

IN THE MATTER OF THE ARBITRATION

WASHINGTON FEDERATION OF STATE
EMPLOYEES

and

AAA 75 390 00347 09
Non-Permanent Appointments

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES

Appearances:	For the Union:	Edward Earl Younglove III, Esq. Younglove & Coker
	For the Employer:	Gina L. Comeau, Esq. Asst. Attorney General

DECISION AND AWARD

The undersigned was selected by the parties through the procedures of the American Arbitration Association. A hearing was held in the above matter on June 23, 2010 in Tacoma, Washington. The parties were given the full opportunity to present testimony and evidence. At the close of the hearing, the parties elected to file briefs. The arbitrator has considered the testimony, exhibits and arguments in reaching his decision.

ISSUE

The parties agreed upon the following issue:

Did the Employer violate the provisions of Section 4.4 of the Parties Agreement regarding non-permanent appointments? If so, what is the appropriate remedy?

BACKGROUND

The State of Washington, Department of Social and Health Services, hereinafter referred to as the Employer, provides assistance to families in need in the State of Washington. The Department is divided into various Sections. The Section involved in this dispute provides among other tasks Food Share Debit Cards to families that qualify for this assistance. The Washington Federation of State Employees, hereinafter referred to as the Union, represents the full-time employees in that division. They signed their first Agreement with the Employer in 2005. The Agreement in effect when the grievance arose was their second Agreement. It began July 1, 2007 and expired on June 30, 2009.

Article 4 is entitled Hiring and Appointments. Section 4.1 provides:

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 a job classification. 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.

Section 4.4 addresses the types of appointments that can be made. There are employees appointed to permanent positions and others appointed to non-permanent positions. Section 4.3 requires that an employee appointed to a permanent position complete a probationary period before attaining permanent status. Section 4.4 (A) covers appointments to non-permanent positions. It states in pertinent part:

A. Non-Permanent

1. The Employer may make non-permanent appointments to fill in for the absence of a permanent employee, during a workload peak, while recruitment is being conducted, or to reduce the possible effects of a layoff. Non-permanent appointments will not exceed twelve (12) months except when filling in for the absence of a permanent employee. A non-permanent appointee must have the skills and abilities required for the position.

3. The Employer may convert a non-permanent appointment into a permanent appointment and the employee will serve a probationary or trial service period. The Employer must follow Article 3, Bid System, or appoint an internal layoff candidate, if one exists, before converting an employee from a non-permanent appointment to a permanent appointment. Time spent in the non-permanent appointment may count towards the probationary or trial service period for the permanent position.

4. The Employer may end a non-permanent appointment at any time by giving one (1) working day's notice to the employee.

The last sentence of Section 3 was added in the 2007-09 Contract. The remainder of the Section was unchanged from the language in the previous agreement.

Grievant was appointed to a non-permanent position effective January 22, 2008. She had previously interned with the Employer as part of a job vocational program in which she went to school part-time and given on-the-job training part of the time. The letter appointing her to a non-permanent position was dated January 30. The letter indicated that "the purpose of her appointment is because DSHS has a short-term workload peak." She was assigned to the Belltown Community Service Office. Her classification was Customer Service Specialist 1. Her primary duty was to issue Electronic Benefit Transaction Cards (EBT Cards) to those eligible to receive them. According to Mark Dalton, the Administrator of the Belltown Office, the workload was

extremely heavy and there were fewer personnel to deal with the heavy workload. Belltown had the highest caseload of any office. Grievant was hired to help address this work volume. The added benefit to the employee working as a non-permanent was the employee also gained experience which could aid that person in possibly getting hired to a permanent position in the future.

A position number is assigned to any employee hired to fill a permanent position. There is no individual position designation or position number for a non-permanent appointment. Instead, the Employer backfills an existing position with a non-permanent employee. That employee is assigned to the same position number as the permanent employee already holding the position. Grievant was assigned position VR 17. That position was filled by an employee who was on medical leave at the time Grievant was appointed. He was actually assigned to the Kent Office and not the Belltown Office, although he had started in the Belltown Office. Grievant was not the only non-permanent employee assigned to position VR 17. Another non-permanent employee had also been assigned to this same position number. Thus, there were three employees all working under the same position designation.

The Legislature of the State of Washington due to budget constraints passed a law freezing all new hires effective February of 2009. Eva Santos, the Director of Personnel, issued a memo informing all Departments there was a hiring freeze. The memo was dated February 20, 2009. Prior to the issuance of this memo, another memo was sent to each Office from the Director over Customer Service requiring a reduction in the number of Administrative positions. Community Service Specialists were considered to be administrative positions.

This memo was dated December 10, 2008. The testimony was that for each office there was a maximum percentage of staff that could be assigned to administrative positions. For Belltown, this meant it could have only one person working in an administrative position. It had three at the time.

Grievant was not terminated prior to her one year anniversary. She continued working at the Belltown Office until early February. Grievant was asked if she would transfer to the Kent Office at that time. The employee who was assigned to position VR 17 was still on medical leave. The Kent Office had a need for additional personnel because of his absence. Mr. Dalton at the time told Grievant he was unable to keep all of the non-permanent employees at the Belltown facility. Grievant agreed to move and went to the Kent Office February 2, 2009. She was not given a new appointment letter when she transferred.

While her performance was not questioned while she worked at the Belltown Office, there were problems regarding her attendance at the Kent Office. She was returned to the Belltown Office at the end of February. She was then given a letter dated February 24 informing her that effective February 27 her non-permanent appointment would end. The Union grieved the decision to terminate Grievant as her employment continued beyond the twelve month limit set in the Agreement.

POSITION OF THE UNION

Grievant worked as a non-permanent employee for over 13 months. The only documentation regarding her appointment states the reason for her appointment was to meet a short-term workload peak. She had exceeded 12

months by the time she moved to the Kent Office. When she was moved to Kent, she was not told it was to fill-in for an absent employee. The fact that the employee was absent well before Grievant was assigned there and remained absent after she left belies any argument that she was assigned as a fill-in. Clearly, the Employer violated the Agreement by keeping Grievant as a non-permanent employee for more than 12 months.

The issue for the Arbitrator is to determine the remedy for this violation. The contract is silent on this question. The appropriate remedy is to make Grievant a permanent employee. The Employer appears to argue that no remedy is required. That argument is contrary to a basic precept in the Law that there should be a remedy when a wrong is committed. Their argument would also render the provision in the agreement limiting appointments to a year meaningless. This is something the Courts and Arbitrators have sought to avoid. Given the absence of a remedy in the Agreement, the Arbitrator has broad discretion in imposing a remedy.

The Employer acknowledged during the hearing that several concerns were raised by the Union regarding non-permanent appointments. It did not want the hiring of non-permanent employees to be used as a way to avoid the bidding rights permanent employees were afforded in the Agreement. Another concern was a fear the Employer would hire non-permanent employees for an indeterminate length and thereby deprive that employee of the rights and benefits afforded to those in permanent positions. The Union in the initial round of negotiations had made a proposal that coincided with the remedy set forth in the Civil Service Regulations for those employed in Higher Education.

The remedy included the ability to make an employee permanent when an appointment exceeded the maximum length allowed. Even though this remedy was not adopted in the Agreement, the rule should provide guidance as to the proper remedy here.

POSITION OF THE EMPLOYER

The Employer does not dispute Grievant's appointment extended beyond 12 months. However, there is nothing in the Agreement that requires the Employer to convert a non-permanent position to a permanent position when this occurs, which is what the Union argues should be the remedy. Such a remedy would violate other provisions of the Agreement. There are requirements on how a position can be filled set out in Article 4 that would be in conflict with Union's suggested remedy. It is the Employer under the Agreement who determines when a position is to be created and when a non-permanent position should be converted to permanent status. The Union position would eviscerate those provisions.

The Arbitrator should not look at any portion of the Agreement in isolation. All provision must be read together. Section 4.4(A) must be read together with Section 4.3 and the other portions of Section 4.4 as well as with other pertinent Articles.

A permanent employee must serve a probationary period, unless the Employer decides to waive it based on time spent in a non-permanent position. The Employer has discretion. It would not have it under the Union's theory.

The Arbitrator must give effect to all provisions of the Agreement. To award the remedy sought by the Union would violate that requirement.

Bargaining history supports the Employer position. The Union proposed a remedy for a situation when a non-permanent employee's appointment exceeded the allowable timeframe. It sought to have the person converted to permanent status. The proposal was rejected by the Employer. The fact that it was proposed and rejected should weigh against the Union argument here.

The remedy for an appointment exceeding 12 months should be to order the appointment ended. In this case, had this issue been raised by the Union at the time, the Employer most likely would have issued a new appointment indicating that the reason for the new appointment was the absence of permanent employee. It is significant that Grievant suffered no harm by working beyond the 12 month period. She was paid for her work. She was never promised she would be made permanent and there was no permanent slot for her to be placed, especially given the hiring freeze. The fact that the error in allowing her to work beyond 12 months without a new appointment was inadvertent and not intentional should also be considered by the Arbitrator. The Employer was simply trying to help Grievant by keeping her employed longer.

DISCUSSION

The facts in this case are essentially not in dispute. While there is some disagreement as to what promises, if any, were made to Grievant about permanent status, the dates of hire, transfer and termination are all

undisputed. Grievant was appointed on January 22, 2008 to her position because of a workload peak. She transferred to Kent on February 2, 2009 and was terminated on February 23, 2009. Clearly, her appointment exceeded 12 months. The question is first whether there was a contractual basis for the continuation. If not, the question becomes whether there are consequences for exceeding the contractual limit?

The Employer has stated that the move by Grievant to Kent was in her best interest in that the employee who held the position was on approved medical leave. It allowed her to continue working. The Agreement does allow for an appointment "to fill in for the absence of a permanent employee," but this was not the reason she was initially appointed. The Employer contends there is nothing in the Agreement that prohibits it from changing the character of an appointment and that is what it did. The Employer is correct in that an appointment can initially be made for one of the enumerated purposes and later change in character to a different one of the enumerated reasons. The employee holding the permanent position was out and the need for Grievant to handle his duties existed. Thus, this change of appointment would fall within the scope of Section 4.4 and it did allow her to keep working. The Union counters by arguing there was no new appointment letter and thus there was no change in the nature of the appointment. The Employer should have prepared such a letter and it clearly erred in its failure to do so when the reason for the appointment changed. It should have put the Union on notice of the change. However, notice and a new letter are not requirements under Section 4.4. The fact is Grievant did move to Kent to fill in for an absent

employee, a valid reason under Section 4.4. Hence, the Section was not violated when the appointment changed, despite the failure to prepare a new appointment letter.

The Union notes that even if the above is true, the move to Kent did not occur until after the one year period had already elapsed. They are correct. Grievant continued in her appointment from January 22, 2008 until February 2, 2009. She exceeded the 12 month period by 11 days. Until February 2, the appointment had not changed in character. This was unquestionably a violation of the Agreement.

The question now becomes what is the consequence, if any, for this violation? The Employer contends in essence there is no harm and thus no foul. The Union takes the position there must be a remedy for a violation. It cites to support this position Elkouri and Elkouri, 2008 Supplement at p. 437. Under the heading "Scope of Remedy Power When the Agreement is Silent," the text quoted from Dexter Axel 418 F.3d at 769. There the Court held:

...the authority to decide the meaning and application of the Agreement, necessarily implies... the authority to prescribe a remedy.

In this case, the Union believes the remedy must be to make Grievant permanent. While this might appear to be a reasonable remedy, adoption of it poses significant issues vis-à-vis other provisions of the Agreement.

Article 35 gives the Employer the right to "hire" employees. While it is true it hired Grievant to a non-permanent position, it did not hire her as a permanent employee. The remedy suggested would take a power away from the Employer it has contractually retained. However, that is not the only problem with the

proposed remedy. Section 4.1 provides: “the Employer will determine when a position will be filled” and “the type of appointment.” The Union is compelling the Employer contrary to Section 4.1 to create a new permanent position that does not yet exist and to then fill it by hiring Grievant. Further complicating the matter is that this new position is unfunded. It would also violate the statutorily created hiring freeze. Nowhere in the Agreement did the Employer agree to give up these rights and nowhere in the Agreement did it agree a violation of Section 4.4 would result in a forfeiture of the above rights.

It is interesting that the Union proposed this exact type of remedy during the negotiations of the initial Agreement. It proposed that: “Remedial Action includes the power to confer permanent status...” The proposal was rejected by the Employer and was not included in the final version of the Agreement. The Union claims this simply left the issue of remedy open. It is true that the Agreement does not provide a remedy, but the rejection of this precise remedy does indicate that the Employer was specifically rejecting this as a possible remedy. The Union now wants to get in arbitration what it could not get at the bargaining table. This it cannot do.

If these were not sufficient reasons for rejecting this remedy, there is yet one more problem with the Union’s proposed remedy. Section 4.4 (A) (3) allows the Employer to convert a non-permanent position into a permanent position. To protect its members, the Union ensured through contract language that this right be a limited one. Before making an employee permanent, the Employer “must follow Article 3, Bid System or appoint an internal layoff candidate.” According to the testimony given, the Union was concerned that a non-

permanent employee could be hired and then subsequently be converted to permanent status, thereby, depriving current employees of an opportunity to bid for the position. Hence, the above language was included. The Union proposed remedy would be completely contrary to the concern it raised during negotiations and in violation of the very provision in the Agreement it wanted inserted. To agree to the remedy suggested, would force the Arbitrator to ignore this provision altogether. While an Arbitrator has great authority when it comes to remedy, to issue an Award contrary to so many provisions of the Agreement is something any arbitrator should avoid doing. Thus, for all these reasons the Arbitrator will not grant the requested remedy.

Rejecting this remedy does not automatically mean the Employer is correct there is no remedy for this violation? It argues that if this same situation should occur in the future the remedy might be to order the employee terminated at the end of 12 months, but in this case there should be no remedy at all. The Arbitrator finds contrary to this assertion and in agreement with the Union that there should be a remedy for a contractual violation. He also finds there is a remedy available to him that does fall within his discretion and that, more importantly, does not violate any contractual provisions. Section 4.1(F) addresses the filling of a vacancy once it is determined a vacancy exists. Once the bidding requirements in Article 3 have been met, those on layoff next get preference. If there are no names on the layoff list who meet the requirements for the job, a pool of 20 candidates is certified as eligible for the position. 75% of those candidates must come from certain categories of State employees. Non-permanent employees are not one of the listed categories. The

only limitation on the remaining 25% is that the person: “have the position-specific skills and abilities to perform the job.” Non-permanent employees, like Grievant, are not restricted from being included in this group. Given that fact, requiring the Employer to include Grievant’s name in that pool the next time a vacancy is declared for a Community Service Specialist I in a geographic area acceptable to Grievant would not violate this provision or any other provision, The Arbitrator so directs this be done. While the Arbitrator will not order Grievant be given the position given Article 35, he can require she be given due consideration. Certainly, her prior 12 month’s experience in the job would put her in good stead, but the ultimate decision remains with the Employer.

AWARD

1. The grievance is sustained.
2. Grievant shall be included in the next pool of 20 candidates created pursuant to Article 4, Section 4.1 (F) for a vacant Community Service Specialist 1 position in the geographic location where Grievant previously worked.
3. The Arbitrator shall retain jurisdiction for no less than 90 days to resolve any issues regarding the implementation of this Award.

Dated: September 13, 2010



Fredric R. Dichter,
Arbitrator