

In the Matter of the Arbitration

between Teamsters Local Union 117 (“Union”)

and

The State of Washington Department of Corrections
 (“DOC” or “the Agency”).

Findings,
Discussion and
Award.

Case Numbers:	FMCS No. 161203-0576-6. DOC #1082-3096. Arbitrator’s R11.
Representing the Union:	Spencer Nathan Thal, General Counsel, Teamsters Local Union 117, 14675 Interurban Avenue S, Tukwila, WA 98168.
Representing the DOC:	Ohad M. Lowy, Assistant Attorney General, 7141 Cleanwater Drive SW, Olympia, WA 98504-0145.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	On March 24, 2016, at the offices of the Washington Attorney General, 1250 Pacific Avenue, Tacoma, Washington.
Witnesses for the Union:	Michelle Woodrow, W. Michael Boe, and Cory Laughlin.
Witnesses for DOC:	Ann Mitchell, Stephen Sinclair, and Julie Mouline.
Post-hearing argument received:	From both parties by email on May 9, 2016.
Date of this award:	May 23, 2016.

This is a dispute over the proper interpretation and application of a provision of the parties' 2015-2017 collective bargaining agreement (CBA). The disputed contract language comes directly from my previous, 2014 interest arbitration award (PERC case No. 26673-I-14-0659, Sept. 26, 2014). The parties could not agree on an exact statement of the issue in arbitration, but they agree that I have the authority to formulate that issue in light of the entire record. They agree that there are no preliminary issues of substantive or procedural arbitrability and that the overall burden of persuasion is on the Union to show, more likely than not, that the Agency violated the CBA as alleged. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Both parties filed timely post-hearing briefs, which I have carefully considered.

Although I issued the interest arbitration award which generated the contract language at issue here, my function in the case at hand is not to 'clarify' that award or to explain what I had in mind behind what I actually wrote. My role here is entirely that of a *grievance* arbitrator charged with resolving a dispute about the parties' existing *contract*—not interest award—language. The language of the interest arbitration award therefore, and the positions of the parties in interest arbitration, etc., become important parts of the history of that disputed contract language and extremely useful for illuminating what the parties understood, or should have understood, that contract language to require. But, to repeat, it is the language of the contract that is at issue, and my function is to approach that dispute with some understanding of the parties' situation but with no special inside access to the 'actual intent' of the author of the underlying interest arbitration award.

FACTS

This bargaining unit includes well over 5,000 employees of the Washington Department of Corrections, mostly in the classifications of Corrections Officer or Sergeant (although employees in a large variety of other classifications are also in the unit). Most public sector Washington interest arbitration awards are issued pursuant to statutory authority; but, oddly, Washington statutes do not provide for interest arbitration for these employees. In 2013, the Union entered into a MOU providing for a single interest arbitration proceeding to resolve issues arising from bargaining the 2015-2017 CBA, and the parties chose me to hear that dispute. I issued the award on September 26, 2014, including specific contract language to be included in the 2015-2017 contract.

The predecessor, 2013-2015 contract had provided for Assignment Pay for the "classifications in this bargaining unit [which] exhibit recruitment and retention problems" (quoting the Award at 6). *DOC* proposed to continue that provision into the new contract and to add "additional class-specific increases." *The Union*, on the other hand, proposed "to eliminate location incentives, characterizing the 'geo pay' language as "the most divisive in the contract, raising the ire both of employees inside the targeted classes but outside the targeted institutions and of employees inside the targeted institutions but outside the targeted

classes. But the Union [did] not dispute that genuine recruitment and retention problems led to the location incentives...” (Interest Award at 23).

The geo pay part of the Assignment Pay provision of the prior contract which was at issue in the interest arbitration was titled “Group C;” and the interest arbitration award included the following contract language for the new Group C provision:

The Department of Corrections may, at its discretion, apply premiums, not to exceed the indicated limit, in order to address problems of recruitment and retention. A premium shown to be applicable to an entire class must be applied to that class uniformly. “At its discretion” means that the only permissible grievance of such a decision is limited to whether or not the decision in question was arbitrary and capricious or violated the express terms of this provision. Once applied, a premium may not be reduced for the life of this Agreement.

That language in the interest arbitration award was followed by a chart duplicating the Group C premiums under the prior agreement plus the Sex Offender Treatment Specialist and Corrections Mental Health Counselor premiums proposed by the DOC in the interest arbitration. The parties duly incorporated that language, including the chart, into their 2015-2017 CBA as part of Appendix F, Assignment Pay. And that language is what the Union now alleges the Agency has violated.

How the grievance arose. That MOU that authorized the 2014 interest arbitration generally tracked the statutory process for such proceedings. The hearing was held in mid to late August, and the Award was issued on September 26, in time for statutory review by the Office of Financial Management as required under RCW 41.80.010(3). OMB found the award to be financially feasible and funding was included in the budget for the July 1, 2015 to June 30, 2017 fiscal years covered by the resulting contract.

On June 3, representatives of OMB HR and the Agency met to review an OMB’s spreadsheet showing turnover in the Group C positions over the period of the prior CBA.

On July 7, 2015, the Agency announced the elimination of the prior Group C Assignment Pay premiums. And on July 13, the Union grieved that elimination:

The Union protests the improper removal of Assignment Pay for the purposes of recruitment and retention issues. *** [T]he Union hereby provides the following information relating to this grievance.

- a. The action referenced above constitutes a violation of the Collective Bargaining Agreement (CBA) including, but not limited to, Article 32 (Compensation) and Appendix F (Assignment Pay) as established by the Interest Arbitration Decision issued by Arbitrator Howell Lankford. On July 7, 2015, the Department notified the Union of its intent to cease paying assignment pay to

classifications identified in Appendix F, Group C, of the CBA. The Union asserts that the Department's decision was arbitrary and capricious and is therefore a direct violation of the negotiated agreement and Interest arbitration decision in (Washington PERC) Case No. 26673-1-14-0659. We stand ready to provide you with additional facts supporting the Union's position.

- b. The violation occurred on July 1, 2015 and is ongoing.

- d. The Union requests a full make-whole remedy including immediately reinstating the assignment pay, back pay with interest for all members that did not receive the appropriate assignment pay, and any other relief that is just and equitable.

The Union simultaneously filed a request for information asking for a list of the affected employees, all "documents reflecting recruitment and retention measures for the affected classifications from January 1, 2014 to present; and [a]ny other documentation and/or information not previously supplied the Union that the Department relied upon in making its decision to cease paying classifications ... Assignment Pay." On July 24, the Agency responded with the turnover spread sheet discussed at the June 3 meeting and a copy of the interest arbitration award.

The parties met at Step 1, and the Agency's response to the grievance was that the arbitration award—and the contract language that incorporated it—had specifically eliminated Group C Assignment pay. In its written Step 1 response, on August 17, 2015, for the first time the Agency added to that response the explanation that

On June 3, 2015, DOC and Office of Financial Management's State Human Resources met to review the recruitment and retention data for Teamsters job classifications that were currently receiving assignment pay. During that review, DOC determined that LPN2's and Psychologist 4's job classifications were experiencing heightened turnover ranging from 14.5%-37.4% for LPN2's and 100% for Psychologist 4's. The remaining job classifications that were receiving Group C assignment pay in accordance with the 2013-2015 CBA were experiencing lower turnover numbers. [I omit the table, which showed maximum turnover rates ranging from 0 to 9.8%.]

Accordingly, DOC performed a thorough review of the turnover data and made the decision to maintain the Group C assignment pay for LPN2s and Psychologist 4's. You received notice of our intent to maintain the Group C assignment pay for these job classifications on July 31, 2015. ***

The July 31 notice mentioned at the end of that excerpt had also referenced the meeting with OFM HR to review turnover data (without providing a date for that meeting).

The new CBA went into effect on July 1, 2015, without geo pay; and on July 13 the Union grieved “the improper removal of Assignment Pay for the purposes of recruitment and retention issues [which] occurred on July 1, 2015 and is ongoing.”

On July 7, 2015, the Department notified the Union of its intent to cease paying assignment pay to classifications identified in Appendix F, Group C, of the CBA. The Union asserts that the Department’s decision was arbitrary and capricious and is therefore a direct violation of the negotiated agreement and the interest arbitration decision...

DISCUSSION

The issue presented in arbitration. In light of the entire record, the issue presented here is whether the Department violated the CBA by deciding, arbitrarily and capriciously, to cease paying geo pay at the beginning of the new contract period and, if so, what is the appropriate remedy? Because of the way the grievance is written, the issue divides into two parts, whether the Department violated the CBA by ceasing geo pay at the beginning of the new contract period and—the “continuing violation” issue—whether the Department violated the CBA thereafter by not reinstating geo pay. We begin with the violation alleged to have “occurred on July 1, 2015.”

On the merits. A dispute about the proper interpretation and application of a provision of a CBA usually calls for consideration of three sorts of evidence of the parties’ probable understanding of the disputed provision: First, of course, is the language of the contract on its face. The answer to some questions is so clear, based on contract language alone, that it is not necessary or appropriate to look any further than the “four corners” of the document itself. Second is the bargaining history behind the disputed language: What did the parties say to one another when they agreed to put this language into the contract? What were their interests? Who drafted the language? What was “the situation of the parties and the circumstances under which a written instrument was executed” (*Berg v. Hudsmen*, 115 Wn.2d 657, 669 (1990))? Etc. And finally, what is the history of the prior administration of the disputed language: What have the parties done in the past in situations where their understanding of this language might make a difference to their actions? In the case at hand there is no evidence of prior administration of the disputed language because the Union grieved DOC’s interpretation on the new CBA’s effective date. And the evidence of bargaining history is slightly unusual in that the language comes not directly from the give and take of two-party negotiations but from the pen of an interest arbitrator. Me, in this case.

We first examine the disputed language itself. Appendix F begins with what seems to be a general “grant” of assignment pay: “Assignment Pay (AP) is granted in recognition of assigned duties which exceed ordinary conditions.” It then sets out premiums for Groups A and B. But when it turns to Group C—the provision in dispute here—instead of following the prior format and setting out premiums the Appendix grants of *discretion* to DOC to

“apply premiums, not to exceed the indicated limit, in order to address problems of recruitment and retention.” The Group C table, unlike those in Group A and Group B, does not grant premiums itself; rather, it sets out limits on DOC’s discretion to grant premiums. The premiums under Groups A and B are expressly granted; but the premiums under Group C are not. The Agency now argues that in the face of that pattern the Appendix does not grant the Group C premiums unless the Agency exercises its discretion; and the Union argues that the very grant of that discretion means that the Agency must consider whether or not to grant those premiums and must make a decision on that issue which is not arbitrary and capricious. To put it another way, the question is whether “discretion to apply” the stated premiums requires discretion *not* to apply them, as the Union claims, or whether “discretion to apply” shows that without the exercise of such discretion the stated premiums do not apply, as the Department claims. The Union argues that its interpretation is implied by the contract language itself, but I find the Agency’s interpretation equally plausible on the face of the language alone: where two prior Group Assignment Premiums are expressly granted and the third is not, it is at least reasonable to understand that the contract itself has eliminated that last group of premiums irrespective of any discretion the Agency might have to reinstate them. On its face, the contract language is not so clear that the question presented here can be answered “within the four corners” of the written contract, and we turn to an examination of its bargaining history.

The bargaining history here consists of the MOU, legal context, the parties’ positions in negotiations and in interest arbitration, and the discussion of the Group C premium issue in the interest arbitration award. Here is the heart of that discussion:

The Parties’ Proposals

DOC proposes, first, a single, 3% increase at the beginning of the 2015-2017 biennium with no other general increase.

Second, some of the classifications in this bargaining unit exhibit recruitment and retention problems, and Appendix F of the current CBA provides “Assignment Pay” for [set out in the Group C provision]. DOC proposes to continue that language and to add a new Section 32.25 to Article 32, Compensation, creating additional class-specific increases *** [for] Sex Offender Treatment Specialist..., Correctional Records classes..., ...Corrections Mental Health Counselor classes..., and ... Electronics Technician classes... [and] for some Psychologist 4 employees. The proposed increases would apply to about 190 employees.

The Union proposes several general rate increases and several class specific pay adjustments. Turning first to the across-the-board proposals, the Union proposes, first, to bring its entire rate schedule up to 10% above the SGSS in recognition of the special demands and personal costs of corrections work and, second, to add a 4% cost of living increase effective July 1, 2015, and another 3% increase effective July 1, 2016. Third, Teamsters would close “the gap.” “The gap” would be defined as the difference between DOC compensation rates and the

Washington State General Survey rates, or the Corrections-specific survey rates, “supplemented by the Union’s data from Washington Counties.” *** Fourth and finally, the Union proposes to eliminate the predecessor agreement’s “geo” premiums. (Interest Award at 6-7, footnote omitted.)

In short, the Department proposed a very small general increase—as it had proposed for all State bargaining units in 2014—and proposed to continue the geo pay provision and to add to the groups of employees receiving geo pay; and the Union proposed to eliminate geo pay. The Union could do so because that loss to bargaining unit employees would be more than covered by the very substantial general increases it proposed. Conversely, the Union argued that the cost savings from elimination of geo pay would reduce the economic impact of its proposed substantial general increase. DOC supported its modest proposal primarily by arguing that it was all the State could reasonably afford; and the Union supported its more substantial proposed increase by arguing that bargaining unit employees were massively behind comparable employees at other agencies. The resulting Award granted a 5.5% increase at the beginning of the biennium and another 4.3% increase at the beginning of the second year.

Here is the heart of the interest award’s discussion of the geo pay dispute (at 23-24):

The Union’s “Geo Pay” Proposal. The Union proposes to eliminate location incentives, painting the “geo pay” language as the most divisive in the contract, raising the ire both of employees inside the targeted classes but outside the targeted institutions and of employees inside the targeted institutions but outside the targeted classes. But the Union does not dispute that genuine recruitment and retention problems led to the location incentives; and the same response that applies to the State’s consistency argument must apply here: It is part of the nature of a bargaining unit. The Union chose to represent a geographically broad unit, and that choice means that some residence areas are more expensive and more popular and some are less. Two of the factors set out in the MOA are sometimes referred to as “barrier factors:” the employer absolutely must be able to pay for the work, and the employer absolutely must be able to staff it. Location pay is the traditional and accepted means of dealing with local recruitment and retention problems.

I will nonetheless tentatively eliminate location incentives—and their costs—because the across-the-board increases awarded here will overtake the incentives. Unfortunately, I cannot tell whether the underlying staffing problems will be eliminated by that general increase or whether there will still be internal staffing problems: Without a location differential, will employees bid out of the targeted institutions as soon as possible, leaving an unacceptably junior workforce? For that reason, and because recruitment and retention really is a barrier factor, I will give DOC the discretion to reintroduce the previously existing location incentives and to introduce those it now proposes. The language of the award is set out below on page 25 after the discussion of DOC’s proposed statewide Range increases.

The interest award awarded specific contract language on this issue, set out on page 25, first changed the introductory second paragraph of Appendix F and then setting out the disputed Group C language and the table listing the limits of the discretionary increases:

Group A indicates those classes which have been granted AP; Group B indicates those assigned duties granted AP which are not class specific; Group C ~~applies only to Ref #29~~ lists classes and assignments for which the Department of Corrections may at its discretion apply the stated premiums based on problems of recruitment and retention.

* * *

GROUP C

The Department of Corrections may, at its discretion, apply premiums, not to exceed the indicated limit, in order to address problems of recruitment and retention. A premium shown to be applicable to an entire class must be applied to that class uniformly. “At its discretion” means that the only permissible grievance of such a decision is limited to whether or not the decision in question was arbitrary and capricious or violated the express terms of this provision. Once applied, a premium may not be reduced for the life of this Agreement.

The Union’s first argument. The Union offers two basic arguments in the grievance at hand. First(Post-hearing Brief at 6, emphasis in the original):

The Arbitrary and Capricious Standard Is A Well-Recognized Limitation on Management Discretion And Requires That The Decision Be Rational And Measured.

The section of the Award that is in dispute in this case has its roots in the well-established principle that “[e]ven where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the ‘sole judge’ of a matter, management’s action must not be arbitrary, capricious or taken in bad faith.” Elkouri & Elkouri, *How Arbitration Works*, 13-7, 13-8 (7th Ed. 2012). ***

But the interest award’s discussion of the elimination of geo pay does not grant to the Agency the discretion “to eliminate location incentives.” The discussion is explicit: “*T*”—i.e. the interest arbitrator in the Award itself—“*tentatively eliminate location incentives...*” That seems pretty clear: the award itself “eliminate[d] location incentives.” The “tentatively” part was the discretion granted to the DOC to bring them back if they proved necessary after the general rate increase had taken effect. Would that general rate increase eliminate the need for geo pay? The Union clearly had understood that the very large increase it championed would eliminate the need for geo pay, because that elimination was part of the Union’s proposal. But would the more modest general increase actually awarded be enough to have that effect? The discussion was explicit: “Unfortunately, I cannot tell...” But, the discussion explained, because the ability to staff the facility is a “barrier factor”—i.e., DOC absolutely

must be able to staff adequately—the award left to DOC the discretion to *react* if staffing shortfalls persisted in spite of the general rate increase.

whether the underlying staffing problems *will be eliminated* by that general increase or whether there will still be internal staffing problems: Without a location differential, *will employees bid out* of the targeted institutions as soon as possible, leaving an unacceptably junior workforce?

The use of the future tense in this passage is significant: the discretion to reinstate geo pay was granted expressly to allow DOC to staff adequately if it turned out that the general rate increase was inadequate to address the staffing problems that had been the motivation for geo pay in the past. The Union had apparently believed that the staffing picture would change significantly after its proposed major general rate increase took effect, but the arbitrator “could not tell” whether the more modest rate increase would eliminate the need for geo pay. The discussion lends itself most easily to the interpretation that the interest award itself was eliminating geo pay and DOC was given the discretion to reimpose it if required to do so by continuing staffing problems. Because of that thrust of the discussion of the Union’s geo pay proposal, the Union cannot now show, more likely than not, that the parties should have understood the resulting contract to require DOC to make an initial decision of whether or not to eliminate geo pay. It is at least as likely as not that they should have understood that the interest award itself did that without any exercise of discretion by DOC.

The Union argues (Post-hearing Brief at 7) that “To find for the Employer, the arbitrator would need to modify his award and the CBA or render meaningless the mandate on assignment pay, contrary to well-established principles and the parties’ agreement.” On the contrary, there simply is no “mandate on assignment pay” on the face of the contract: the interest award first *specifies* the continuation of the increases for Groups A and B; but it does not specify any increase for employees in Group C. Instead, the interest award gave DOC the discretion to address problems of recruitment and retention for those employees.¹ The parties’ contract follows that same pattern, and I would be adding to that contract to award a geo increase to Group C employees when the CBA specifically provides increases only for Group A and Group B employees.

The Union’s second argument. The Union’s second fundamental argument here (Post-hearing Brief at 4) is that “OFM effectively foreclosed DOC’s ability to comply with the Arbitrator’s award by making a funding decision for the DOC budget that assumed elimination of assignment pay before conducting the reasoned analysis (mandated by the Award) as to whether retention of assignment pay was warranted.”

¹For some reason not included in the record before me the parties chose to omit from the contract the language revision awarded for the second paragraph of the preface of Appendix F. Neither party argues that this omission is significant for the case at hand.

Unfortunately, in State government there is a massive structural rift between those who finance (OFM and the Legislature) and those who operate (The Department's headquarters and Institution management team). In this case, that rift was dispositive: those who hold the purse-strings made decisions **before** those who operate were allowed to weigh in as to the propriety of assignment pay. This cart-before-the-horse approach is inherently arbitrary and capricious insofar as it disregards the Arbitrator's dictate in the Award: do the work and analyze whether assignment pay would be operationally cost-beneficial for the Department **before** making the final budgetary decision. By reversing the order and letting the financial considerations drive the analysis, the State foreclosed any meaningful consideration of operational needs, stripping the Award's mandate of its meaning. (Post-hearing Brief at 7, emphasis in the original.)

But the parties to the MOU and to the interest arbitration award knew that that award had to survive a determination of financial feasibility by OFM—not to mention Legislative funding—before any an actual contract could result from it. (Interest Award at 2.) The MOU incorporated the statutory time frame for the initial determination of financial feasibility, and the time lines were tight enough that they left no room for written briefs. (“[T]he parties closed their cases orally in consideration of [the RCW 41.80.010(3)] deadline.” Id.) The interest award made it clear that the overall costs to be weighed by OFM did not include geo pay (at p. 27): “The overall initial cost of the general rate increases awarded here are therefore reduced by the prior cost of the location differentials, which DOC takes to have been about \$9.5 million and by the a part of the projected costs of DOC’s own range increases set out just above.” The only reasonable referent for the “therefore” was *the award’s* elimination of geo pay, not the mere possibility that DOC might eliminate geo pay.

“Those who operate” *had* weighed in on geo pay in the interest arbitration and had proposed to continue it. The Union, on the other hand, had proposed to eliminate it as extremely divisive of the bargaining unit. The resulting award took a ‘let’s try it and see’ approach to the Union’s proposal, awarding the elimination of geo pay but including a staffing safety net in light of the Department’s arguments that geo pay was required in order to staff adequately. That safety net left it up to the Department to take a look at the change in staffing resulting from the general increase and to return to geo pay “at its discretion...in order to address problems of recruitment and retention.”

The parties were certainly aware of the statutory scheme adopted by their MOU: if the interest award had left a good chance that DOC might be *required* to reinstitute geo pay, then OFM would have taken the fiscally conservative approach required of it and would not have decreased the overall cost of the interest award by the cost savings of the elimination of geo pay. OFM and DOC understood the award itself to eliminate geo pay without any action on the part of the Department; and the Union should have shared in that understanding.

The ‘continuing violation’ grievance. The written grievance not only alleges a violation of the CBA by the elimination of geo pay on its effective date but also claims that

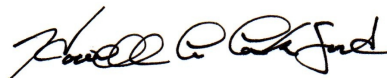
there was a continuing violation. The point of that claim may be to allege that a fresh violation occurs every payday after the Department's elimination of geo pay on July 1, 2015. But "continuing violation" could also suggest that the CBA requires DOC to actively and continually monitor the staffing situation at the facilities eligible for geo pay. The Union argues, for example (Post-hearing Brief at 8) that "the [interest] Arbitrator expressly and properly contemplated a thoughtful balancing of operational and financial interests in determining whether to retain assignment." (The portion of the discussion the Union points to for that proposition is set out on page 7, above under "The Union's "Geo Pay" Proposal".) But that discussion does not place a new burden upon DOC as part of the awarded discretion to reinstitute geo pay. The Department's Post-hearing Brief is largely devoted to arguing that DOC made a reasoned—not arbitrary and capricious—decision that the staffing situation did not require resorting to geo pay. But the record does not show—more likely than not—that the CBA creates any special burden on the Department in that respect.²

In short, the CBA, on its face does not *expressly* say whether or not there shall be geo pay. But neither does the CBA on its face require geo pay unless DOC exercises its discretion to eliminate it: the CBA's failure—and the interest award's failure—to expressly grant Group C assignment pay after having expressly granted assignment pay for Group A and B will not allow that interpretation. Once we look beyond the language of the contract itself, the positions of the parties, the legal context, and the discussion in the interest arbitration award all support the Department's interpretation that geo pay was eliminated by the interest award itself without the exercise of any discretion by the Department. The grievance must be dismissed.

AWARD

Geo pay was eliminated by the interest award itself. The Department did not violate the CBA by deciding, arbitrarily and capriciously, to cease paying geo pay at the beginning of the new contract period. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford, Arbitrator

²In particular, the Union points out (Post-hearing brief at 8) that "financial hardships do not trump contractual obligations." But that does not mean that DOC may not consider costs in the exercise of its contractual discretion. Cost is a common discretionary consideration. For example, salary minimum provisions—i.e. language allowing the employer to pay more than the stated rate—are among the common examples of contractually granted employer discretion, and costs are a major factor in an employer's decision to exceed a bargained minimum rate.