbert testified that if they wished to pay a higher rate of pay than what the CBA required, they would have to sit down with the Union to discuss it. *Tr. 59:12-20 Day 2.* Ironically, HES never sat down with AFSCME to notify us that they were going to pay the employees a higher rate of pay than the starting rate, which contradicts this testimony. Despite Mr. Gilberts testimony that they could pay more than the CBA required, *(Tr. 63:2-22 Day 2 & Tr. 64:14-65:2 Day 2)* when asked on Cross examination does HES have that same authority to pay more in relations to the vacation and benefits, his testimony went against having the authority to do the same for accrued benefits; here he testified HES had to follow the CBA. *Tr. 59:22-60:10 Day 2 & Tr. 65:3- 14 Day 2).*

Company witness and Operations Manager Jason Whitaker testified that the Pass-along increases which are negotiated between the DCSB and AFSCME are to be passed to the HES employees and the DCSB reimburses HES. *Tr. 83:19-84:22 Day 3.* It is unimaginable to try and understand why HES is denying the GCA employees their two pay increases when it is in the DCSB service Contract that they will be reimbursed for these costs. Mr. Whitakers testimony supports the language in both CBA's AFSCME negotiates with the District and the Contractor on Pass-Alongs; this also follows the terms of the DCSB service contract. *Co. Ex 1 Article 18 Section 9, pg. 102; Un. Ex. 12 – Article 25, Section A, pg. 64;Co. Ex. 11, pg. 505 – Section (D)(1).*

Mr. Whitaker testified that the DCSB and AFSCME are the parties that negotiate the pass-along pay increases to the contractors; that the contractors are not a party to those negotiations; and that the terms of eligibility and the amount of the pay increases are done by AFSCME and the DCSB without any input of the contractors (GCA at the time of the last negotiated pay increases). *Tr. 67:10-13 Day 2;*

265:4-266:1 Day 2; Tr. 266:15-24 Day 2; Tr. 85:7-86:5 Day 3; Tr. 97:9-12 Day 3. None of the company representative who worked previously for GCA were signatories to the CBA. *Tr. 73:9-13 Day 2; Tr. 88:4-6 Day 3.*

Contrary to Mr. Whitaker's testimony that Union Exhibit 11 did not include probationary employees receiving pay increases, the grievance did in fact grant probationary employees the pay increases for the year. *Un. Ex. 11, pg. 14&43; Tr. 104:18-21 Day 3.* GCA argued in this grievance that the increases applied only to non-probationary employees. *Un. Ex. 11, pg. 36 (Management Merit Position: ……It was clear from the language that only non-probationary employees who started before June 30, 2016 would get both increases.)* The arbitrator agreed with AFSCME that the pass-along increases apply to <u>all</u> employees employed in the fiscal year, whether probation or not. *Un. Ex. 11, pg. 14&43.* Mr. Whitaker's testimony is factually incorrect. *Tr. 104-106 Day 3.*

Mr. Whitaker's testimony furthers the argument that if HES believes it can rely on an action of another company which occurred back in 2007 to support its position in 2022, then should AFSCME be allowed to argue that the incorrect hire dates began back in 2007 and we have a right to challenge and correct those? I am sure HES would not agree to that. *Tr. 110-111 Day 3.*

Mr. Johns gave testimony regarding the Tentative agreement to Article 25 of the DCSB CBA *Co. Ex. 16.* This exhibit is a tentative agreed article which is contained in the DCSB/AFSCME CBA. *Un. Ex. 12, Article 25*[3]. On cross-examination, Mr. Johns testified that this Tentative Agreement language does not say who the employees must be employed with to receive the pass-along wage increase. *Tr.146:21-147:4 Day 3.*

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[3] The current language in Article 25 of this agreement has the 2019 language. The 2022 language resulted from a reopener and had not been attached to the CBA yet. The Company Exhibit 16 is the current language for Union Exhibit 12 – Article 25.

Mr. Johns also testified that if HES paid the pass-along increases after being informed by the DCSB that the HES employees were not eligible, HES would not be reimbursed. *Tr. 155:9-13 Day 3.* This is factually inaccurate. The DCSB cannot instruct HES not to pay a negotiated increase between the DCSB and AFSCME; it is spelled out in both CBA's and the service contract that it will be paid and reimbursed. *Co. Ex. 11, pg. 505, Section D.* This section of the service contract even goes further to inform HES to pay the increase and back wages on an off-pay week of the HES employees. The intent of the language in Union Exhibit 12, - Wages is clear that it refers to the HES employees because DCSB no longer hires employees directly, all newly hired custodians are hired by HES and work for HES. All employees currently employed with the DCSB have worked for the DCSB at least fifteen (15) years and therefore there would be no need to use the June 30, 2021 eligibility date for that group of employees. This June 30, 2021 eligibility date is there and negotiated between DCSB and AFSCME to determine the cutoff date for eligible contractor (HES) employees who are eligible to receive the pass along wage increase for that fiscal year. To ensure further the distinction, AFSCME and the DCSB included a sentence in section A into the CBA that distinguished the supplemental pays addressed in the article; that they applied only to the DCSB employees only. *Co. Ex. 16.* Mr. Thomas Cross gave testimony on company exhibit 16 language does refer to the HES unit. *Tr. 164-165.*

Mr. Johns testimony is hearsay, the DCSB has not notified AFSCME that it will not grant the negotiated wage increases to the HES employees, nor did HES produce any evidence that the DCSB informed them of this; his testimony should not hold weight, he further testified that he is not the authority figure on contractual matters between the DCS and HES, AFSCME asks that his entire testimony in these proceedings be dismissed as hearsay; he admitted he is not the authority figure to testify. *Tr. 156:19-23 Day 3.*

HES Placing the GCA Employees on a Ninety (90) Day New Hire Probation.

We must first address the language of the CBA that addresses seniority. District Seniority is the term used to describe the seniority attached to the bargaining unit employees. It is well known on the DCSB service contract by all, that "District" refers to the Duval County School Board and not the contractors. This brings us to the next question, if the CBA's intent is not to recognize an employee's entire tenure on the DCSB contract (notwithstanding the exceptions in the CBA that defines broken service) then why would the CBA use the term "District?" The ordinary meaning of a term is the best evidence of the party's intent. *Farnsworth, at 7.2 & 7.3.* If the language of the CBA is clear, there is no need to resort to rules of contract interpretation. *State of Florida (Department of Health) And LaTonya Polite (AFSCME Florida Council 79), at pgs. 7-8; State of Florida (Department of Corrections) and Charlie Burnett (AFSCME Florida Council 79), at Pg. 8.*

Article 17 defines District Seniority as "the length of continuous service, computed from the most recent date of employment by the company. *Co. Ex. 1 – Pg. 38.* The words "most recent date of employment" refers to an instance where an employee left employment and later was rehired. *Co. Ex. 1- Unpaid Leaves of Absence, Section 3, Pg. 33; Un. Ex. 10; Tr.86 – 87-Day 1.* This language does not refer to HES or a new Company being awarded the DCSB service Contract. *Tr. 87:1-5-Day 1* Some employees on the GCA/ABM bargaining unit list had two hire dates; an original hire date and a rehire date and the rehire date was not due to a medical issue. *Un. Ex. 10; Tr. 130:21-132:19 – Day 1.* Company witness Phillip Gilbert testified that if an employee were separated from work for eight months and later rehired, they would not retain their original hire date and the most recent hire date would be the date they were rehired. Mr. Gritzuk testified to the same. Although HES did not properly apply this article, Messrs. Gilbert and Gritzuk's testimony on cross is the definition of a most recent hire date with the company as defined in Article 7 of the CBA. *Co. Ex. 1, Article 7; Tr. 151:5 – 152:8 Day 2; Tr. 211:15 – 212:3.* Company witness Jason Whitaker also supports the Union's position on the definition of "most recent

hire date". Mr. Whitaker testified that during his employ with GCA, there were employees who separated from GCA and returned and were give a new hire date and that date was considered as their most recent hire date. *Tr. 119:17-120:5 Day 3.*

The GCA/ABM employees did not have a break in service when HES took over the DCSB contract. They worked and were employed on the DCSB Service contract on June 30, 2021 and they were also employed on July 1, 2021. *Tr. 88:19-24-Day 1.* Company witness Matthew Johns testified that on June 30, 2021 all the GCA employees had completed their workday prior to 11:59 pm. *Co. Ex. 14; Tr. 147:6-18 Day 3.* Mr. Johns also testified that the GCA employees were employed on June 30. *Tr. 147:19-23 Day 3.* Contrary to Mr. Johns hearsay testimony, the DCSB service contract clearly states they will pass along the increases to the HES employees and reimburse HES. *Co. Ex. 11, pg. 505, Section D.* Even if the District and AFSCME negotiate step increases for the DCSB unit, the step increases will be converted to a percentage and then passed along to the HES unit employees. *Co. Ex. 11, pg. 505, Section D. (If the district negotiates a step raise for district employees, that step will be converted to a corresponding percentage and that will determine the contractors wage increase on the labor portion of the contract…)* The DCSB and AFSCME have not negotiated a pay increase to the DCSB steps in several years. All recent increases have been percentage increases to the steps the employees are currently placed in. There have been years in the past where DCSB employees were "bumped up steps as wage negotiations and in those instances, the percentage of the bump up in step was given in a percentage to contractor employees.

Testimony on Recross of Company witness Phillip Gilbert was that the GCA employees who began working for HES on July 1, 2021 had no break in their School Board service; they just changed employers. *Tr. 167:20 – 168:21 Day 2.* These same employees continued to work without any changes in their work conditions when HES assumed the DCSB service contract. *Tr. 89:1-4-Day 1.* These

employees also served their probationary period with GCA/ABM. *Tr. 89:13-16-Day 1.* The GCA/ABM employees did not have a break in their work service on the DCSB service contract, they changed employers from one day (June 30, 2022) to another (July 1, 2022); this can also be considered a "transfer of power" or some other change of power which falls under the "otherwise" definition of the CBA and the DCSB contract. *Co. Ex. 1 - Article 30, pg. 54; Tr. 124:21- 126:17 – Day 1; Tr. 138:6-15 – Day 1.* Testimony of Company witness Phillip Gilbert was that the GCA employees were employed on the DCSB service contract on June 30, 2021, and that there was no break in their service working for the School Board. *Tr. 140:25-141:10 Day 2.* This qualifies the aggrieved employees for the pay increases which HES refused to pay the employees. To receive the pay increases for the particular year, the employees must be employed as of June 30. *Co. Ex. 1 , Pg. 42 (Section E6) & Un. Ex. 12, pg. 64 Section A.* The GCA employees were not terminated from GCA, they transitioned over to HES the next day after working for GCA. *Co. Ex. 14 & Tr. 141:11-142:4 Day 2.* Testimony of Company witness Phillip Gilbert was that the GCA employees transitioned over to HES. *Tr. 155:20-156:10.* The non-AFSCME represented employees were terminated from GCA. *Co. Ex. 15 & Tr. 143:4 Day 2;Tr. 144:15-21 Day 2.* Company witness Jason Whitaker testified that the GCA layoff notices did not use the word terminate anywhere in the document. *Tr. 117:8-20 Day 3.*

The company is overlooking the CBA titling of seniority. The seniority is called "District Seniority," this means the employees seniority is determined by their time working on the Duval County School Board contract. *Tr. 261:3-7 Day 2.* Duval County School Board is referred to by AFSCME and HES as the "District." *Tr. 52:22 – 53:9 – Day 1; Tr. 109:1 – 110:3 – Day 1.* Even the DCSB makes it clear that they are the "District" and it is stated in their service contract with the Company. *Tr. 54:23 – 55:9 – Day 1; Co. Ex. 11 – pg. 429.* The employees are called "Duval" employees by HES. *Un. Ex. 7, pg. 2; Tr. 69:15 – 21-Day 1.* (Emphasis). Even HES agrees that the word "District" refers to the School

Board and not HES or a contractor. *Tr. 66:12-18 Day 2.* The district is also referred to as Duval. Mr. Decker testified on cross that time/seniority within the district is any accruals the GCA employees held prior to being employed with HES. *Tr. 260:24 – 261:7 Day 2.* Company witness Jason Whitaker testified the term "District" refers to the DCSB, not the contractors. *Tr. 98:5-15 Day 3.* Mr. Gilbert never answered when asked why AFSCME and a GCA use the word "District" to define seniority if we are relying on Company hired seniority as HES defines it. *Tr. 70:24 – 71:15 Day 2.* HES used the word "Grandfathered" to refer to the former GCA employees.

Mr. Decker testified on cross that the district refers to the DCSB and not HES. *Tr.261:8-11 Day 2.* That an employee's time worked on the DCSB service contract is their "district seniority." *Tr. 261:3-7 Day 2.* While Mr. Decker was unable to speak on HES Specific payroll classifications, when asked about HES use of the word "Grandfathered" when referring to Ms. Lora Patterson status, he in his experience in collective bargaining, defines "Grandfathered" as somebody who has worked in a particular <u>district</u> for a period of time. *Tr. 261:23 – 262:6 Day 2.* (Emphasis). A newly hired employee serving a probation period is not considered a Grandfathered employee. A grandfathered employee is one who has been employed for a period and their length of service is recognized.

HES interpretation of the Seniority definition is misplaced, and they are using it to strip all employees of their hire dates to consider them new hires. *Tr. 51:19 – 24. – Day 1.* Local Union Vice-President Lora Patterson testified she had fifteen (15) years of employment with GCA as her seniority hire date. *Tr. 144:25 – 145:8 – Day 1.* Not only did HES strip her of her fifteen (15) years of service, but they also took away her vacation accruals which she would have been entitled to as a fifteen-year employee. *Tr. 145:14 – 146:17.* Mrs. Patterson lost out on longevity pay at the proper rate. *Tr. 147:15 – 22 – Day 1.* HES should have paid Mrs. Patterson her longevity pay for the fifteen (15) years she had based on the language of the CBA, but they did not, even though the CBA says they are supposed to and

also to count predecessor time. *Co. Ex. 1 – Article 18, pg. 41; Tr. 147:23 – 149:6.* Company witness Matthew Johns agrees that Mrs. Patterson should receive longevity pay for fifteen years. *Tr. 146:3-16 Day 3.* HES never told her she would receive her fifteen-year longevity pay.

HES Denied the Alleged Probationary Employee Benefits Which They Were Entitled To

Even assuming for the sake of discussion and argument here that HES properly placed the GCA employees on a new hire 90-day probationary period, HES still violated the CBS because there are certain benefits which the CBA does not prohibit probationary from enjoying while clearly prohibiting others until an employee reaches their ninety-first (91) day of employment.

There is arbitral precedent in this CBA that probationary employees are entitled to pay increases. *Un. Ex. 11: Tr. 92:15-19-Day 1.* The company attempted to object to Mr. Cross' line of question although they opened the door to the past by improperly citing past practice as their justification for stripping the employees of their GCA/ABM hire dates. The arbitrator overruled the objection and Mr. Cross further explained the arbitral precedent and how the GCA/ABM employees should have still been entitled to the negotiated Pass-along pay increases which were negotiated between the Duval County School Board and AFSCME. *Tr. 93 – Tr. 98-Day 1.* Mr. Cross also gave extensive explanation on the loss of the pass-along increase because of HES transition onto the DCSB. *Tr. 118:25 – 123:12 – Day 1.* Mr. Cross also elaborated in detail on how the HES employees are entitled to the two increases. *Tr. 162 – 163 Day 3.*

Although the GCA/ABM employees were insured with medical coverages prior to HES assuming the DCSB contract, HES denied the GCA/ABM employees' medical insurance during their first ninety days arguing they were on probation. This violates the collective bargaining agreement because the CBA does not prohibit legitimate probationary employees, let alone the former senior GCA employees from being insured during their probationary period. *Co. Ex. 1 – Article 27; Tr. 101:15-22-Day 1.* HES disagrees that probationary employees can be paid for working out of classification. *Co. Ex. 1 – Article*

19, pg. 43 and promoted according to the CBA. *Co. Ex. 1 - Article 24, Pg. 46.; Tr. 99:21 – 100:3-Day 1,* but the CBA does not prohibit either.

The CBA specifically outlines all benefits which are contingent upon successful completion of a ninety (90) day probationary period; all others where the probationary employees are permitted to participate in, will not have the probationary exclusion language. *Co. Ex. 1 – Article 27, pg. 52: Tr. 102-Day 1;* . HES also did not provide for a 401(k) plan as the CBA requires. They did not have a plan in place at the time of this arbitration. *Tr. 103:22-104:4-Day 1.* HES provided the Union with notification of its plan to implement a 401(k) plan after the conclusion of the arbitration hearing and provided the details during a bargaining session. HES did not provide the employees with a 401(k) plan as the CBA requires. *Tr. 106:23 – 107:3-Day 2.*

ii. HES' CBA Contradictions

Seniority

Following HES' interpretation of the CBA's seniority definition would produce absurd results. HES believes it has the right to abolish seniority hire dates in the CBA, but in Article 18, the CBA requires them to honor their hire dates with GCA/ABM for purposes of longevity bonuses. In other words, HES argues AFSCME and GCA negotiated language which permits a successor employer (not the predecessor) to strip existing employees of all accrued benefits and pay, except for longevity bonuses which are given every fifth year and in other areas. This means that every time a new contractor wins the DCSB bid, the employees would have a new hire date even if there is a change of contractors every year, since the DCSB service contract has one-year options. This interpretation produces an absurd result. *Advanced Graphite Materials, at pg. 19.* The Company never thought that by placing over nine hundred employees on a July 1, 2022 new hire date, they would have to somehow determine each of those employees' seniority rank, given they were all hired on the same day. *Tr. 117:8-21 Day 2.* This is an

especially important matter because employees bid on positions and transfers which seniority is a factor. No one could explain how the Company is determining seniority for employees with the same hire date. The Company's interpretation of stripping the GCA employees of their hire dates and giving all nine hundred (900) of them the same hire day has created another issue, which is also why the CBA acknowledges the GCA hire dates. Testimony on cross of Company witness Steve Gritzuk proved the company has no idea how to address instances how will they define the seniority ranking of over nine hundred (900) employees they stripped of original hire dates and gave a July 1, 2022 hire date. Mr. Gritzuk never explained how the Company distinguished the seniority ranking of employees with the same hire date. *Tr. 208:7 – 209:8 Day 2.*

It would be absurd to believe that GCA and AFSCME would draft language that had this meaning, nor would any company ever negotiate language which would place it at an unfair bidding advantage and AFSCME employees lose their seniority hires dates; Under HES position a new bidder has the right to strip hire dates, which means that HES would be obligated under the CBA to bid the hire dates of its employees which also accrue benefits based on their hire dates, while outside bidders can bid all employees as new hires and strip all existing benefits and accruals. GCA, nor HES would ever agree to that interpretation, nor would AFSCME. Mr. Gilbert does not believe that HES would ever intentionally place itself in a disadvantaged position in bidding on the DCSB service contract. *Tr. 135:6-12 Day 2.* Company witness Jason Whitaker also agrees. *Tr. 122:17-19 Day 3.* Mr. Decker testified that he would never intentionally negotiate language in the CBA which would put his employer at a bidding disadvantage on the DCSB service contract. *Tr. 246:20-247:1 Day 2.* Mr. Decker is aware of the seriousness of not placing his employer at a bidding disadvantage by stating he would never intentionally do something that was detrimental like that. *Tr. 247:1 Day 2.* But in all his testified experience in the collective bargaining process in the past when he was employed with GCA, he never sought the need to

change this language to protect his employer from being placed at a bidding disadvantage, even after they stripped employees of their seniority when they were awarded the Bid from Aramark back around 2007 as it was speculated to have occurred; clearly HES interpretation of District Seniority is misplaced and factually incorrect, HES is aware that the language in Article 7 is not intended to allow contractors to strip current employees of their seniority, seniority pay rates, and other benefits the employees obtain through their seniority (accrued benefits, etc.).

HES conceded that they stripped employees of their hire dates with GCA/ABM. *Tr. 84:14 – 17-Day 1.* They also conceded that they paid the GCA employees their higher rates of pay they had with GCA. *Tr. 73:7 – 12-Day 1; Tr. 80:16 – 19-Day 1.* The CBA provides a starting rate of pay for all new hires and HES did not reduce the employees' rates of pay to the new hire rate of pay because they knew these employees are not new hires.

Articles 14 and 17 provides the only manners which an employee loses his/her seniority date; they do not provide for the loss of seniority in any other manner and if HES is honoring the agreement as required, then their action in stripping the hire dates is a violation of the CBA. In Article 14 – Unpaid Leaves of Absence, Section 3, employees who have exhausted their paid leaves and unpaid leave of absence time limits who are unable to return to work within six (6) months, but who the company rehires after six (6) months will now have a new seniority hire date and that date will be considered their "most recent hire date" for purposes of this CBA. *Unpaid Leaves of Absence, Section 3, Pg. 33; Tr. 49:6-15 – Day 1; Tr. 49:22 - 50:5-7– Day 1; Tr. 51:5 – 13– Day 1; Tr. 56:4 – 9– Day 1.* Article 17 lists four (4) reasons which an employee loses his/her seniority; (1) voluntary quits or resigns; (2) is discharged and the discharge is not reversed in the grievance/arbitration procedure; (3) Fails to return to work within five days of a recall without an approved leave of absence: and (4) Fails to report to work at the expiration

of a leave of absence. *Co. Ex. 1, pg. 39.* Changing of employers during a successorship or new employer award on the DCSB service contract is not a break in seniority according to the CBA.

HES wants to strip seniority hire dates and consider employees new hires, taking away all their years of service on the Duval County School Board contract, but recognize those same hire dates for longevity accruals only. They then want to deny benefits to the GCA employees while they consider them on probation, although the CBA does not deny probation employees those benefits which are mentioned in this brief. The Company's interpretation would lead to an anomalous result. *South Peninsula Hospital,* 133 BNA LA 1003, 1008 (Landau, 2014). Any ambiguity should be clarified from the four corners of the CBA that the language of Article 7 District Seniority considers the date the employee oldest hire date on the DCSB contract, not every time a new employer assumes the DCSB service contract; in other words, an employee's time worked on the DCSB service contract. *Id. at* 1008. *Tr. 261:3-7 Day 2.*

HES did not strip the employees of their pay rates when they took over the DCSB service contract, which, if they were following the requirements of the CBA, they were supposed to do. According to the CBA, the starting rate for new hires is listed in Appendix B of the CBA. *Co. Ex. 1 – Appendix B.* The only way an employee can maintain their higher rate of pay with a successor is if the successor contractor identifies the employees as a non-new hiree or seniority employee. To further support our position, HES hired all GCA employees at their GCA rate of pay despite the CBA stating that the starting rates are less. I am sure that HES is not hiring new hires which were hired off the street after the July 1, 2022 date at a higher rate of pay than what is listed in Appendix B as the starting rate or pay. This means HES considered the predecessor GCA employees as new hires but paid at their GCA pay rates, but a new employee hired "off the street" will start at the starting rate in Appendix B, even if HES hired them on July 2, 2022 (one day after the GCA employees began with HES). This is contradictory. In Union Exhibit

9, a HES Seniority bargaining unit roster, there are Custodians[4] hired on the same date (July 1, 2021) with different pay rates. For example, on page 1 of Union Exhibit 9 & 10 employee Adela Martinez, who is a former GCA employee who transitioned to HES on July 1, 2021 has a GCA hire date of August 1, 2007 (Un. Ex. 10, pg. 15) and a HES hire date of July 1, 2021 (Un. Ex. 9). Union Exhibit 9 is HES bargaining unit list provided to AFSCME. Ms. Martinez has a rate of pay at $12.31 per hour, while another employee Ms. Adelina Murataj who has a GCA hire date of December 17, 2014 (Un. Ex. 10, pg. 20) and a HES hire date of July 1, 2021 (Un. Ex. 9. Pg. 1) but Ms. Murataj's rate of pay is $12 per hour. HES is improperly paying its employees even under the position it takes in the hearing. One GCA employee has a HES pay rate of the starting rate while another hired on the same date has a .31 greater pay rate and they both are Custodians; this is inconsistency and a violation of the CBA. HES conceded in the hearing that they did not strip employees of their GCA pay rates although the CBA states new hires should start at a starting rate of pay.

HES is aware that it should not have stripped the employees of their benefits. They did not strip the pay because it would have alerted a "red flag" with the Duval County School Board. Accrued benefits discrepancies are easier to conceal on these type of service contracts. HES wants this arbitrator to determine that the language of the CBA gives HES the right to abolish predecessor hire dates. Either the predecessor hire dates are abolished in their entirety or they are accepted in their entirety, it cannot be interpreted both ways, this is a contradiction. The ordinary meaning of a term is the best evidence of the party's intent. *Farnsworth, Contracts §§7.2, 7.3 (3rd, 1999).*

Just as the Current AFSCME Representatives cannot speak with clarity on the seemingly loss of seniority dates when the employees transitioned from Aramark to GCA, this does not mean AFSCME waived any rights to file a future grievance on current issues which violate the agreement and are

[4] HES uses the title "General Cleaner" which is not in compliance with the CBA. The employees are defined in the CBA as Custodians, Lead Custodians, and Project Techs. HES improperly identifies the employees as General Cleaner, Lead General Cleaner, and Floor Techs; this is in violation of the CBA.

completely independent of any alleged infractions which occurred over fifteen (15) years ago. *Tr. 133:3-10 – Day 1.* AFSCME cannot be held at fault for any violation which was not brought to their attention regarding whether the GCA/ABM denied probationary employees any benefits to which we believe they are entitled to. The Company's Representatives who testified they were former GCA management back in 2007 never produced any records to support that the Union waived any rights to the filing of a grievance on hire dates. *Tr. 133:11-16 – Day 1.* Mr. Whitaker testified that he has no evidence that the Union did not file a grievance back in 2007 when it is said that the employees lost their seniority time. *Tr. 99:20-24 Day 3.*

Union witness Thomas Cross testified on cross examination that AFSCME has never been made aware of a probationary employee ever being denied a benefit by GCA to which the CBA permits probationary employees to share in since his tenure with AFSCME, which began in 2016. *Tr. 114:24 – 116:5 – Day 1.* We do not know any of the reasons why the former Aramark employees lost their seniority hire dates if they did in fact do so. The Company never produced any documentation to support that. Mrs. Lora Patterson, AFSCME Vice-President for the Local testified that GCA still considered their former hire dates, but this issue was never brought to the attention of the Union.

Perfect Attendance

Although HES says it is honoring the CBA, they believe they do not have to honor it for perfect attendance the employees time spent with GCA in the previous year. *Tr. 95:1 – 96:15 Day 2.* Even if AFSCME provided the attendance records of the employees (as we did for hire dates) HES stated they would not honor the employee's attendance with GCA. *Tr. 96:5-20 Day 2.* Despite the Company's position that they are honoring the CBA, Mr. Gilbert says HES is not required to honor the perfect attendance period from September 30 to October 1 of each year as stated in the CBA, even if they were

provided attendance records as we did for hire dates. *Tr. 96:9-25 Day 2; Tr. 98:4-9 Day 2,* but HES honored the pay rates GCA paid its employees when we supplied that to them.

HES Obligations as a Successor Employer

Company witness Phillip Gilbert testified that everywhere GCA or employer is referred to in the CBA, HES is now interjected as the company. *Tr. 99:11-23 Day 2.* Mr. Gilbert further agrees that the DCSB has in their service contract the requirement that HES honor the two CBA's AFSCME has in place; one with the District and AFSCME and the second which is between GCA and AFSCME. *Co. Ex. 11, pg. 505 & Tr. 127:3 – 128:15 Day 2.*

It is a settled matter in considering successorships, that the new Employer is obligated to interpret and apply the contract terms in the context of what the negotiating parties had understood it to be. *Transit Mgt., at pg. 7.* On Direct, Mr. cross explained that the GCA/ABM employees were transitioning over to HES, not being rehired. *Tr. 72:8 – 73:1-Day 1; Tr. 102:25-105:9 -Day 1.* HES job advertisement to the existing GCA Custodial employees was that they were "transitioning to HES." *Un. Ex. 7, pg. 2.* In this exhibit, HES distinguished the GCA employees from other applicants by its use of the words "Duval Employees" "Current Custodial Employees" and "ABM Employees;" none of those references would apply to an individual hired off the street, who would truly be a new hire. *Un. Ex. 7, pg. 2.* If HES labels the existing employees as "Duval Employees" "Current Custodial Employees" and/or "ABM Employees," it is clear they have a distinction between new hire employees and the predecessor employees or they would consider them all new hirees.

AFSCME and the employees were misled by HES prior to their taking operations of the DCSB service contract that they would maintain their seniority and benefits. *Universal Mack Sales & Svc.,* 87 BNA LA 391, 392 (Chance, 1986). HES made several contacts with AFSCME after they were awarded the service contract and prior to their start date. HES also communicated with AFSCME during the bid

process to obtain employee information. HES asked the Union for the employee's years of service. *Tr. 56:18 – 57:4 – Day 1.* Employers bidding on service contracts do not ask for information unrelated to the bidding processes, everything they ask for is relevant to honoring an existing CBA and the bidding process. The years of service is a relevant and necessary component part of the process which is why HES requested it. Mr. Cross provided HES with the bargaining unit list which included the employees hire dates. *Co. Ex. 6; Tr. 58:8 – 19 – Day 1.*

Company witness Michael Weinrich testified that he did receive a copy of the current CBA in effect from Mr. Thomas Cross, AFSCME Staff Representative. *Tr. 36:22-37:3 Day 3.* He further testified that his purpose in requesting the years of service from the employees was related to pay increases which may have been given to various employees. *Tr. 39:13-16 Day 3.* It is important to note that Mr. Weinrich's testimony was that the years of service was requested by him <u>only</u> for purposes of calculations of pay rates based on steps that are dictated by years of service. If the employees were going to be considered as new hires as HES argues in this grievance, there would be no need for Mr. Weinrich to need the years of service for step increases because the CBA clearly states the starting rates for new hires. *Co. Ex. 1 Appendix B, pg, 59; Tr. 39:13-16 Day 3.* Mr. Weinrich would need to know years of service for more than assumed step increases, in fact, he received a copy of the CBA from Mr. Cross, so he knew there were no step increases given in the CBA. Mr. Wenrich understood his reasons for requesting the employees' years of service was to calculate the benefits of the employees such as vacation, sick pay, and other benefits, to include longevity pay increases. Even during the bidder meetings with the DCSB, the DCSB informed all bidders that they provided information related to wages and benefit calculations to all of them, therefore Mr. Weinrich needed the benefits calculations. *Co. Ex. 11, pg.463, #6 & 7.*

The Company argues that because the CBA says job security cannot be guaranteed, it somehow has the right to not hire the existing employees of GCA/ABM. That and any arguments of a similar nature

by HES are misplaced. That section of the CBA means the current employer cannot be held liable for the actions of a successor. *Co. Ex. 1 – Article 7, pg. 18; Tr. 129 – 130:6 – Day 1.*

HES never asked for any clarification to the CBA when they assumed the DCSB service contract. *Tr. 98:14-17.* They also did not request to bargain over any part of the CBA. *Tr. 98:22-24-Day 1.* Arbitrator Chance found an Employer's argument unpersuasive when they stripped employees of their hire dates and longevity benefits. *Universal Mack Sales & Svc.,* at 392. The Employer in *Universal Mack Sales & Svc.* also failed to disclose its intentions of stripping seniority and led the employees to believe that the language would be the same. *Id. at 392.* HES and AFSCME met in an introductory meeting. *Tr. 58:8-12 – Day 1; Co. Ex. 6.* The Company never mentioned during their introductory meeting with AFSCME that it intended to strip the Successor employees of their seniority hire dates.

Denying the GCS Employees Their Accrued Benefits Helped HES Secure the Bid Win

In the Service Contract industry, it is common that some bidders abolish benefits to win contracts, and if later found to be in error, submit contract modifications to the Contracting Officers for a change in their pay. This accomplishes the purpose of securing the win against other bidders by claiming "error." The bargaining unit employees should not be permitted to be "victimized" through this type of bidding. *Union Attachment A - "The Most Common Procurement Fraud Schemes And Their Primary Red Flags"- Change Order Abuse, pg. 2*

Employees acting as Agents of their employer and in the course of their business are considered to be speaking on behalf of their employer. Mr. Weinrich reached out to Mr. Cross and I requesting information which HES needed to bid on the DCSB service contract. Mr. Weinrich requested via email information relating to the GCA/ABM employees and requested their years of service in this request. *Un. Ex. 4, pg. 3; Tr. 112 – 114 – Day 1.* If Mr. Weinrich was not acting in his capacity as an agent of his employer and on behalf of HES, the company ever explained how he obtained the contact information

for the proper AFSCME Staff Representative assigned to service the Custodial bargaining unit for AFSCME. Mr. Weinrich does not work in the State of Florida, he is a corporate officer that works in another state at the HES headquarters. *Tr. 134:6-11 – Day 1.* Mr. Weinrich was asking for the employee's years of service to build a costing structure. *Tr. 132:17-25 Day 2.* Mr. Gilbert testified that placing existing GCA employees on probation could be a cost savings. *Tr. 148:18 – 149:12 Day 2.* HES did not pay longevity pay but agrees they should have done so if they are honoring the CBA. *Un. Ex. 10, pg. 21 & Tr. 73:14 – 10 Day 2.*

Probationary employees have the rights to become Union Stewards in the CBA, even though they do not have seniority rights yet. *Tr. 101:7-102:4 Day 2.* At the time of this arbitration hearing, HES had not implemented a 401(k) plan as the CBA requires for employees. *Tr.106:23-107:2 Day 2.* HES is not using the correct titles for the employees as the CBA states. *Tr. 111:8-112:14 Day 2.*

HES did not pay the GCA employees holiday pay because they placed them on a new hire probation, yet Mr. Gilbert testified that a probationary employee would be paid time and a half for working on a holiday. *Tr. 115:18-117:7 Day 2.* Holiday pay is a premium benefit which is paid to employees working on a holiday. If HES does not pay holiday pay for working the holiday, why would they pay a premium pay?

Although HES denied the GCA full-time employee's medical benefits while it placed the employees on a probationary period, Messrs. Gilbert and Whitaker acknowledges that the CBA does not prohibit full time probationary employees the right to medical insurance. *Co. Ex. 1 – Article 1, pg. 27 & Tr. 119:17-120:2 Day 2; Tr. 127:3-7 Day 3.* Time off for voting in the CBA is a benefit and the CBA does not limit probationary employees from enjoying this benefit. *Co. Ex. 1, Article 13, pg. 29 & Tr. 149:13 – 150:33 Day 2.*

HES Witnesses Have No First-Hand Knowledge of the Negotiations Between

GCA and AFSCME Which Led to the Drafting of the CBA

Testimony of Steve Gritzuk was that he has no knowledge of the practices and issues which took place between GCA and AFSCME from the year 2015 until the time GCA left the DCSB service contract. *Tr. 196: 19-23 Day 2.* Mr. Gritzuk testified on cross contradictory that he is familiar with the GCA CBA processes because they are extremely similar to the time when he was working for GCA and not shortly after that, he testified that the processes he is familiar with, he is unsure if the intent and purposes of the language have changed due to arbitral precedent that he is unaware of. *Tr. 197:15-21 Day 2; Tr. 198:17-21 Day 2; Tr. 200:3-5 Day 2.*

Mr. Gritzuk testified he was familiar with the language of Article 30 Successorship, contrary to that testimony, he can only "assume" what the language means, especially considering the fact the language at dispute is being disputed after he left GCA and there could be interpretations he is unfamiliar with. *Tr. 205:15- 207:9 Day 2.*

CONCLUSION

HES wants to have their cake and eat it too. *Attachment B.* HES stated they accepted the CBA, but they have selectively picked portions of the CBA they decided to honor, most for the benefit of cost savings and to secure the DCSB bid as the lowest bidder. They changed the job titles of the Employees from Custodians, Project Techs, and Lead Custodians (*Co. Ex. 1. Appendix B, pg. 59)* to General Cleaner, Floor Techs, and Lead General Cleaner *(Co. Ex. 6)* This violates the CBA. On one hand, they want to strip employees of their hire dates, yet did not strip their pay rates, but denied the employees certain rights even probationary employee enjoy in the CBA. Clearly this is not fair to strip an employee of their benefits they worked for. *Tr. 146:12 – 147:1 – Day 1.* Even Mrs. Patterson's Supervisor feels this is not fair for her to lose benefits as well as her employees. *Tr. 19:3-6 Day 3; Tr. 27:17-20 Day 3.*

HES selectively "seized" upon portions of the CA it chose which would give it a cost savings and an unfair bidding advantage over the other bidders who were bidding all the pay and accruals of the bargaining unit employees. It is evident that HES intentionally violated the CBA by stripping the employees of their hire dates to win the bids, which thereby allowed them to "low Ball" all other bidders who bid the proper pay rates and benefits. Company witnesses Bernie Decker and Jason Whitaker were Former GCA management staff who somehow became HES employees working on assisting HES. Mr. Whitaker, ironically, was terminated from GCA because of bidding strategies, and somehow, he ended up on HES Team.

HES was aware the employees were represented by AFSCME when they assumed the DCSB service contract and cannot change or alter the agreement because they do not understand it and their understandings cannot be permitted to vary, alter, or amend the CBA. *Carrolton Bd. Of Ed.,* 126 BNA LA 783, 785 (Allen, 2009). Arbitrators are also inclined historically to adopt interpretations which will prevent forfeitures. *City of Maron, Ohio,* 91 LA 175 (Bettel, 1988). Allowing HES to strip the employees of their hire dates (which majority of these employees have been employed on the DCSB contract longer than HES has been a corporation) would render the successorship and seniority clauses of the contract meaningless because employees are susceptible to lose seniority every year because the DCSB service contract has one-year options for the contractors. Arbitrators, as far back as 1946 hold to the determination that any interpretation of a CBA which nullifies or would render meaningless any part of the CBA should not be chosen over an interpretation which gives meaning and effect to other provisions. *John Deere Tractor Co. at* 632. This arbitrator has the authority to reform language of the CBA to reflect the actual intent of the language without violating her jurisdiction. *American Federation of State, County and Municipal Employees, Local 1184 v. Miami-Dade County Public Sch.,* 95 So.3d 388 (Fla. 3rd DCA 2012)

WHEREFORE, for the reasons set forth in this document, the Union's Opening Brief, testimony, and exhibits, AFSCME prays this arbitrator grants the grievance in its entirety, make all affected employees whole, and retain jurisdiction over the matter until the grievance award has been properly satisfied entirely.

Respectfully submitted,

_____*/s/ Torrence Johnson* .

CERTIFICATE OF SERVICE

This Brief will be furnished to the Company at the following address after the Arbitrator identifies that she has received both parties closing briefs. Our brief will be furnished to:

Michael Prendergast
Ford Harrison, LLP
225 Water Street, Suite 710
Jacksonville, FL 32202

Respectfully submitted,

/s/ Torrence Johnson .

Regional Director – Region 1
AFSCME Florida Council 79, AFL-CIO
5208 N. Pearl Street
Jacksonville, FL 32208
O: 904-356-4888
C: 904-888-9048
F: 904-355-3001
E: tjohnson@afscmefl.org