BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between State of Washington, Office of Financial Management/UTC the Employer and Washington Federation of State Employees the Union	**ARBITRATOR'S OPINION AND AWARD** AAA No. 75 390 00302 06 LYMC (Grievance of Ken Chapman)

Representatives:

For the Union:
Gregory M. Rhodes
Younglove Lyman & Coker, PLLC
PO Box 7846
Olympia, WA 98507-7846

For the Employer:
Glenn W. Frye
Office of Financial Management
210 11th Ave. SW, Suite 331
Olympia, WA 98504

December 28, 2006

Jane R. Wilkinson, Esq.
Labor Arbitrator
PMB 211
3 Monroe Pkwy, Ste. P
Lake Oswego, OR 97035

WITNESS LIST

For the Union
Kenneth Chapman, Grievant

Randy Lorello, WFSE Representative

For the Employer
Mary DeYoung, Human Resources Manager, Washington Utilities and Transportation Commission

Vicki Elliott, Assistant Director of Transportation Safety, Washington Utilities and Transportation Commission

Catherine (Cathy) Hunter, Transportation Safety Compliance Officer, Washington Utilities and Transportation Commission

Carole Washburn, Carole Washburn, Executive Secretary, Washington Utilities and Transportation Commission

EXHIBIT LIST

Joint Exhibits

1. 10/24/05 - Ken Chapman Grievance dated 10/24/05
2. Collective Bargaining Agreement, July 1, 2005 through June 30, 2007
3. 5/28/91 - Letter appointing K. Chapman to MCLE position
4. 8/3/93 - Letter appointing K. Chapman to CPS 1 position
5. Classification Questionnaire — CPS 1 position
6. 6/9/95 - Letter appointing K. Chapman to CPS 2 position
7. 4/2/01 - Notice appointing K. Chapman to temporary assignment MCLE Special Investigator
8. 10/9/01 - Letter appointing K. Chapman to MCLE position
9. 7/31/03 - Letter appointing K. Chapman to CPS 1 position
10. 5/6/04 - Notice appointing K. Chapman to Transportation Specialist 2 position
11. MCLE Position Description
12. Transportation Specialist 2 Position Description
13. 3/30/04 - Settlement Agreement
14. 9/7/05 - Letter from Carole Washburn to K. Chapman
15. 9/2/05 - Letter from K. Chapman to Carole Washburn
16. 10/5/05 - Letter from Carole Washburn to K. Chapman
17. Certification of Vehicle Inspectors, Safety Auditors, and Safety Investigators

I. INTRODUCTION

This dispute, between State of Washington Utilities and Transportation Commission (UTC), which is part of the Office of Financial Management (the Employer) and the Washington Federation of State Employees (the Union), concerns a grievance of Ken Chapman (the Grievant) that the Union submitted to the Employer under the parties' Collective Bargaining Agreement. The Union alleges that the Employer violated the Agreement when it ceased to implement the provisions of an agreement to settle a prior grievance that arose under the parties' penultimate Collective Bargaining Agreement. The parties were unable to resolve the dispute and submitted the dispute to arbitration, utilizing the procedures of the American Arbitration Association. At an arbitration hearing held on November 3, 2006, in Olympia, Washington, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision as to the issues submitted herein. The parties also stipulated that the Arbitrator would retain jurisdiction, for 90 days, over the remedial aspect of the dispute should a remedy be awarded in favor of the Union. Upon the receipt of both parties' closing briefs to the Arbitrator on December 11, 2006, the hearing closed and the case stood fully submitted for decision.

II. SUMMARY OF THE EVIDENCE

The parties do not dispute that the Grievant has worked for the Washington Utilities and Transportation Commission since at least May 1991, when he took the position of Motor Carrier Law Enforcement (MCLE) Investigator, a position that involves the inspection of motor vehicles for compliance with safety regulations. He obtained the required CVSA (Commercial Vehicle Safety Authority) certification for that position. A prerequisite to that certification requires the employee to perform a specified number of inspections (currently, the number is 32). The

certification lapses if the employee does not maintain his skills by again performing a designated number of inspections each year. The Grievant worked in that position until August, 1993, when because of a reduction in force (RIF), the Employer appointed him to the Consumer Protection Specialist (CPS) 1 position. Almost two years later, the Employer elevated him to a CPS 2. In April 2001, the Employer gave him a temporary assignment as a MCLE Special Investigator, and since his CVSA certification has lapsed, he began the process anew of obtaining that certification and succeeded in doing so. In October of 2001, his appointment as an MCLE became permanent. In July 2003, the Employer again eliminated his job and assigned him to another CPS 1 position. In mid-August, 2003, the Employer placed the Grievant on the RIF register (i.e., the recall list) for the MCLE position. The Grievant remained on the recall list for the MCLE position for a period of two years from the date of his layoff. Thus, he was removed from the recall list in mid-August, 2005. That removal meant that henceforth, he would be required to compete for any open MCLE positions.

The Grievant filed actions protesting his RIF with the Washington State Personnel Appeals Board and the Public Employment Relations Commission (PERC). On March 30, 2004, the parties resolved that grievance with a written agreement signed by the Grievant, a Union representative, and a representative for the Employer. In that settlement, the Grievant accepted a 60% assignment to a Transportation Specialist 2 position, a position that does not involve the inspection of commercial vehicles.[1] The agreement also enabled the Grievant to maintain his Commercial Vehicle Safety Authority (CVSA) certification needed (in the MCLE position) for inspecting motor carriers. Section A.5 of the Settlement Agreement stated (Exh. Jt-13):

> 5. That Kenneth Chapman will be provided the opportunity to conduct the number of vehicle inspections necessary to maintain his CVSA credential. He will also be provided appropriate compliance review refresher training offered by the Washington State Patrol.

[1] Although the Transportation Specialist 2 position does not involve the inspection of commercial vehicles, the Transportation Specialist 4 position was rewritten to include this duty. An employee in that grade currently spends part of his time performing vehicle inspections

The Settlement Agreement contained no duration clause or expiration date on any of its provisions, including section A.5, nor did it even hint at one. The evidence was clear that the parties never discussed the duration.

The parties reached the Settlement Agreement after mediation sessions with a Public Employment Relations Commission (PERC) mediator. The parties were caucused in separate rooms and never met face to face. Instead, the mediator carried messages back and forth.

The Grievant testified that he could not recall any discussion of a time limit on section A.5 and that he would not have agreed to an obligation of brief duration. He explained that he wanted to maintain the CVSA certification to make his resume more attractive for any future jobs, including jobs with other employers, which might require this certification. Randy Lorello, the Grievant's Union representative at the time, also testified that he could not recall any discussion of time limits. He added that the certification issue was very important to the Grievant.

For the Employer, UTC director Carol Washburn testified that she "understood" that the commitment of section A.5 would expire when the Grievant was removed from the RIF register (i.e., the recall list). She testified that she told the mediator that she understood the section A.5 obligation would terminate upon the Grievant's removal from the RIF register, but she did not know whether the mediator conveyed that understanding to the Union and the Grievant. The mediator did not report or comment one way or the other on duration. She testified that she assumed the duration of Section A.5 would coextend with the Grievant's eligibility for the RIF register. She explained that the context of the grievance and mediation was his RIF from the MCLE position. When asked on cross-examination, whether she told the mediator that Section A.5 was acceptable only so long as the Grievant remained on the RIF register, Ms. Washburn replied that the Employer's side told the mediator that the language was reasonable because the Grievant was on the RIF register at the time. She was pressed further whether she made her understanding of the obligation's duration to the mediator. She responded that it was part of

the discussion with the mediator because the whole agreement was about the RIF. She testified she did not propose the inclusion of language on duration because she thought it was understood, that the context of negotiations was the RIF of the Grievant's MCLE position. She also testified that it was not her intent to provide the continued certification in order to better the Grievant's credentials in searching for a job with another employer.

Ms. Washburn also testified, however, that while the Grievant remained on the recall list, if an MCLE position became open, he would automatically receive it, with or without the CVSA certification. But, having maintained that certification, the Employer would not require him to obtain it anew should it appoint him to an MCLE position during the recall period.

Human Resources Manager Mary DeYoung, who also was present at the mediation, essentially testified that the parties did not address the time limit on A.5; she stated the parties only discussed the RIF and the RIF register.

Vicki Elliott, the UTC's Assistant Director of Transportation Safety, testified that when the agency hires a new MCLE, it is willing to provide the employee the opportunity to obtain the required CVSA certification. In other words, having a CVSA is not a prerequisite to being hired. Nevertheless, she agreed that an applicant who had the CVSA would be a more attractive candidate for the position, that it would be one of the factors the agency would consider when making a hiring decision.

The Employer adhered to its Section A.5 commitment until September 2005. On September 7, 2005, Carole Washburn sent the Grievant a letter that stated, in relevant part, as follows (Exh. Jt-14):

> During the time that your name remained on the reduction-in-force register or internal layoff list for the Motor Carrier Law Enforcement Special Investigator class, you were provided the opportunity to maintain your CVSA vehicle certification. ....
>
> Now that your name is no longer on the internal layoff list and you will be competing for future openings along with any other qualified candidate, this commitment has ended. Should you later be rehired into the Motor Carrier Law Enforcement Special Investigator classification, the Commission would provide

> you the same opportunity to obtain any required credential as would he provided to any other successful, candidate.

A round of correspondence ensued in which the Employer clarified that the "commitment" referred to in the above quoted letter referred to its pledge, in the Settlement Agreement, to give the Grievant the opportunity to maintain his CVSA credentials.

On October 24, 2005, the Grievant filed a grievance alleging that the Employer's action, as set forth in its September 7, 2005, letter (above), and its October 5, 2005 clarification, violated the Settlement Agreement and Article 9 of the current Collective Bargaining Agreement.

III. ISSUES

The parties stipulated to the following statement of the issues:

1. Is the dispute arbitrable?

2. Did the Employer violate the 2005/2007 WFSE/State of Washington Collective Bargaining Agreement as a result of no longer allowing the Grievant, Kenneth Chapman, to participate in conducting vehicle safety inspections and to maintain his vehicle safety inspection certification, as of September 2005?

3. If so, what is the appropriate remedy?

IV. RELEVANT CONTRACT LANGUAGE

ARTICLE 4 - HIRING AND APPOINTMENTS

4.1 Filling Positions .... Only those candidates who have the position-specific skills and abilities required to perform the duties of the vacant position will be referred for further consideration by the employing agency.

A. An agency's internal layoff list will consist of employees who have elected to place their name on the layoff list through Article 34, Layoff and Recall, of this Agreement and are confined to each individual agency.

B. The statewide layoff list will consist of employees who have elected to place their name on the statewide layoff list in accordance with WAC 357-46-080.

****

F. When filling a vacant position with a permanent appointment, candidates will be certified for further consideration in the following manner:

1. The most senior candidate on the agency's internal layoff list with the required skills and abilities who has indicated an appropriate geographic availability will be appointed to the position.
2. If there are no names on the internal layoff list, the agency will certify up to twenty (20) candidates for further consideration. Up to seventy-five percent (75%) of those candidates will be statewide layoff, agency promotional, internal transfers, and agency voluntary demotions. All candidates certified must have the position-specific skills and abilities to perform the duties of the position to be filled. ....
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ARTICLE 9 - LICENSURE AND CERTIFICATION

9.1 The Employer and the Union recognize the necessity for bargaining unit employees to maintain appropriate licensure and/or certification to perform the duties of their assigned position.

9.2 Agencies will continue their current practices related to licensure and certification.

ARTICLE 29 – GRIEVANCE PROCEDURE
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29.2 Terms and Requirements

A. Grievance Definition
A grievance is an allegation by an employee or a group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. ....
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D. Authority of the Arbitrator
1. The arbitrator will:
a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
c. Not make any award that provides an employee with compensation, greater than would have resulted had there been no violation of this Agreement;
d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.
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 arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.
3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs
1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.
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ARTICLE 34 - LAYOFF AND RECALL
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34.15 Recall
A. The Employer will maintain layoff lists for each job classification, which will include geographic availability. Employees who are laid off may have their name placed on the lists for the job classification from which they were laid off or bumped and will indicate the geographic areas in which they are willing to accept employment. Additionally, employees may request to have their name placed on layoff lists for other job classifications in which they have held permanent status. An employee will remain on the layoff lists for two (2) years from the effective date of the qualifying action.

B. When a vacancy occurs within an agency and when there are names on a layoff list, the Employer will fill the position in accordance with Article 4, Hiring and Appointments. An employee may be removed from the layoff list if he or she is certified from the list and waives appointment to a position two (2) times.
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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.
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ARTICLE 46 - ENTIRE AGREEMENT
46.1 This Agreement constitutes the entire agreement and any past practice or past agreement between the parties—whether written or oral—is null and void, unless specifically preserved in this Agreement.
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46.4 During the negotiations of the Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining. Therefore, each party voluntarily and unqualifiedly waives the right and will not be obligated to bargain collectively, during the term of this Agreement, with respect to any subject or matter referred to or covered in this Agreement. Nothing herein will be construed as a waiver of the Union's collective bargaining rights with respect to matters that are mandatory subjects/topics under the law.

V. POSITIONS OF THE PARTIES

A. **Position of the Union** – The Employer violated the parties' contract when it no longer allowed the Grievant to conduct vehicle inspections or maintain his certification. The Employer should be required to reinstate and maintain the Grievant's certification.

1. This grievance is arbitrable because the Employer violated Article 9.2 of the parties' contract.
    a. The provision requires the Employer to maintain its current practices regarding licensure and certification.
    b. Article 9.2 should be given nothing less than the full force of the plain language in which it was drafted, which places no limits on its application. No evidence was presented regarding the intentions of the drafters.
    c. Adopting the Employer's position would require the Arbitrator to implicitly modify Article 9.2 by assuming the qualifying phrase "...required to perform the duties of an assigned position."
    d. The Employer created a practice of maintaining the Grievant's CVSA certification when it entered into the Settlement Agreement with the Grievant. This practice is clearly encompassed by the language of Article 9.2.
    e. The Employer clearly violated Article 9.2 when, after a year of living up to the Settlement Agreement, the Employer abdicated its responsibilities spelled out in the agreement.
2. The Settlement Agreement is not limited in time or scope.
    a. As the party seeking to adopt an interpretation of the Settlement Agreement that goes beyond the four corners of the document, the Employer bears the burden of showing that such an interpretation is warranted by context or intent of the parties. The Employer has not met this burden.
    b. The Settlement Agreement was not made contingent upon the Grievant's being on an internal layoff list or being in a position that requires certification. There was no discussion about the duration of the agreement in reference to these or any other benchmark. The Employer's reliance on these reasons for violating the agreement is arbitrary "and extrapolates in self-serving fashion on the actual terms of the agreement."
    c. The Grievant was the one who proposed the term of the agreement regarding maintaining his certification, and he would not have agreed to a term that contained time limitations or a listing contingency.
    d. Ms. Washburn testified that the Employer entered into the Settlement Agreement as "a way to settle [the claims]." The Employer is not now free to unilaterally modify the deal to suit its interests.

B. **Position of the Employer** – The Grievant's October 24, 2005 grievance is procedurally flawed and not properly before the Arbitrator. The Employer did not violate Article 9 of the parties' contract when it stopped allowing the Grievant to conduct vehicle safety inspections and maintain his certification.

1. The Grievance is procedurally flawed.
    a. The March 2004 Settlement Agreement was not preserved in the contract.

   b. Pursuant to Article 46 of the contract, the Settlement Agreement would have had to be preserved to be arbitrable.
   c. Therefore, this grievance is not properly before the Arbitrator.
2. The question of arbitrability of this grievance is properly before the Arbitrator.
3. The Employer did not violate Article 9 of the parties' contract.
   a. Article 9.1 requires the Employer to maintain licensing requirements of employees' current positions, not former positions.
   b. Article 9.2, which provides that the Employer will maintain its current practices related to licensure and certification, applies only to practices related to Section 9.1.
   c. Therefore, Article 9.2 applies only to the Grievant's current position, Transportation Specialist 2.
   d. The Transportation Specialist 2 position does not require the Commercial Vehicle Safety Alliance certification, nor does it require that the Grievant perform vehicle safety inspections.
   e. The Employer properly ended its commitment to Section A.5 of the Settlement Agreement because
      1) The Grievant's name was no longer on the MCLE layoff list and
      2) The new 2005-2007 master contract had gone into effect July 1, 2005.
   f. Ms. Washburn testified that, based on her conversations with the PERC mediator, it was not in any way her understanding or intent that the provisions of Section A.5 would continue in perpetuity.

VI. DISCUSSION AND ANALYSIS

A. Principles of Contract Construction and Interpretation

There are two separate contracts at play in this case: One is the parties' 2005-07 Collective Bargaining Agreement and the other is the Settlement Agreement signed by the Employer, the Union and the Grievant on March 30, 2004. Both are subject to the same general rules of construction and interpretation.

The parties agree that the Union bears the burden of proving contract violations in this case and I have kept that in mind in resolving this dispute.

An arbitrator's goal in a contract dispute is to seek an interpretation that is most consistent with the parties' evident mutual intent when negotiating the language in dispute. *Boise Cascade Paper Group*, 85-1 ARB ¶8013 (Bognanno, 1984); *Southern Indiana Gas & Elec. Co.*, 86 LA 342, 343 (Schedler, 1985); *Ind. School Dist. No 47,* 86 LA 97, 103 (Gallagher, 1985); *Riley*

Stoker Corp., 7 LA 764, 767 (Platt, 1947). 1 *Labor and Employment Arbitration*, §14.0112] T. Bornstein and A. Gosline, eds., (Matt. Bender, 1991).[2]

However, when contract language (reading the contract as a whole in light of its circumstances) is clear as to the issue in dispute, it ordinarily will be given effect. Although the Washington Supreme Court, in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), allowed consideration of the context of a contract when determining meaning, even when the language seems clear on its face, the law does not support an inference of mutual intent when there clearly was none. The court cautioned also that one should not use contextual evidence to import an intention not expressed in the writing; instead, the evidence must give meaning to the words employed. Thus, one looks at the written words, not at what a party intended to write. *See Berg*, at 669. See also, Comment B to §212 of the *Restatement (Second) of Contracts* (referred to hereafter as "*Restatement*")

Occasionally, an important term in a written contract is missing. If omissions are so material as to preclude the creation of a valid contract, the document will not be enforceable. On the other hand, when the rights and duties in an agreement are sufficiently defined to be a contract, but the parties "have not agreed with respect to a term which is essential to determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement*, §204. See also, *Restatement*, §226, comment c. The Washington courts have applied this principle. In Estate of Bachmeier, 106 An. App. 862, (Div. II, 2001) the court addressed a missing termination clause, stating:

> When analyzing the propriety of implying a termination clause, the first step is to determine whether, despite the absence of an express clause dealing with this situation, the parties nevertheless reached agreement on this issue. To decide this, we look to the parties' conduct and surrounding circumstances, as well as the contractual language.

[2] Most authorities follow the view that general principles of contract interpretation are of assistance in interpreting collective bargaining agreements. 1 *Labor and Employment Arbitration*, §14.01[1], T. Bornstein and A. Gosline, eds., (Matt. Bender, 1991).

Id., 872. If no agreement in fact can be found, the court, citing the *Restatement*, stated that the next step is to supply a term that is reasonable under the circumstances, considering both "community standards of fairness and the reasonable expectations of the parties." *Id.,* 874.

With the above principles in mind, I will examine the disputed contract language.

B. Whether the Employer's Violation is Arbitrable

The Employer contends that the dispute is not arbitrable under the current Collective Bargaining Agreement, and in so doing, it raises a question of substantive arbitrability. The Employer's argument is correct if there is no current contract language that could even arguably apply to the Union's claim of Collective Bargaining Agreement breach. As stated by the United States Supreme Court, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986), *citing* Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

In addressing this contention, I have in mind the oft-enunciated presumption in favor of arbitrability, which traces its roots to the *Steelworkers'* case, *supra*, and its companions, which comprise what is known as the *Steelworkers' Trilogy*. *Steelworkers v. American Mfg. Co.*, 363 US 564, 46 LRRM 1414 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 46 LRRM 2423 (1960).

As the Employer has noted, the layoff and recall provisions of the current agreement are inapplicable. The layoff that gave rise to this dispute occurred under the parties' previous Collective Bargaining Agreement. The Employer also points to the very strong "zipper" clause in the current agreement, Article 46.1. That section not only states that the document constitutes the "entire agreement" between the parties, but it also states that all past practices and past agreements are null and void, "unless specifically preserved in this Agreement."

In my opinion, there are two provisions that arguably could apply to this dispute. The first is Article 9.2, which requires agencies to "continue their current practices related to licensure and certification." The second is Article 38.1, which incorporates into the contract, as an Employer covenant, at least part of the Employer's statutory duty to bargain mandatory subjects of bargaining. That section states that the Employer must notify the Union of any proposed change to an employee's working conditions and request negotiation on the impact of that change. Both provisions trump the contract's "Entire Agreement" language. The Employer's obligation to maintain licensures and certification is "specifically preserved in this Agreement," within the meaning of Article 46.1. Article 38.1, which retains the duty to bargain, is reinforced by Article 46.4, which states that the Union does not waive its bargaining rights on mandatory subjects of bargaining. A disputed unilateral action with respect to a grievance Settlement Agreement almost surely would be considered a mandatory subject of bargaining.

The determination of arbitrability does not require the Arbitrator, to determine whether these arguably applicable provisions were actually violated. Rather, this determination is a prerequisite for further addressing the grievance.

Because I find the two referenced contract sections arguably applicable, I determine that the dispute is arbitrable.

C. Whether the Employer Violated the Settlement Agreement

The March 30, 2004, Settlement Agreement is missing a term, which is duration. It does not specify the period of time that the Employer is required to provide the Grievant with the opportunity to maintain his CVSA certification.

The Employer contends that the parties intended that the Grievant's removal from the RIF register terminated its obligation. The Union disagrees; its position would leave the term of the agreement open-ended. The Union further argues that the parties did not agree, or intend to agree, that the obligation terminated with the Grievant's removal from the recall list.

From the record evidence in this case, I have concluded that there was no meeting of the minds on the duration of the Employer's obligation, meaning that there was no ascertainable mutual intent.

The agency's director, Carole Washburn, testified that she understood that removal from the layoff list terminated the Grievant's obligation, and this was the Employer's intent. She explained that the context of the grievance and mediation was the Grievant's layoff, so she assumed that the CVSA certification obligation ran concurrently with the Grievant's recall rights. All communications went through a PERC mediator. Ms. Washburn testified that she indicated to the mediator her understanding of duration, and assumed the mediator would carry the message to the Union. She testified that she received no contrary response from the Union. On cross-examination, when asked whether she clearly conveyed her intent with respect to duration, she hedged somewhat, saying that it was part of the discussion with the mediator because the settlement was about the layoff. Counsel then asked her whether she told the mediator that the certification obligation was acceptable so long as the Grievant remained on the recall list. Ms. Washburn responded that her team told the mediator that the Grievant's request was reasonable because the Grievant was on the recall list at the time. When asked why she did not require a clause on duration, she answered that it did not come to mind and she assumed it was understood, that "this was the context." She said she did not ask the mediator why a duration clause was not in the agreement.

I note that Ms. Washburn never testified that she told the mediator, in so many words, that the Employer's certification obligation would end upon the Grievant's removal from the recall list. Nor did she specifically request the mediator to convey that intent to the Union.[3] Rather, her testimony indicated the matter was "understood," given the context of negotiations. The Grievant and his Union representative testified that the mediator did not communicate the

[3] To be clear, communicating an intent to the other side does not necessarily prove mutual intent. But, assuming the other party got the message, one can look to that side's conduct to see whether it somehow manifested agreement.

Employer's view of the obligations' duration to them. The evidence is far from sufficient to infer that there was a mutual understanding on the duration obligation.

Ms. Washburn emphasized the context of negotiations, but this point is not persuasive. The context of negotiations was the fact of the Grievant's layoff, which he alleged was wrongful under State statute and personnel rules. He already was on the recall list; that was not a matter in dispute. The Grievant testified that he was looking beyond the two-year period during which he enjoyed recall rights. He wanted to position himself to be appointed to any future MCLE vacancy, or even to secure employment outside of the State if something came up. He knew that having the CVSA certification would give him an edge over uncertified candidates, and an Employer witness, Vicki Elliott, the agency's Assistant Director of Transportation Safety, confirmed this. Thus, to the Grievant, this was the context of the negotiations. On the other hand, Ms. Washburn's assumed context does not make sense. While the Grievant remained on the recall list, the maintenance of his certification gave him no advantage. He already had a seniority right to any open MCLE position. If his certification had lapsed, the Employer would have given him the opportunity to re-gain it. The maintenance of his certification during the recall period did little to benefit the Grievant. To the contrary, it benefited the Employer by giving it, in the event of the Grievant's recall, an employee who already met the certification requirement for the job. I do not find it reasonable to believe that the Union would have proposed an Employer obligation that, as a practical matter, benefited the Employer, but not the Grievant. Yet, that is the effect the Employer's view of the Settlement Agreement's duration would have. The Union and the Grievant were quite reasonably looking further downstream. The benefit to the Grievant of maintaining his certification would be realized when he no longer enjoyed the benefit of being on the RIF register and instead, would have to compete on an equal footing with other applicants for any MCLE vacancy that might arise.

Having concluded that there was no meeting of the minds on the duration of the Employer's obligation, I must next determine whether this renders the Settlement Agreement, or at least the

part in dispute here, unenforceable. It does not. The parties adhered to the agreement for over a year without difficulty. It is a complete agreement, except that an essential term is missing. There was mutual consideration for that agreement. The Grievant promised not to further pursue his legal claims protesting his layoff, in exchange for the Employer's promises to place him in a different position and to facilitate his maintenance of his CVSA certification. The missing term is duration; it is one that can be supplied as a matter of law without doing violence to the underlying agreement.

Because the Employer prematurely and unilaterally refused to continue its obligation under Section A.5 of the March 30, 2004 Settlement Agreement, I conclude that the Employer was and remains in breach of that Agreement.

The next step of this analysis is to determine the term of the Employer's obligation to enable the Grievant to maintain his certification.[4] At the far end of the spectrum, one could posit that the State's obligation ceases with the Grievant's death or incapacity. No doubt, both parties would agree a term of that length would be absurd. More within a range of reason would be a term that extends to the Grievant's retirement, resignation or removal from State of Washington employment. On the near side, I previously concluded that a term that expired with the Grievant's removal from the RIF register was not within the mutual intention of the parties. Nevertheless, a good argument can be made for a duration less open-ended than the Grievant's retirement or termination from State employment.

As stated previously, the task is to determine the duration of the Employer's obligation after considering "[b]oth the community standards of fairness and the reasonable expectations of parties ...." *Estate of Bachmeier,* supra at 874. In my opinion, a lengthy and open-ended duration is not something that would comport to any employer's reasonable expectation. Public

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[4] Strictly speaking, it is not necessary for me to supply this missing term in order to decide this dispute and I note that that parties did not argue the issue. Therefore, I hesitated before undertaking this task. On the other hand, not supplying this missing term would leave the parties in a continued position of uncertainty.

agencies generally avoid this kind of uncertainty in a personnel matter. There can be changes of relevant circumstances over time, personnel familiar with the case may change, misunderstandings will arise, and the obligation can end up being an endless source of confusion and contention. Moreover, a reasonable employee and employee representative, considering the question at the time of the Settlement Agreement, would probably agree that a specified ending date makes sense. Therefore, I reject any duration that ends with the termination of the Grievant's employment or his retirement. In my view, a duration that ends after a specified period, or sooner if there is a failure of underlying conditions supporting the obligation, is the reasonable one. This would comport with community standards of fairness and reflect the parties' reasonable expectations.

I will now specify a duration that I believe will be seen as fair and reasonable. I realize that the precise length of the duration is an arbitrary choice, but it is necessary. I will select a duration of approximately 6 3/4 years, a period that I believe comports with community standards of fairness and the reasonable expectations of the parties. This period is sufficient for allowing the Grievant to find a more desirable position with the State of Washington (or elsewhere) should no MCLE appointment be forthcoming; at the same time, it will not impose an unreasonable burden on the Employer. I included a fraction of a year so that the obligation will expire, at the latest, at the conclusion of a calendar year. Expiring on the anniversary date of the Settlement Agreement could raise the unnecessary issue of whether the Employer must give the Grievant his certification opportunities during the first three months of the final year. Accordingly, as a matter of law, I find that the Employer's obligation under Section A.5 of the Settlement Agreement will expire, at the latest, on December 31, 2010. The obligation will cease before December 31, 2010, if circumstances change in a way that frustrates the purpose of the Employer's obligation to provide the Grievant with training. Such changed circumstances could include, for example, the voluntary or involuntary termination of the Grievant's

employment with the Utilities and Transportation Commission, his unreasonable refusal of training opportunities, or his refusal of an offer for an MCLE position.

D. Whether the Employer violated the 2005-07 Collective Bargaining Agreement

The final and ultimate question in this case is whether the Employer's breach of the Settlement Agreement constituted a breach of the parties 2005-07 Collective Bargaining Agreement. The Arbitrator will, be without authority to remedy a violation of the Settlement Agreement unless she can determine that its breach also violated the parties' 2005-07 Collective Bargaining Agreement. Previously I stated that a breach of Section A.5 of the Settlement Agreement arguably could be a breach of Article 9.2, Article 38.1, or both. I now must determine whether either of those provisions was actually violated.

Article 9, on Licensure and Certification, states:

> **9.1** The Employer and the Union recognize the necessity for bargaining unit employees to maintain appropriate licensure and/or certification to perform the duties of their assigned position.
>
> **9.2** Agencies will continue their current practices related to licensure and certification.

The Union focuses on Section 9.2. That section requires agencies to maintain "current practices" with respect to licensing and certification. Facilitating the Grievant's retention of his CVSA certification was certainly a "current practice" at the inception of the 2005-2007 Collective Bargaining Agreement and it continued as one until the Employer unilaterally ceased that practice in September 2005.

The Employer argues that Section 9.2 is inapplicable because its meaning is circumscribed by Section 9.1. Section 9.1, in the Employer's view, limits Section 9.2's application to employees who need the "licensure and/or certification to perform the duties of their assigned position."

Section 9.2 is not expressly conditioned upon 9.1, although the two are evidently related. Nevertheless, the two sections are not overtly linked, nor does Section 9.2 contain language

limiting its application to employees in currently assigned positions. Section 9.2 places an obligation on the Employer to maintain "current practice," which apparently can vary from agency to agency or among groups of employees. As the Union argued, Section 9.2 can be read as a stand-alone section and its meaning, in the context of this dispute, is clear. The parties did not present evidence of the drafters' intent. Without affirmative evidence showing that the parties intended to limit the application of Section 9.2, the better view is to apply its plain language. As the Union pointed out, had the parties intended to limit Article 9.2's application, they could have easily added a qualifying phrase to its language.

I conclude that Section 9.2 encompasses the circumstances of the parties' September 30, 2004, Settlement Agreement, which established a "current practice" of maintaining the Grievant's CVSA license. Accordingly, I conclude that the Employer violated Section 9.2 of the Collective Bargaining Agreement when it abrogated its obligation under Section A.5 of the Settlement Agreement.

Having so decided, it is not necessary for me to determine whether the Employer's breach of the Settlement Agreement also violated Article 38.1 of the Collective Bargaining Agreement.

E. What is the Appropriate Remedy?

No evidence was presented that the Grievant lost any pay or opportunity for increased pay by reason of the Employer's breach. Rather, he seeks an order requiring the Employer to comply with Section A.5 of the Settlement Agreement. That request will be granted. The Employer's obligation will continue until its termination as specified above (December 31, 2010, or sooner in the event of relevant changed circumstances.) Because the 2006 calendar year is nearly over, this order will take effect on January 1, 2007.

VII. AWARD

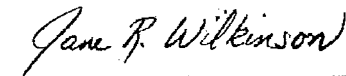
Pursuant to the foregoing discussion and analysis, the undersigned Arbitrator determines that the Employer violated the parties 2005-07 Collective Bargaining Agreement in September 2005 when it abrogated its obligation under Section A.5 of the parties' March 30, 2004, Settlement Agreement. Accordingly, the grievance at issue in this dispute is SUSTAINED.

As a remedy, the Arbitrator orders the Employer to cease and desist from violating Section A.5, meaning it must re-implement the requirements of that Section starting on January 1, 2007. It must continue to honor its commitment under Section A.5 until its obligation lawfully ceases, which as described more fully above, will occur on December 31, 2010, or sooner in the event of relevant changed circumstances.

Per the parties' stipulation, the Arbitrator shall retain jurisdiction in this matter for 90 days from the date of this award in order to resolve any issues pertaining to the remedy herein ordered.

Pursuant to Article 29.2.E. of the parties' Agreement, the parties will share equally in the fees and expenses of the Arbitrator.

Date: December 28, 2006



Jane R. Wilkinson
Labor Arbitrator