IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	AAA CASE NO. 75-390-00419-07
	)	
THE WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	ARBITRATOR'S OPINION
	)	
	)	AND AWARD
Union,	)	
	)	GRIEVANCE OF
and	)	
	)	LINDA RIPKE
STATE OF WASHINGTON, DSHS/HRD,	)	
	)	(JOB CLASSIFICATION)
	)	
Employer.	)	

HEARING SITE:	Department of Social & Health Services Spokane, Washington
HEARING DATE:	June 18, 2008
POST-HEARING BRIEFS DUE:	Postmarked August 28, 2008
RECORD CLOSED ON RECEIPT OF BRIEFS:	September 10, 2008
REPRESENTING THE UNION:	Kandys Dygert Senior Field Representative Washington Federation of State Employees 316 W. Boone, Suite 353 Spokane, WA 99201
REPRESENTING THE EMPLOYER:	Randy Withrow Labor Relations Specialist State of Washington DSHS 1212 N. Washington, Suite 308 Spokane, WA 99201
ARBITRATOR:	Gary L. Axon P.O. Box 190 Ashland, OR 97520 (541) 488-1573

I. INTRODUCTION

This case arises out of a management directive to utilize State Operated Living Alternative (SOLA) employees in the classification of Attendant Counselor (AC) to conduct a client move from one housing location to another residence. The Washington Federation of State Employees (Union) filed a grievance with the Department of Social and Health Services (DSHS or Employer) alleging the Employer violated the Collective Bargaining Agreement when SOLA management directed AC employees to move SOLA participants' furniture, appliances, and household goods to a new location. The Employer denied the grievance. When the dispute was not resolved in the lower levels of the grievance procedure, the Union advanced the case to arbitration.

II. STATEMENT OF THE ISSUE

The parties stipulated to a statement of the issue that read as follows:

> Did the Department of Social and Health Services (DSHS) violate, misapply or misinterpret the 2005-2007 Collective Bargaining Agreement in Articles 20, 38.1 and 41.1 when management conducted a client move from one housing location to another using State Operated Living Alternatives (SOLA) employees? If yes, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 20
SAFETY AND HEALTH

20.1 The Employer, employee and Union have a significant responsibility for workplace safety.

A. The Employer will provide a work environment in accordance with safety standards established by the Washington Industrial Safety and Health Act (WISHA).

B. Employees will comply with all safety practices and standards established by the Employer.

C. The Union will work cooperatively with the Employer on safety-related matters and encourage employees to work in a safe manner.

20.2 The Employer will determine and provide the required safety devices, personal protective equipment and apparel, which employees will wear and/or use. If necessary, training will be provided to employees on the safe operation of the equipment prior to use.

…

ARTICLE 35
MANAGEMENT RIGHTS

Except as modified by this Agreement, the Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to, the right to:

…

C. C. Direct and supervise employees;

…

L. Determine, prioritize and assign work to be performed.

…

ARTICLE 38
MANDATORY SUBJECTS

38.1 The Employer will satisfy its collective bargaining obligation before making a change with respect to a matter that is a mandatory subject. The Employer will notify the Executive Director of the Union of these changes in writing, citing this Article, and the Union may request negotiations on the impact of these changes on employee's working

conditions. In the event the Union does not request negotiations within twenty-one (21) calendar days of receipt of the notice, the Employer may implement the changes without further negotiations. There may be emergency or mandated conditions that are outside of the Employer's control requiring immediate implementation, in which case the Employer will notify the Union as soon as possible.

…

ARTICLE 41
CLASSIFICATION

41.1 Classification Plan Revisions

A. The Employer will provide to the Union, in writing, any proposed changes to the classification plan, including descriptions for newly created classifications. Upon request of the Union, the Employer will bargain the salary effect(s) of a change to an existing class or newly proposed classification.

B. The Employer will allocate or reallocate positions, including newly created positions, to the appropriate classification within the classification plan.

…

Jt. Ex. 1.

IV. STATEMENT OF FACTS

The Union is the exclusive representative of Linda Ripke and other employees of the bargaining unit working at SOLA residences under the umbrella of the Washington State Department of Social and Health Services. SOLA is a community residential program for persons eligible for developmental disability services. The SOLA program enables developmentally disabled adults to live in community neighborhood settings rather than in institutions.

Grievant Ripke heard through the grapevine of a plan to move a number of SOLA clients to different locations. Ripke contacted SOLA Program Manager Sheila Simpson to inquire about the possible move and was informed the move would take place and management was going to ask for permanent ACs and on-call ACs to volunteer to move the participants to new locations. On May 1 and 2, 2007, thirteen individual SOLA participants were moved from their current residences to different residences. Management assigned workers in the classification of AC 2, AC 3, and AC Manager to assist participants and their families with the moves. The moves included transporting participants' personal belongings and in some cases furnishings, equipment, and appliances. DSHS rented a truck to haul the furniture.

The Union filed a grievance dated May 8, 2007, on behalf of the AC class alleging management violated the Collective Bargaining Agreement by assigning ACs to move the clients to their new residences. By way of remedy, the Union requested as follows:

> An agreement that DSHS will not use SOLA staff to move SOLA participants' furniture; appliances; and household goods. To not require and/or allow SOLA staff covered by the CBA to perform duties outside his/her class concept. To pay all expenses to the grievants for use of personal vehicles or other personal property used during the move. To bargain changes in the working conditions of SOLA employees covered by the CBA in accordance with Article 38 of the CBA and any other remedy to make the grievants whole.
>
> Er. Ex. 2.

The Employer denied the grievance concluding there was no violation of the Collective Bargaining Agreement by SOLA management during the participants'

moves. Er. Ex. 2. The Union advanced the case through the grievance procedure to arbitration.

A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Post-hearing briefs were timely filed. The case is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Union

The Union takes the position the Employer violated Article 20 because management failed to provide training on the safe operation of the moving equipment prior to use by the Grievants. The move required the use of a moving truck and dolly to transport furniture, freezers, and other heavy items from one location to another. There is no dispute that management did not arrange for any safety training for ACs for moving large household items from one location to another.

The Union next argues that Article 38 was misapplied, misinterpreted, and violated because management failed to notify the Union of changes to the AC classification. At the Labor Management meeting held in December 2003, it was agreed between the parties “the AC class will not be moving boxes and furniture." Un. Ex. 6. The classification has not changed since December 2003, nor has the understanding of the classification changed. If the Employer desired to change the duties of the AC classification, management should have addressed the issue by

informing the Union pursuant to the mandatory bargaining subject process found in Article 38.

It is also the position of the Union that the Employer violated Article 41--Classification when management failed to provide to the Union, in writing, any proposed changes to the classification plan. By providing the Union with notice of any proposed changes to the classification plan, the Union would have had the opportunity to bargain over the salary effects including special duty or assignment pay or even hazardous duty pay for the extra function of moving household furniture to new locations. The Union asserts there is a significant difference between helping the participants pack or rearrange furniture inside their residences, from that of moving heavy furniture and appliances in a moving truck to new residences.

Based on all of the above-stated arguments, the Union submits the Arbitrator should sustain the grievance and order the relief requested.

B. <u>The Employer</u>

The testimony of management and Union witnesses established that the primary thrust of the AC classification is to assist SOLA participants with whatever they need in order to carry out the functions of daily living in the community. The AC classification specifications were adopted in early 1990 and have remained essentially unchanged since they were first implemented. The classification specifications and the testimony of management witnesses made clear that physically demanding tasks such as laundry, housekeeping, and lifting or physically supporting participants have all been part of assisting participants with activities of daily living. While the moving tasks do not

occur on a daily basis, they are normal functions performed while assisting participants to live in the community.

Management witness Simpson testified that it has been necessary to move participants from one residence to another well over 80 times since the programs started in the early 1990s. Management has never claimed that physically moving participants' belongings was a major part of AC jobs. However, when it is necessary, the moving of participants by ACs is a function of the normal living community and part of providing assistance to participants.

The Union failed to meet its burden of proof to show that moving participants' furnishings, boxed personal belongings, equipment, and appliances are functions outside the scope of duties for employees in the AC classifications. Moving participants' goods--performed on an occasional basis--is part of the job. SOLA employees have facilitated individual participant moves since the inception of the program in the early 1990s. The May 1 and 2, 2007 assignment of ACs, to move individual participant's furnishings represented no change from the consistent utilization of those classifications in Region 1 SOLA.

The Union identified one move out of 80+ participant moves where employees in classifications other than AC 2, AC 3, or AC Manager moved participants' furnishings, equipment, boxed belongings, and certain appliances. According to the Employer, this move was not of individual participants, but a group of 15 participants' entire household from four old residences to four new residences. This move differed from the move on May 1 and 2, 2007.

Management witnesses testified that the assignment of AC counselors to facilitate moving participants during the May 1 and 2, 2007 move, as in all but one of the moves since the inception of Region 1 SOLA, was to protect participants from potential exploitation, as well as the emotional impact of having strangers handling their belongings. The single move in December 2003 is an exception and cannot be held to establish a past practice regarding either work assignment or the proper use of AC classifications.

Management made a one-time agreement in December 2003 to utilize employees in other classifications rather than the AC classifications. Article 46.1 abolished all prior local agreements unless they were expressly incorporated into the 2005-2007 Master Agreement. The 2003 Region 1 SOLA agreement was not incorporated into the Master Agreement. The Employer is not required to bargain each individual classification, but would be required to bargain if the classification language was changed in a way that impacted employees' salaries. Therefore, the December 2003 agreement is not enforceable in the instant case.

Article 41.1 provides that management would give notice to the Union of changes in the classification plan and bargain wage impacts. The Employer did not notify the Union under this clause for three primary reasons.

First, the participant move of May 1 and 2, 2007, was a “work assignment,” not a change in the classification plan.

Second, the content of classifications was and is a permissive, not a mandatory, subject of bargaining under both Article 41.1 and Article 38.1 of the

Collective Bargaining Agreement. Managers are only required to provide notice to the Union regarding changes impacting mandatory subjects of bargaining.

Third, the Employer maintains there was no impact on employee wages. Thus, there is no violation of Article 38.1 of the contract.

The Union raised safety concerns about using AC classifications to physically move participants' furnishings and related items. According to the Union, the ACs had not been adequately trained to lift or to load trucks. However, training was provided to employees in the classifications of AC 2 and AC 3 on how to lift and move participants. No staff member who participated in the May 2007 move reported sustaining or observing injuries. No staff member raised any safety concerns before, during, or after the move. There is no violation of Article 20.

In sum, the Employer submits this case is about a work assignment, not a classification issue. The assignment of ACs to assist in the move was incidental to fulfilling the mission and purpose of SOLA of assisting program participants in performing normal life functions. It stretches the bounds of credibility to assert that each and every task performed by an AC 2, AC 3, or AC Manager would have to be included in the individual's position description form.

The right to assign work is an inherent management right that has long been upheld by both arbitrators and courts. The Arbitrator should sustain the managerial right of the Employer to assign work and deny the grievance in its entirety.

VI. DISCUSSION

The Arbitrator finds the Union failed to prove by a preponderance of the evidence DSHS violated Articles 20, 38.1, or 41.1 when management conducted a

client move from one housing location to another using SOLA employees in the AC classifications. This conclusion is supported by an examination of the contract language and evidence offered at the arbitration hearing. Accordingly, the grievance will be denied. The following is the reasoning of the Arbitrator.

The fundamental goal of contract interpretation is to determine and give effect to the intent of the parties as expressed in the collective bargaining agreement. In issues of contract interpretation, arbitrators are controlled in the first instance by the contract language. Past practice and bargaining history may be important in ascertaining the meaning of a contract in dispute where the provisions are ambiguous or unclear.

The grievance in the case at bar protests management's assignment of ACs to move SOLA's participants' furniture, appliances, and household goods on May 1 and 2, 2007. The Employer rented a truck and dollies for the ACs to use in moving washers and dryers, refrigerators and freezers, and boxes of personal items owned by the participants. The ACs who worked the move were on-call employees. An all-volunteer crew of AC employees performed the move. No AC was forced to move the household items in question against their will.

Article 35, Sections C and L, make clear that the Employer has retained the managerial prerogative to "Direct and supervise employees" and to "assign work to be performed" by employees. Except as limited by the terms of the Collective Bargaining Agreement, this Employer has wide discretion to assign various tasks and duties to individual employees. Absent from this Collective Bargaining Agreement are

any express provisions limiting the right of management to assign and reassign work to individual ACs.

The Union relied on three sections of the Collective Bargaining Agreement as the basis for its claim of contract violations. First, the Union argued Article 20--Safety and Health, was misapplied, misinterpreted, and violated because management failed to provide training on the safe operation of moving equipment prior to use. According to the Union, management failed to comply with Article 20 by not providing ACs with training to safely move furniture, freezers, and other heavy items from one location to another.

Article 20.2 reads as follows:

> The Employer will determine and provide the required safety devices, personal protective equipment and apparel, which employees will wear and/or use. If necessary, training will be provided to employees on the safe operation of the equipment prior to use.
>
> Emphases added.

In clear and express language, the contract reserves to management the power to determine whether training is necessary for employees in the safe operation of equipment prior to use. There is no mention in this provision of the employees or the Union having any right to make the final decision regarding when or if training will be provided. Thus, I am compelled to reject the Union's arguments based on Article 20.

Second, the Union avers that the Employer violated Article 38--Mandatory Subjects when management failed to notify the Union of changes to the AC classifications. The Union's attempt to characterize the assignment to ACs to move household goods of participants as a change of duties in the AC classifications is misplaced. The instant grievance challenges a work assignment that was reasonably

related to the duties of Attendant Counselors as set forth in the specifications for ACs. The duty of physically moving participants' goods, including furnishings, has historically been a part of the work performed by AC 2, AC 3, and AC Managers in the classifications used in the Region 1 SOLA program.

Moreover, the Union relied on an agreement reached at a SOLA Labor/ Management meeting held on December 2, 2003, where it was "agreed that the AC class will not be moving boxes and furniture." This agreement was clearly tied to the move that would take place during December 2003 and January 2004. The December 2003 agreement does not purport to constitute a broad based agreement that ACs will not be used as movers in the future. The December 2003 agreement was not incorporated into the subsequently negotiated 2005-2007 Collective Bargaining Agreement. If the Union had wanted the opportunity to negotiate special duty or assignment pay, or even hazardous duty pay for moving household furniture to new locations, it was incumbent on the Union to negotiate a similar provision into the 2005-2007 Collective Bargaining Agreement.

Third, the Union argued the Employer violated Article 41--Classification when management failed to provide to the Union, in writing, any notice of proposed changes to the classification plan. As previously held, the assignment to have ACs move the household goods of participants to a new location does not rise to the level of a change in the classification plan. Since the May 1 and 2, 2007 move, did not constitute a change in the classification plan, there was no duty of the Employer to provide written notice of proposed changes in the classification plan to the Union.

Your Arbitrator cautions the parties this case was not presented by the Union as a claim for additional compensation for ACs allegedly working in a higher classification. The Award in this grievance should not be considered as a decision involving a claim ACs were being worked in a higher classification.

Additionally, the instant grievance was not a disciplinary case where your Arbitrator was faced with a situation concerning an AC who refused to move heavy items such as a freezer, refrigerator, washer and dryer, or a sofa. All of the employees on the crew that conducted the move on May 1 and 2, 2007 were volunteers. No AC was forced to load or unload a freezer, washer and dryer, refrigerator, or sofa into a truck for delivery of the participants' household items to a new and different location.

Based on the facts of the instant case, I am compelled to deny the grievance in its entirety.

AWARD

Having reviewed all of the evidence and argument, I find the Union failed to prove the Employer violated Articles 20, 38 or 41 when management assigned ACs to conduct a client move from one housing location to another on May 1 and 2, 2007. The grievance is denied and dismissed in its entirety.

Respectfully submitted,

Gary L. Axon
Arbitrator
Dated: September 24, 2008