In the Matter of the Arbitration

between Washington Federation of state Employees ("WFSE" or "Association"), on behalf of grievants William Longnecker and Gregory Ambrose,

and

The State of Washington,

Findings, Discussion and Award.

Case Numbers:	American Arbitration Association case No. 75 390 00124 06. Arbitrator's case No. H53.
Representing the Association:	Gregory M. Rhodes, Esq., and Younglove Lyman & Coker, PLLC, P.O. Box 7846, Olympia, WA 98507.
Representing the State:	Kara A. Larsen, Asst. Attorney General, State of Washington, P.O. Box 40145, Olympia, WA 98504.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In Tumwater, Washington, on August 21, 2006.
Witnesses for the Association:	William Daniel Longnecker and Gregory Ambrose.
Witness for the State:	Katherine Hernandez-Bell, Michael Lilly, and Nancy Widders.
Post-hearing argument received:	From both parties on October 2, 2006.
Date of this award:	November 3, 2006.

The parties disagree about whether the two grievants are exempt from overtime. They also disagree about whether this grievance is arbitrable under their collective bargaining agreement. The Union points to this contract language in Article 6, Hours of Work:

> **6.2** Per federal and state law, the Employer will determine whether a position is overtime-eligible or overtime-exempt. * * *

(These grievances were originally filed as class actions; but the Union elected to proceed only on behalf of the two named grievants. The State specifically consented to that change.) The State argues that such a claim is not a proper grievance under the parties' collective bargaining agreement and that the designation in question predates the contract so that there is not State action against which the designation would support a timely grievance. The parties could not agree on a statement of the exact issue presented in arbitration; but they agree that I have the authority to frame the issue based on the entire record. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. The parties filed timely post-hearing briefs.

ARBITRABILITY

The collective bargaining agreement specifically addresses disputes about the arbitrability of a grievance (in Section 29.3, D, 2):

> The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitration. * * *

The State offers a collection of attacks on substantive and procedural arbitrability in this case. It argues: that the underlying right at issue is statutory in nature, and is not a creation of the CBA, and that the grievance procedure therefore does not extend to an allegation of violation of that statutory right; that the language of the contract is insufficient to show that the parties understood that an arbitrator would be authorized to determine such fundamentally statutory issues; and that each of these grievants has been designated as overtime-exempt since long before the effective date of this collective bargaining agreement so that there is no State action within the term of the contract which might properly be the object of a contract grievance.

Substantive arbitrability: The legal authority of a contract arbitrator. First, the State cites *Alexander v. Gardner-Denver Co.*, 415 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1974) and its progeny for the proposition that "the CBA endows the arbitrator with no authority to determine statutory claims." (Post-Hearing Brief at 6.) This misunderstands *Gardner-Denver*. *Gardner Denver* involved a claim of racial harassment which had been presented to a contract arbitrator under the just cause provision of a collective bargaining agreement. The Union lost in arbitration and the individual employee then brought an action against the Company under Title VII. The Federal District Court dismissed that action, concluding that the issue of discrimination "had been submitted to the arbitrator and resolved adversely to petitioner."[1] 436 F. Supp. 1012, 1014. The issue before the Supreme Court was whether the arbitrator's determination of the discrimination issue under the collective bargaining agreement was dispositive of the discrimination issue under Title VII. The question before the Supreme Court was *not* whether the arbitrator had had authority to address the discrimination issue under the collective bargaining agreement; in fact, the arbitrator's authority to address that issue under the contract is a fundamental foundation of the question addressed by the Supreme Court. If the arbitrator's award had been outside his or her authority in the first place, then there would have been no need to decide whether the arbitrator's determination of the contractual discrimination issue was dispositive of the statutory discrimination issue.

Three issues are somewhat confusingly interrelated in this wing of American labor and employment law. First, there is the *Gardner-Denver* question of whether a collective bargaining agreement arbitrator's determination will be dispositive of an employee's individual statutory rights when the collective bargaining agreement in question authorizes the arbitrator to enforce those rights. The answer to that question, ever since *Gardner-Denver*, has been "no." Second, there is the somewhat related question of whether or not the broad national labor policy favoring arbitration of contract disputes requires an individual employee to at least exhaust the grievance and arbitration process of a CBA before he or she brings an individual action under an employment statute. The answer to that question, too, is generally "no." As long as a statute or regulation creates an individual right of action, a covered employee may seek individual statutory or

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1. Quite apart from the courts' assumption that grievance arbitrators have the authority to address such statutory issues, there has been a vigorous discussion in the arbitral community for over forty years about whether and in what situations an arbitrator *should* do so. One recent discussion of that issue can be found in the 2004 *Proceedings of the National Academy of Arbitrators* (BNA), beginning at 185, by Ted St. Antoine et. al.

regulatory redress without first resorting to the grievance & arbitration process, and that is true even if the collective bargaining agreement specifically echoes the statutory or regulatory provision in question.

Finally, we come to the issue presented in the case at hand, the question of whether or not a labor arbitrator may be authorized by a collective bargaining agreement to address and decide a statutory or regulatory issue when the collective bargaining agreement in question incorporates that statute or regulation. None of the cases cited by the State really addresses that issue. But the general answer is certainly "yes." In fact, both of the other two lines of cases are built on the fundamental principle that a labor arbitrator, interpreting a CBA, *would have* the authority to interpret and apply statutory or regulatory language if that language were germane the contract issue before that arbitrator. Without that fundamental principle, it would make no sense to ask whether a labor arbitrator's determination under CBA language should be dispositive of the individual statutory issue (*Gardner-Denver*) or to ask whether an individual employee should have to exhaust the CBA grievance and arbitration process before seeking to enforce a statute directly.

Substantive arbitrability: These parties' agreement to arbitrate. The State's next arbitrability challenge is not that the parties *legally could not* have authorized an arbitrator to resolve statutory and regulatory issues but that they *factually did not* do so with respect to the statutory and regulatory material at issue in this case. The State offers two versions of that claim. First, it suggests that the parties *generally* understood the contract language "...the Employer will determine..." to signify that such a determination would not be subject to grievance arbitration. The first problem with that claim, of course, is that it seems to ask me to add something to the contract, e.g. "...and such determination will not be subject to grievance arbitration under Article 29," or perhaps "...the Employer will determine at its absolute discretion..." This contract was obviously bargained by professionals and drafted with great care. There is no serious room for doubt that the bargainers knew how to say "this next bit will not be subject to arbitration" if that was part of their deal.

On the other hand, collective bargaining does not always produce crystal clear contract language. One party is often unwilling to accept a *perfectly* clear and express statement and the other party is sometimes forced to accept language which it considers close enough that an arbitrator would very likely understand it as that party intends. So the parties here conceivably could have understood "...the Employer will determine..." as the State now suggests. The State offers a series of

examples of contract provisions built around that expression; and the first two provide some support:

> **4.1 Filling Positions**
> The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within the job classification. * * *

> **Article 7, Overtime**
> **7.4 General Provisions**
> A. The Employer will determine whether work will be performed on regular work time or overtime, the number, the skills and abilities of the employees required to perform the work, and the duration of the work. * * *

These two functions—determining which positions will be filled and the sequencing of the work to be done—are traditional management rights, not usually exercised even with input by the union unless the contract specifically so provides. The use of the expression "the Employer will determine..." for these particular reservations is some evidence that the parties may have understood that expression to mark out management discretion which is traditionally beyond the reach of an arbitrator. Unfortunately for the State, however, the contract also uses that expression in contexts that are common grist for the mill of grievance arbitration:

> **Article 20, Safety and Health**
> **20.2** The Employer will determine and provide the required safety devices, personal protective equipment and apparel, which employees will wear and/or use. ***

> **Article 21, Uniforms, Tools and Equipment**
> **21.1 Uniforms**
> The Employer may require employees to wear uniforms. Where required, the Employer will determine and provide the uniform or an equivalent clothing allowance. ***

Grievance disputes over respirator requirements are extremely common. In the past, when many brands of positive pressure respirators required a clean-shaven face, grievances and arbitrations over contract language similar to this were everyday affairs. Similarly, although not *so* common, disputes over language like "an equivalent clothing allowance" are not at all rare. In short, the use of "the Employer will determine" in these contexts is not convincing evidence that the parties *generally* associated that expression with the exercise of non-arbitrable managerial discretion.

The State's final version of this arbitrability argument focuses on just the language of the provision at issue in this case. The full text of the disputed provision of the Hours of Work article is:

> **6.2 Determination**
> Per federal and state law, the Employer will determine whether a position is overtime-eligible or overtime-exempt. In addition, the Employer will determine if an overtime-eligible position is a law-enforcement position, with or without an extended work period or a shift position.

The State points to the second sentence and argues that its determination of whether a position is in law-enforcement is certainly not arbitrable and that the first sentence should not be similarly interpreted. But this language is in the Hours of Work Article. On the face of the contract, the parties probably understood the second sentence to be a reference to the FLSA's peculiar overtime rules for law-enforcement personnel; and that distinction is clearly reflected in the CBA's different provisions for overtime and scheduling of non-law-enforcement employees—in Section 6.3—and for law-enforcement employees, in Section 6.4. (That intent is also reflected in the contract language "...with or without an extended work period or shift position.") Both parts of Section 6.2 refer to FLSA status (and similar issues of status under state law).

As the Union points out, overtime eligibility issues of both types are commonly presented in grievance arbitration.[2] But the Union's interpretation of this language also runs into a problem with the basic rules of contract interpretation: As much as I am forbidden to *add* to the disputed language something like "...at the Employer's absolute discretion...," so am I forbidden to *subtract* from the disputed language the expression, "The Employer will determine..."[3]

What did the bargainers of this contract probably have in mind when they specified that the Employer would determine overtime eligibility but did not go so

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2. The Union cites a whole paragraph of federal trial and appellate cases in support of that proposition in its Post-Hearing Brief at p. 3, N 5.

3. This can be considered the "no loitering language" rule: every bit of a carefully bargained collective bargaining agreement is presumed to have been understood to have a substantial job to do. In some cases that presumption may be overcome, but the conclusion that part of any disputed language is "mere surplusage" should be embraced only as a last resort.

far as to exempt such determinations from arbitral review? One of the systematic assumptions underlying the resolution of such disputes is the assumption that the parties gave their choice of expression here some careful thought. (To doubt that assumption is to invite an arbitrator—or a court, for that matter—to substitute his or her judgment for that of the parties by dismissing their choice of expression out of hand.) It is possible, of course, that each side was taking a gamble, that this was the best language that each could get the other side to agree to, and that each party thought it had a fair chance of convincing an arbitrator to interpret the resulting "in between" language in its favor. The most likely possibility, however, is that they intended the contract to be taken to mean just what it says, that they did not understand the employer's determinations to be entirely free of arbitral review through the grievance and arbitration process but that they understood "the employer will determine" to give the Employer some degree of discretion in making these determinations. There are a lot of very close calls in determining overtime eligibility for a workforce as large as the one covered by this contract. When the parties bargain contract language specifying that "the employer will determine" overtime eligibility, more likely than not, that reflects their agreement that arbitral review of those calls will be for abuse of the Employer's determination rather than de novo. And, of course, that is pretty much just what the contract says on its face.

Procedural arbitrability: Timeliness. There is no dispute that both of these grievants have been classified as overtime-exempt for many years; and the State argues that there was no act of overtime eligibility determination within the reach of the grievance process, or even within the life of this collective bargaining agreement.

At bottom, disputes about overtime eligibility are disputes about rates of compensation. And compensation rate disputes are the best example of allegations of "continuing violations" of the contract. The continuing violation doctrine is a general principle of contract law and not only a creature of labor arbitration: whenever a contract calls for periodic performance by each of the parties, each occasion of performance presents a new possibility of compliance or breach of that contract. Oregon case law probably has the most colorful example of the application of that doctrine: In *Alderson v. State of Oregon*, 105 Or App 574 (1991) the state's trial judges challenged changes to their compensation formula, but they did not file the action within the applicable statute of limitations if measured from the effective date of the change. The court found that the alleged violation was a continuing one, which would occur anew with each allegedly improper payment. For the same result and discussion in a Washington case see

Mulligan v. Thompson, 90 Wn. App. 586, 595 (1998). This grievance is not untimely for those salary payments which fall within the time limits of the grievance and arbitration provision of the contract; but it is untimely for payments outside those time limitations.

ON THE MERITS

The contextual facts behind this grievance are not substantially disputed. The State of Washington's Telecommunications services Division runs its own phone system based on three massive, "carrier class switches," in Olympia, Seattle, and Spokane. That same equipment also provides a video network for all K-12 and higher education institutions in the State. Mr. Longnecker is classified as an ITSS4. He and his single colleague in that classification are "responsible for the integrity of network operations, intermediary troubleshooting tasks and technical support" for those systems (quoting the class description). For about 60% of his time (again according to the class description) his task is to

> 1) Identify and resolve complex, statewide network and operations problems (provide maintenance troubleshooting, problem troubleshooting and problem resolution and consulting tasks). * * * 2) Use advanced diagnostic tools to analyze information and trends. * * * 3) Develop and implement quality assurance testing and performance monitoring for ... networks Make recommendations and take action to improve system performance and efficiency * * * 4) conduct capacity planning for statewide . . . network Operations. (Emphasis is in the original.)

The next 25% of his duties include:

> Monitor and review outstanding trouble-tickets with NMC Workgroup Leader, and discuss any requirements needed for ticket closure. Oversee system management of [the switch] assist service-engineering staff in service implementation assignments. Assist service-engineering staff in [switch] software maintenance.

The State justifies Mr. Longnecker's overtime exemption on two separate and independent bases: it claims that he falls under the Computer Employee Exemption and that he also falls under the Administrative Exemption.

Computer Employee Exemption. Here is DOL's discussion of the relevant requirements for the Computer Employee Exemption (the compensation element is not at issue in this case):

> To qualify for the computer employee exemption, the following tests must be met:

* * * * *

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duties must consist of:

1) The application of systems analyst techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

2) The design, development, documentation analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by the use of computers and computer software programs (e.g. engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemptions.

The focus of Mr. Longnecker's work—according to both his job description and the uncontested testimony in the record—is troubleshooting for the system switches. This is "troubleshooting" at the very highest level, of course; but it is troubleshooting still. Within the computer employment sector, the number of workers involved in systems analysis and design is substantially eclipsed by the number of workers assigned to troubleshooting already developed systems. If DOL had included the terms "troubleshooting" or "maintenance programing" in the list of primary duties which satisfy this exemption, then the exemption would have applied to that vastly broader slice of the workforce. DOL did not do so. Instead, it included the final admonition against confusing the *use of* or *dependence on* computers with the performance of computer systems analysis and programming. I assume the switches Mr. Longnecker works on are, in many senses, computers and that his troubleshooting activities include what could properly be called programming; but the addition of "troubleshooting" or "maintenance programming" to the list of primary duties set out by DOL would

vastly expand this exception. As the Union points out—Post-Hearing Brief at 7-8—the DOL contemplated addition of alternative specifications to its rule but ultimately declined to do so because it was not "appropriate, given the history of the computer employee exemption, to cite additional job titles as exempt beyond those cited in the primary duty test of the statute itself."[4] The State abused its discretion by applying the computer employee exemption to Mr. Longnecker.

Administrative Exemption. Here is DOL's discussion of the administrative exemption (again omitting the compensation element, which is not at issue here):

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;[5] and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

DOL provides this explanation of "directly related to management or general business operations:"

> To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, * * * computer network, Internet and database administration, * * *.

At the time of the hearing in this case there was no reported Washington case interpreting this rule. The October 17 Court of Appeals Advance Sheets includes *Mitchell v. Pemco Mut. Ins. Co.*, 134 Wn. App. 723 (2006), characterized by the Court as a case of first impression, which provides some guidance in the application of the "exercise of discretion" requirement. The Court begins by quoting the DOL rule:

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4. 69 Fed. Reg. 22122 at 22160 (2004).

5. The corresponding exemption under State law is more narrow: it still includes the requirement that the work in question must be directly related to management "policies," a term which was omitted in the most recent redrafting of the federal rule.

> In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.
>
> . . . .
>
> (c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.
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> 29 C.F.R. §541.202(a), (c).

Based on the record before me, more likely than not, Mr. Longnecker meets this modest test for exercise of discretion and independent judgment. His responsibility is for the statewide system; and his lead worker has other primary duties of his own, leaving Mr. Longnecker and his only peer to work mostly on their own. The Union points to the extensive diagnostic manual provided by the manufacturer of the switches and argues that Mr. Longnecker's troubleshooting function is limited to looking up problems in that documentation and following the step-by-step instructions provided by the manufacturer. As far as I can tell from the record before me, that description does not capture Mr. Longnecker's skill, expertise, discretion and independence of judgment very much better than it would describe an attorney's work, considering that he or she is surrounded with collections of administrative rules and reported cases. Mr. Longnecker was properly found to be overtime-exempt as an administrative employee.

Mr. Ambrose. The State argues that Mr. Ambrose falls under the Computer Employee exemption:

> Mr. Ambrose is an ITS 3 responsible for supporting operations of DIS's multiple protocol transport network or Wide Area Network (WAN). In the simplest terms, Mr. Ambrose manages and maintains a variety of networks that consist of computers communicating with computers. His position is designed to be exempt from overtime. If Mr. Ambrose is not performing exempt work, then he is misallocated within the ITS category. (Post-Hearing Brief at 13, transcript references omitted.)

The State points to Mr. Ambrose's position description, which accurately describes his primary duties as follows:

> Utilizes advanced hardware/software monitoring and diagnostic tools to identify network problems; determines appropriate techniques and approach to identify and resolve issues. In a highly complex network environment, independently analyzes network traffic and configurations to determine and make appropriate configuration changes to optimize network performance to include determinations of correct traffic flow. Analyze network software/hardware to determine reasons for network outages or slowdowns. Makes appropriate software/hardware configuration changes to effect restoration of service or optimize performance . . .

In short, Mr. Ambrose, too, is primarily involved in troubleshooting and problem solving and in maintenance of the network. Those terms do not appear in the language of the rule; and adding them to the rule would very substantially increase the applicability of the exemption. Even granting the State substantial discretion in its determination of overtime exemption, the State does not have the discretion to massively expand the application of this exception. Mr. Ambrose does not properly fall under the Computer Employee exemption, and he must be properly designated as overtime-eligible.

AWARD

The State did not violate the collective bargaining agreement by its designation of Mr. Longnecker as overtime-exempt as an administrative employee; and that portion of the grievance is dismissed. The State did violate the collective bargaining agreement by its designation of Mr. Ambrose as a computer employee. The State shall designate him as overtime-eligible and shall make him whole for any non-compensated or improperly compensated overtime he should have been paid for during the period beginning 21 days before the filing of his grievance.

By stipulation of the parties, I retain jurisdiction for the limited purpose of resolving issues that might arise under the general "designate" and "make whole" language of the award in this case. That retained jurisdiction shall lapse 30 days from the date of this Award unless it is previously invoked or is extended by mutual agreement or for good cause shown.

Respectfully submitted,

Howell L. Lankford
Arbitrator