

IN THE MATTER OF

**STATE OF WASHINGTON
LIQUOR CONTROL BOARD**

AND

**WASHINGTON PUBLIC EMPLOYEES ASSOCIATION/
UFCW LOCAL 365**

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MARCH 25 2011
ATTORNEY GENERAL'S OFFICE
SPOKANE

Grievance: Danny White – Reallocation/Salary

AAA No.: 75 390 00215 10

Date Issued: March 25, 2011

ARBITRATION OPINION AND AWARD

OF

ALAN R. KREBS

Appearances:

**STATE OF WASHINGTON
LIQUOR CONTROL BOARD**

Patricia A. Thompson

**WASHINGTON PUBLIC EMPLOYEES ASSOCIATION/
UFCW LOCAL 365**

David Schiel

IN THE MATTER OF
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LIQUOR CONTROL BOARD

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**WASHINGTON PUBLIC EMPLOYEES ASSOCIATION/
UFCW LOCAL 365**

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 30 of their 2009-2011 Collective Bargaining Agreement. A hearing was held on February 1, 2011 in Spokane, Washington. State of Washington Liquor Control Board was represented by Patricia A. Thompson, Assistant Attorney General. Washington Public Employees Association/UFCW Local 365 was represented by David Schiel, Staff Representative.

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 March 8, 2011.

ISSUE

The parties, being unable to agree upon a stipulated statement of the issue to be decided, agreed to have it framed by the Arbitrator. Having considered the testimony and arguments, your Arbitrator frames the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it reduced the Grievant’s salary and demanded that he pay back salary that it considered to be an overpayment?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

* * *

**ARTICLE 36
MANAGEMENT RIGHTS**

36.1 The Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, shall include but not be limited to, the right to:

* * *

J. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions;

* * *

36.2 The Employer agrees that the exercise of the above rights shall be consistent with the provisions of this Agreement.

* * *

**ARTICLE 40
CLASSIFICATION**

40.1 Classification Plan Revisions

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

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

* * *

40.4 Salary Impact of Reallocation

An employee whose position is reallocated will have his or her salary determined as follows:

- A. Reallocation to a Class with a Higher Salary Range Maximum
Upon appointment to the higher class, the employee's base salary will be increased as follows:
 - 1. Employees promoted to a position in a class whose range is less than six (6) ranges higher than the range of the former class will be advanced to a step of the range for the new class, which is nearest to five (5%) higher than the amount of the pre-promotional step.

* * *

- C. Reallocation to a Class with a Lower Salary Range Maximum
The employee will be paid an amount equal to his or her current salary, provided it is within the salary range of the new position. In those cases where the employee's current salary exceeds the maximum amount of the salary range for the new position, the employee will continue to be compensated at the salary he or she was receiving prior to the reallocation downward, until such time as the employee vacates the position or his or her salary falls within the salary range.

**ARTICLE 41
COMPENSATION**

* * *

41.20 Salary Overpayment Recovery

- A. When an agency has determined that an employee has been overpaid wages, the agency will provide written notice to the employee, which will include the following items:
 - 1. The amount of the overpayment
 - 2. The basis for the claim
 - 3. The rights of the employee under the terms of this Agreement.
- B. Method of Payback
 - 1. The employee must choose one of the following options for paying back the overpayment:
 - a. Voluntary wage deduction

- b. Cash
 - c. Check.
2. The employee will repay the overpayment over a period of time equal to the number of pay periods during which the overpayment was made, unless a longer period is agreed to by the employee and the agency.
 3. If the employee fails to choose one of the three options described above, within the timeframe specified in the agency's written notice of overpayment, the agency will deduct the overpayment owed from the employee's wages. This overpayment recovery shall take place over a period of time equal to the number of pay periods during which the overpayment was made.

C. Appeal Rights

Any dispute concerning the occurrence or amount of the overpayment will be resolved through the grievance procedure in Article 30 of this Agreement.

* * *

RELEVANT STATUTE

RCW 49.48.210

* * *

(10) When an employer determines that an employee covered by a collective bargaining agreement was overpaid wages, the employer shall provide written notice to the employee. The notice shall include the amount of the overpayment, the basis for the claim, and the rights of the employee under the collective bargaining agreement. Any dispute relating to the occurrence or amount of the overpayment shall be resolved using the grievance procedures contained in the collective bargaining agreement.

* * *

NATURE OF THE DISPUTE

The Grievant, Danny White, is the manager of the Employer's Spokane-Hillyard liquor store, No. 051. Store 051 is considered a level 1 store because its sales count, referred to as the personal adjusted units (PAUs) is, and has been, below 17,000 PAUs per month. A level 1 store

manager is classified as Retail Manager 3. A liquor store with a sales count of over 17,000 PAUs is considered a level 2 store. A level 2 store manager is classified as Retail Manager 4. The class specifications for both Retail Manager 3 and Retail Manager 4 define a PAU, in pertinent part, as “(1) one bottle or (2) one four or six pack of beer or (3) one can of cocktail mix or (4) one package or (prepackaged such as for gift giving) or (5) seven mini bottles or (6) ten lottery tickets. . . .” When a level 1 store increases its sales to over 17,000 PAUs during the fiscal year, July 1, through June 30, it is elevated to level 2 status and that store’s manager is promoted to Retail Manager 4. If that store’s sales decline in a subsequent fiscal year to less than 17,000 PAUs, then the store manager is reallocated downward to Retail Manager 3, but, based on Section 40.4.C, does not suffer a reduction in salary.

On June 30, 2009, the Grievant received and signed for a shipment of 787 cartons of liquor at store 051. Grant Bulski, who is the district manager and the Grievant’s immediate supervisor, testified that the Employer was mistakenly double billed for this shipment. As a result the Employer’s computer system overinflated that store’s inventory, and, based on that, its PAU sales count. Neither the Grievant, nor Mr. Bulski, was immediately aware of, or in any way responsible for, this double billing.

As a direct result of the double billing that occurred regarding the June 30, 2009 delivery, the Employer’s monthly computer generated record of PAU sales at store 051 for June 2009, the last month of the fiscal year, reflected a huge increase over the prior months. Whereas store 051 normally had monthly sales of about 15,000 to 16,000 PAUs, the Employer’s computer records of sales at store 051 for June 2009 indicated sales of 24,389 PAUs. This was a mistake as there had not been a substantial increase in sales that month.

On July 26, 2009, an inventory report for store 051 indicated that the monetary value of the store's inventory was short by \$135,029. The Grievant investigated the matter and discovered the double billing of the June 30 shipment. On July 28, 2009, the Grievant sent an email to Mr. Bulski and the Employer's merchandise accounting section reporting the apparent double billing and asking that the problem be corrected. On July 29, 2009, Mr. Bulski reported the double billing to the Employer's retail project manager and the error was confirmed. However, no action was taken at that time to correct the PAU sales reports.

On August 3, 2009, the Employer issued its annual PAU sales report for fiscal 2009. It indicated that the average monthly PAU sales at store 051 for the period from July 1, 2008 to June 30, 2009 was 17,111 PAUs. Had the double billing event in June 2009 not resulted in the mistaken computer entry, the average monthly PAU count for the fiscal year ending June 30, 2009 would have been less than 17,000 PAUs.

On August 20, 2009, Annelle Lerner, the Employer's director of human resources, wrote to the Grievant, advising him that his position as a Retail Manager 3 had been reallocated to Retail Manager 4 and that he would receive a higher monthly salary effective July 1, 2009. Ms. Lerner explained in that letter that the determining factor in the reallocation was that store 051 had average monthly sales exceeding 17,000 units during the past fiscal year. Garnet Marsh, a human resource consultant, testified that the reallocations are done automatically based on the PAU sales records. As a result the Grievant's salary was increased from \$3377 to \$3549 per month.

Mr. Bulski testified that in September 2009, while reviewing the PAU sales report for July 2009, he noticed that it indicated that PAU sales at store 051 had dropped from 24,389 in June to 7,167 in July. Mr. Bulski testified that he reported this anomaly to his supervisor. An

investigation revealed the errors in the PAU sales reports for store 051 and the fact that without these errors, store 051 would never have qualified as a level 2 store.

On November 18, 2009, Ms. Lerner wrote to the Grievant advising him that the reported PAU sales count for store 051 was “falsely inflated” as a result of “computer issues at the Distribution Center.” Ms. Lerner advised the Grievant that his position had been reallocated to Retail Manager 3, effective July 1, 2009, that his salary was reduced to his previous Retail Manager 3 rate, which was \$3,377 per month, and that he would be contacted about his overpayment and repayment options. On November 19, 2009, the Employer’s payroll manager wrote to the Grievant that he had received an overpayment of \$882.18 for the August 15 through October 31, 2009 pay periods. She advised the Grievant of several repayment options. The Grievant has since paid the \$882.18.

On December 17, 2009, a grievance was filed alleging that the assessed overpayment and reduction in salary violated Section 40.4.C of the Agreement. The Employer denied the grievance, citing Section 41.20 of the Agreement and RCW 49.48.210.

POSITION OF THE UNION

The Union does not dispute that a mistake occurred in the bottle count for the Grievant’s store, and that his reallocation to Retail Manager 4 was based on this error. The Union also does not dispute the downward reallocation of the Grievant back to Retail Manager 3. The Union does contend that when the Grievant was reallocated downward, the Employer violated the clear language of Article 40.4.C by reducing his salary and seeking reimbursement. The Union avers that Article 40.4.C is intended to protect and maintain the stability of an employee’s income in

the event of a downward reallocation, regardless of the circumstances or reasons behind that move.

POSITION OF THE EMPLOYER

The Employer contends that it properly relied on Section 41.20 of the Agreement to recover the overpayment of wages to the Grievant. The Employer asserts that wages were overpaid to the Grievant because of a computer error which resulted in his reallocation to an inappropriate classification. The Employer asserts that while the Grievant did nothing wrong, he should not be unjustly rewarded when he did not meet the requirements of the Retail Manager 4 position. The Employer maintains that the Grievant was treated like all other employees who have had to repay a wage overpayment when an error was made, discovered and corrected. The Employer argues that it had an obligation under Section 41.20 and RCW 49.48.210 to seek repayment of wages that an employee did not earn, and that to do otherwise would be a “gift of state funds” not allowed by Article II, § 25 of the State Constitution.

DISCUSSION

Sections 36.1.J and 40.1 of the Collective Bargaining Agreement, when read together, provide for the Employer to establish descriptions for job classifications and to allocate and reallocate positions to the appropriate classification. Section 40.4.C provides that when a position is reallocated to a lower paid classification, “the employee will continue to be compensated at the salary he or she was receiving prior to the reallocation downward, until such time as . . . his . . . salary falls with the salary range.” Based on this language, when an employee classified as a Retail Manager 4 because he or she is in charge of a level 2 liquor store is

reclassified as a Retail Manager 3 because decreased sales has changed the store to level 1, the employee is protected against a reduction in salary. Section 41.20.A provides to the Employer the right to require repayment from an employee who has been overpaid wages.

In the matter at hand, the Grievant was reallocated from Retail Manager 4 to Retail Manager 3, a classification with a lower salary. Normally, the language of Section 40.4.C would serve to freeze the Grievant's salary at the amount he had been receiving prior to the downward reallocation. However, Section 40.4.C cannot be construed without regard to the rest of the Agreement. The meaning of each provision must be determined in the context of the entire document. Ruben, ed., Elkouri & Elkouri – How Arbitration Works, 6th ed. (2003) pp 462-63. Section 41.20.A clearly presupposes that mistakes may result in the overpayment of wages to employees and that such overpayments may be recovered from the employee who had benefited from the mistake. I find that Section 41.20.A is the controlling provision in this dispute, and it justified the Employer's actions with regard to the Grievant.

I am not persuaded by the Union's contention that Section 40.4.C dictates that there are no circumstances which would justify a reduction in salary for an employee who is reallocated to a lower paid classification. Section 40.4.C must be read together with Section 40.1.B which provides for allocation and reallocation "to the appropriate classification within the classification plan." It must be remembered that the Grievant's work never changed. Before and after July 1, 2009, he managed a liquor store which had average monthly sales of less than 17,000 PAUs. It is undisputed that at all times, his appropriate classification within the classification plan was a Retail Clerk 3. It is also undisputed that the Grievant was elevated to Retail Clerk 4 because of a mistaken computer entry. This is not a situation where the Grievant was kept in the Retail Manager 4 position for a substantial length of time. Rather, the mistake was discovered in a

relatively quick fashion. I find that it is more likely than not that Section 41.20's provision for salary overpayment recovery was intended to apply to such situations. If the Union's position were accepted, then an employee could financially benefit from a reallocation mistake regardless of the circumstances. For instance, what if the mistake involved a keying error or a confusion of names which resulted in a mistaken reallocation to not just the next level, but to a much higher paid position? If the salary could not be corrected, the employee would be unjustly enriched for perhaps years after the mistake was discovered. That would clearly be a salary overpayment which could not be reasonably justified. Arbitrators generally will avoid interpreting ambiguous contract language in a manner which would lead to unreasonable or nonsensical results, when there is a more reasonable interpretation. Snow, "Contract Interpretation," § 2.13, in St. Antoine, ed., The Common Law of the Workplace, 2nd ed. (2005); How Arbitration Works, *supra*, at pp. 470-71. It is simply unreasonable to interpret Section 40.4.C to allow an employee to financially benefit, perhaps for years, from a mistaken reallocation caused by an incorrect computer entry which was promptly realized and corrected. Rather, in such circumstances, I find the more likely intent of the parties was to allow the Employer to correct the employee's salary to its appropriate level and recover any salary overpayments in accordance with its reserved right under Section 41.20.

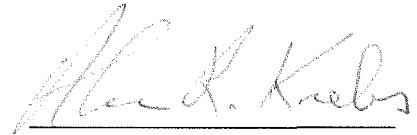
For the foregoing reasons, I conclude that the Employer did not violate the Collective Bargaining Agreement when it reduced the Grievant's salary to the level appropriate for a Retail Manager 3 and demanded that he pay back the amount of the overpayment which he had received during the August 15 through October 31, 2009 pay periods.

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: March 25, 2011

A handwritten signature in cursive script that reads "Alan R. Krebs". The signature is written in dark ink and is positioned above a horizontal line.

Alan R. Krebs, Arbitrator