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OFFICE OF THE ATTORNEY GENERAL
LABOR & PERSONNEL DIVISION

IN THE MATTER OF

**STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT**

AND

WASHINGTON FEDERATION OF STATE EMPLOYEES

Grievance: Denise Oster – Posting of Non-Permanent Position

AAA No.: 75 390 00228 10

Date Issued: April 19, 2011

ARBITRATION OPINION AND AWARD

OF

ALAN R. KREBS

Appearances:

**STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT**

Michael W. Rothman

WASHINGTON FEDERATION OF STATE EMPLOYEES

Debbie Brookman

IN THE MATTER OF

**STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT**

AND

WASHINGTON FEDERATION OF STATE EMPLOYEES

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

The Arbitrator was selected by the parties with the assistance of the American Arbitration Association in accordance with Article 29 of their 2009-2011 Collective Bargaining Agreement. A hearing was held on January 24, 2011 in Olympia, Washington. State of Washington Employment Security Department was represented by Michael W. Rothman, Assistant Attorney General. Washington Federation of State Employees was represented by Debbie Brookman, Labor Advocate.

At the hearing, witnesses testified under oath and the parties presented documentary evidence. There was no court reporter, and therefore, the Arbitrator tape recorded the proceedings for the sole purpose of supplementing his personal notes. The parties' briefs were received by the Arbitrator on April 4, 2011.

ISSUE

The parties agreed upon the following stipulated statement of the issue to be decided by the Arbitrator:

Did the Employer violate Article 4.2 when a non-permanent bargaining unit vacancy was not posted for 7 days?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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ARTICLE 4 HIRING AND APPOINTMENTS

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 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.

- 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.
- C. A promotional candidate is defined as an employee who has completed the probationary period within a permanent appointment and has attained permanent status within the agency.
- D. A transfer candidate is defined as an employee in permanent status in the same classification as the vacancy within the agency.
- E. A voluntary demotion candidate is defined as an employee in permanent status moving to a class in a lower salary range maximum within the agency.
- 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. If there is a tie for the last position on the certification for either promotional or other candidates, the agency may consider up to ten (10) additional tied candidates. The agency may supplement the certification with additional tied candidates and replace other candidates who waive consideration with like candidates from the original pool.
3. Employees in the General Government Transition Pool Program who have the skills and abilities to perform the duties of the vacant position may be considered along with all other candidates who have the skills and abilities to perform the duties of the position.
4. If the certified candidate pool does not contain at least three (3) affirmative action candidates, the agency may add up to three (3) affirmative action candidates to the names certified for the position.
5. When recruiting for multiple positions, the agency may add an additional five (5) agency candidates and five (5) other candidates to the certified list for each additional position.

4.2 Recruitment

Agencies will determine the recruitment process that will be utilized to fill positions. When recruiting for a bargaining unit position, the recruitment announcement will be posted for a minimum of seven (7) calendar days. These may include e-recruitment, agency electronic process, and/or paper applications as indicated on the recruitment announcement. Agencies that use the Department of Personnel's E-recruiting system will accept and process agency-defined paper forms. Upon request, agencies will assist employees through the application process.

4.3 Internal Movement – Permanent Employees

Prior to certifying candidates in accordance with Subsection 4.1, an Appointing Authority may grant an administrative transfer, voluntary demotion or elevation within an agency as long as the permanent employee has the skills and abilities required to perform the duties of the position. Employees desiring a transfer, voluntary demotion or elevation will initiate a request in writing, and appointing authorities will consider these individuals for an opening. Candidates interviewed will be notified of the hiring decision. This Subsection does not apply to those positions that have a required bid system established in accordance with Article 3.

* * *

4.5 Types of Appointment

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.

B. On-Call Employment

The Employer may fill a position with an on-call appointment where the work is intermittent in nature, is sporadic and it does not fit a particular pattern. The Employer may end on-call employment at any time by giving notice to the employee.

* * *

C. In-Training Employment

* * *

D. Project Employment

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E. Seasonal Career/Cyclic Employment

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**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. The term “grievant” as used in this Article includes the term “grievants.”

B. Filing a Grievance

Grievances may be filed by the Union on behalf of an employee or on behalf of a group of employees. If the Union does so, it will set forth the name of the employee or the names of the group of employees.

* * *

E. Contents

The written grievance must include the following information:

1. A statement of the pertinent facts surrounding the nature of the grievance;
2. The date upon which the incident occurred;
3. The specific article and section of the Agreement violated;
4. The steps taken to informally resolve the grievance and the individuals involved in the attempted resolution;
5. The specific remedy requested;
6. The name of the grievant; and
7. The name and signature of the Union representative.

Failure by the Union to provide a copy of the grievance or the request for the next step with the Human Resources Office or to describe the steps taken to informally resolve the grievance at the time of filing will not be the basis for invalidating the grievance.

* * *

29.3 Filing and Processing (Except Departments of Corrections and Social and Health Services Employees)

* * *

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;

* * *

NATURE OF THE DISPUTE

This grievance involves the seven day posting requirement in Article 4.2 and its application to non-permanent bargaining unit positions. The dispute arose in the Employer's Employment Security Department. The bargaining unit includes various types of employees including those holding non-permanent positions.

Denise Oster is a Program Coordinator 3 in the Unemployment Insurance Division of the Employment Security Department and is also a Union shop steward. Ms. Oster testified that Carole Bernhardt worked as a non-permanent Program Coordinator 3 for a continuous twelve month period. According to Ms. Oster, she noticed that the bulletin board read "break in service" next to Ms. Bernhardt's name. Ms. Oster testified that she asked her manager whether she would recruit for the position that Ms. Bernhardt had filled and that her manager replied that Ms. Bernhardt would be back in two weeks. Ms. Oster testified that she filed her grievance when Ms. Bernhardt returned after being off work for two weeks. That grievance, dated September 21, 2009, stated that Ms. Bernhardt was hired in August 2008, took a break in service from August 16 to 30, 2009, and was back to work September 1, 2009, although there was no such specific testimony presented. In fact, there was no evidence presented regarding when it was that Ms. Bernhardt returned to work, how long she worked upon her return, or what it was that she was doing upon her return. The grievance alleged that the "position should have been posted before Ms. Bernhardt was re-hired." The grievance further alleged that "ESD is not posting all non-permanent bargaining unit positions prior to filling them." However, no specific positions or names of individuals involved or affected by such actions occurring prior to the filing of the grievance, other than Ms. Bernhardt, was mentioned in the grievance or during the hearing. The only requested remedy set forth in the Union's brief is that "all bargaining unit positions should

be posted for a minimum of seven days prior to being filled.” The Union seeks no remedy applying to Ms. Bernhardt’s situation specifically.

Ms. Oster testified that the dispute about Ms. Bernhardt’s rehiring has been resolved. She testified that Ms. Bernhardt no longer works there and her workload was shifted to the remaining staff. She testified that a full time employee has been recruited to replace Ms. Bernhardt. Ms. Oster testified that the Employment Security Department has since “done a good job” of making sure that supervisors properly follow the twelve month limit on non-permanent assignments and that is no longer an issue.

Diane Leigh, the director of financial management for the State’s Labor Relations Office, testified that the practice of state agencies with regard to filling non-permanent positions has been mixed. She testified that sometimes an agency engages in a recruitment process to fill non-permanent positions, and when it recruits, it posts for seven days. Ms. Leigh further testified that agencies also sometimes fill non-permanent positions by appointment, without a recruitment process and without posting. Similarly, Teresa Eckstein, the Employment Security Department’s human resources manager for recruitment, compensation, and classification, testified that the Department sometimes does not recruit for non-permanent positions such as when a position is to be filled temporarily while a formal recruitment for a permanent hire is conducted or if there is a need to act quickly. Michelle Castanedo, the Employment Security Department’s assistant commissioner for human resources, testified that the Department posts about half of its non-permanent vacancies. She testified that the Department hired about 800 employees from January to July 2009, when there was an economic crisis. She testified that about 40 percent of those hired were internal candidates, and that caused a domino effect in filling the resulting vacancies. Ms. Castanedo testified that it was very important that positions be filled quickly so that

unemployment insurance checks were sent out and the unemployed were assisted with job placement. Ms. Castanedo testified that during this difficult period, many non-permanent positions were filled without a posting and often without interviews.

BARGAINING HISTORY

The seven calendar day posting requirement contained in Article 4.2 was agreed to during contract negotiations for the 2009-11 Collective Bargaining Agreement. During those negotiations, the Union proposed the following new language to be added to Article 4.1:

All vacancies will be posted for transfer and/or lateral candidates at a statewide, agency, division, regional and local level for at least seven (7) days to provide opportunity for employees to apply, before opening for all candidates. The posting period for open competitive positions will be not less than ten (10) days.

The Union further proposed the following new language to be added to Article 4.4:

When a position will be filled with a non-permanent appointment, the employer will place the justification for filling the position with a non-permanent appointment on the posting.

The Employer would not agree to these Union proposals. The Employer offered a counter-proposal which included the new seven day posting language which is now incorporated in the Agreement.

Sherri-Ann Burke, a Union labor advocate who served on the Union's negotiating team for the 2009-11 Agreement, testified that when the Employer representatives proposed the seven day posting language now in Article 4.2, they explained that they tried to meet the Union's needs. Ms. Burke and Union President Carol Dotlich, each testified that the Employer's negotiators never explained that their posting proposal was intended to cover only some, but not all, bargaining unit positions. Ms. Leigh and Ms. Castanedo both served on the Employer's

negotiations team. They both testified that the Employer negotiators expressed at the bargaining table that posting was not required for non-permanent positions. They also both testified that the Employer made its posting proposal in response to a particular situation brought up by the Union negotiators where a permanent vacancy had been posted by the Employer for only the three days of the Memorial Day weekend.

POSITION OF THE UNION

The Union contends that the Employer violated Article 4.2 when it did not post a recruitment announcement for seven days for the non-permanent position filled by Carol Bernhardt. The Union argues that the Employer is required by Article 4.2 to post all bargaining unit positions for a minimum of seven days prior to being filled, including permanent, non-permanent, on-call, seasonal, and project positions. The Union urges that the plain meaning of the word “recruit” should apply to the new contract language in Article 4.2, and the plain meaning of “recruit” and “recruitment” is “to secure the services of: engage, hire,” quoting the definition of “recruit” in the Free [on-line] Merriam-Webster Dictionary. The Union avers that in the absence of an explanation that a narrower interpretation was intended, then the Union’s interpretation which is based on common usage of those terms, should prevail. The Union maintains that as the drafter of the disputed language, the Employer bore responsibility for explaining its intent. The Union asserts that there is no evidence that the Employer explained that it reserved the right to not post depending on the circumstances. The Union also relies on the first sentence of Article 4.2, which it reasons, implies that there will be a “recruitment process.” The Union avers that no matter the type of vacancy, the seven day posting period is a reasonable period of time for interested employees to become aware of the opportunity and

indicate their interest. The Union argues that the Employer's interpretation that Article 4.2 only applies when the Employer decides it should apply, would render the new contract language meaningless.

POSITION OF THE EMPLOYER

The Employer contends that a requirement for the Employment Security Department to post for all positions is not supported by the clear contract language. The Employer maintains that Article 4 addresses separately the issues of permanent appointments under Article 4.2 and non-permanent appointments under Article 4.5, with a seven day posting required when there is a recruitment to a permanent position and no such language with regard to a non-permanent appointment. The Employer argues that Article 4.5.A.1 gives it the flexibility to quickly fill positions with a non-permanent employee when one of the three listed conditions is met. The Employer asserts that the plain meaning of Article 4.2 does not require that it post for all positions, merely those for which there is a recruitment. The Employer points out that the Union clearly attempted during negotiations to require the Employer to post for all vacancies and then dropped that proposal. It argues that the Union should not be allowed to obtain at arbitration a right not achieved through bargaining. The Employer suggests that the reason that it held fast to its position that it need not post all non-permanent vacancies was because it is imperative that it be able to appoint people into such positions when necessary to fulfill its crucial role of providing laid off people with unemployment checks and assisting them to find jobs.

DISCUSSION

While the grievance in this matter referenced the situation of Carole Bernhardt, it became apparent during the arbitration hearing that the matter in dispute was not Ms Bernhardt's situation, since that had already been resolved to the Union's satisfaction. In fact, Ms. Bernhardt's situation was not dealt with in any detail during the Union's presentation, was barely mentioned in the Union's brief, and was not mentioned at all in the Employer's brief. The focus of the hearing in this matter, as evidenced by the presentation and arguments of both parties, is a resolution of the question whether or not the Employer is obligated to post all non-permanent positions prior to their being filled. Since it is the parties' desire that there be a resolution of this question, I shall proceed accordingly. For the reasons explained below, I conclude that the Union has not met its burden of proving its contention that the Employer must post all non-permanent positions prior to filling them, no matter the circumstances.

The Union's argument relies on the first two sentences of Article 4.2 to argue that the Employer must post recruitment announcements for all positions which are to be filled. I do not agree that such a broad requirement is contained in that section. Article 4.2 does not provide that all vacancies must be posted. The Union proposed such a provision during collective bargaining, but it was rejected by the Employer. Rather, Article 4.2 provides for a seven day posting "[w]hen recruiting for a bargaining unit position." Thus, the posting requirement occurs when there is a recruitment. Recruitment is, as the first sentence of Article 4.2 indicates, a "process." The generally recognized meaning of "recruiting" and "recruitment" among labor relations professionals is set forth in a respected specialized dictionary:

recruiting A function usually of the personnel office which involves the search for individuals to fill the special needs of a particular company.

Heneman et al. define recruitment as "the process of seeking out and attempting to attract individuals in external labor markets who are capable of

and interested in filling available job vacancies.” The primary recruitment methods include direct applications by job seekers, employee referrals, advertising, college recruiting, employment agencies and executive search firms, and computerized search services. “The product of the recruitment process is a pool of applicants, all of whom have been screened and have expressed an interest in the job(s) involved.”

Roberts, Roberts’ Dictionary of Industrial Relations, 4th ed. (1994), p. 657. Thus, recruitment signifies a search for a pool of qualified applicants to fill a position. This is consistent with the reference to “recruiting” in Article 4.1.F which relates to the establishment of a pool of candidates to fill a permanent position. Article 4.2, while recognizing that the Employer has discretion in determining the recruitment process to be utilized, sets forth a posting requirement when there is recruiting. It does not indicate that the parties mutually agreed to a requirement that there must be a recruitment, including a posting, before any position is filled, no matter its nature or duration.

In fact, considering Article 4.2 in the context of the rest of Article 4, it is not the case that the Employer would be obligated to always engage in a recruitment process to fill positions. Arbitrators generally will interpret words, phrases, sentences, and sections not in isolation, but rather in the context of the entire agreement. Ruben, ed., Elkouri & Elkouri – How Arbitration Works, 6th ed. (2003), pp. 462-63. Article 4.1 provides that “[t]he Employer will determine when a position will be filled.” It also provides that the Employer “will determine . . . the type of appointment to be used when filling the position.” Article 4.1.F sets forth certain requirements for the certification to the agency of recruited candidates, “[w]hen filling a vacant position with a permanent appointment.” However, Article 4.1.F.1 indicates that a recruitment is not required for all permanent appointments. It indicates that “[t]he 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.” Thus, the recruitment process is unnecessary when there is an appointment from the internal layoff list.

Article 4.5 is headed “Types of Appointment.” Included in Article 4.5’s types of appointment are non-permanent, on-call, in-training, project, and seasonal career/cyclic employment. Permanent appointment is not one of the types of appointment listed in Article 4.5. The types of appointment listed in Article 4.5 are not covered by the certification process described in Article 4.1.F, since that provision is confined, by its terms, to permanent appointments. Article 4.5.A allows the Employer to “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.” Article 4.5.A does not establish or reference a procedure for establishing or referring a pool of candidates as does Article 4.1. Rather, in Article 4.5.1, the Employer is simply given the right to fill a non-permanent position in the designated circumstances by appointment, without the delay associated with a posting period and a certification process. If a permanent position became vacant and was posted in accordance with Article 4.2, and the Employer deemed that position needed to be filled with a non-permanent assignment during the recruitment process, I find insufficient basis in Article 4, taken as a whole, to require the Employer to have a second posting for that temporary assignment. Such a requirement would not mesh with the apparent purpose of temporarily filling the position by appointment or reassignment as needed while a recruitment was conducted. Similarly, non-permanent assignments may be made routinely to fill in for absent employees when the work must be done in a time sensitive manner, such as would be required in furtherance of the Department’s obligation to provide unemployment insurance checks to those entitled to receive

them. I am not persuaded that any language in Article 4 requires that the Employer engage in a recruitment process, including posting, whenever it fills such a non-permanent position.

The evidence regarding the parties' bargaining history does not sufficiently establish that a mutual understanding was reached at the bargaining table which would require a posting prior to the filling of any non-permanent vacancy. There was conflicting testimony in this regard. A statement by an employer representative at the bargaining table that it proposed the contract language in dispute in Article 4.2 in order to meet the Union's needs, may have been a response to a Union negotiator's complaint that a three day posting over a holiday weekend was unfair. It does not establish that the Employer was agreeing to post all non-permanent vacancies.

I am not persuaded by the Union's argument that not adopting its position renders meaningless the seven day posting requirement in Article 4.2. That requirement would, in any event, serve the purpose of preventing a situation such as the three day posting which occurred in the past.

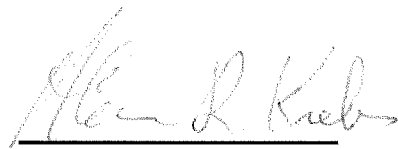
In sum, Article 4.2 requires a seven day posting whenever there is a recruitment. For the reasons previously discussed, I find that it has not been sufficiently proven that the Employer must engage in a recruitment process, including a seven day posting, in all circumstances when it fills a non-permanent position.

AWARD OF THE ARBITRATOR

It is the Award of your Arbitrator, for the reasons set forth in the attached Opinion, that the grievance is denied.

Sammamish, Washington

Dated: April 19, 2011


Alan R. Krebs, Arbitrator