In the Matter of Arbitration Between	)	
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	)	
	)	
Washington Federation of State Employees, (Union or WFSE),	)	
	)	
	)	OPINION AND AWARD
and	)	
	)	Burgess Grievance
	)	AAA Case No. 01-16-0000-0950
Washington State Department of Employment Security, (Agency or Employer)	)	
	)	
	)	
	)	

BEFORE:	David W. Stiteler, Arbitrator
APPEARANCES:	For WFSE: Thomas Keehan Younglove & Coker 1800 Cooper Point Road SW, Bldg. 16 Olympia, WA 98507 For the Agency: Albert Wang Office of the Attorney General 7141 Cleanwater Drive SW Olympia, WA 98501
HEARING LOCATION:	Tumwater, WA
HEARING DATE:	October 26, 2016
RECORD CLOSED:	December 16, 2016
OPINION & AWARD ISSUED:	January 12, 2017

OPINION

INTRODUCTION

The Agency notified Waltraud Burgess (Grievant) in July 2015 that she would be laid off. The Union grieved, alleging that the Agency did not follow the layoff procedure required by the parties' contract. The parties were unable to resolve the dispute and the Union advanced the grievance to arbitration. Through the procedures of the American Arbitration Association, the parties selected me as the arbitrator.

At hearing, the parties had the full opportunity to introduce documentary evidence, examine and cross-examine witnesses, and argue their positions. They agreed that the dispute was properly before me for resolution. They also agreed that I could retain jurisdiction for 90 days following the decision to resolve remedial disputes, if any.

After the parties presented their evidence, they agreed to waive closing argument and submit post-hearing briefs. I received their briefs by December 16 and closed the hearing record.

ISSUE

The parties agreed that the issue is:

> Did the Employer violate Article 34.9 of the collective bargaining agreement when it identified the ESPC 2 position occupied by the grievant as a formal option for a more senior ESPC 2? If so, what is the remedy?

FACT SUMMARY

Grievant worked for the Agency on and off since 1985 in various positions. By the summer of 2015, she was working as an Employment Security Program Coordinator 2 (ESPC 2). Her seniority date was December 7, 2000.

In June 2015, the Agency decided to eliminate two ESPC 2 positions in its Information Technology and Business Integration Division. The decision was based on both a lack of need for the positions because of work restructuring and a lack of

funds. The incumbents of the two affected positions were Tanya Brewster and Karen Spurgeon. Both Brewster and Spurgeon were more senior than Grievant.

Section 34.9 of the parties' collective bargaining agreement (CBA) describes the procedure to be followed in a layoff. It requires that employees be laid off by seniority, and provides that employees subject to layoff be offered options to avoid layoff. Regarding those options, it provides, in part:

> Employees being laid off will be provided the following options to comparable positions within the layoff unit, in descending order, as follows:
>
> 1. A funded *vacant* position for which the employee has the skills and abilities, within his or her current job classification.
>
> 2. A funded *filled* position held by the least senior employee for which the employee has the skills and abilities, within his or her current permanent job classification. (Emphasis added.)

At the time the Agency decided to eliminate Brewster's and Spurgeon's positions, there were three vacant ESPC 2 positions.

The ESPC 2 classification is general in nature. An incumbent in one ESPC 2 position would not necessarily have the skills and abilities to fill a different ESPC 2 position in another program area.

Pursuant to Section 34.9, HR Manager Teresa Eckstein initially determined that Brewster had the skills and abilities to fill one of the vacant positions, which was in the UI division. She concluded, however, that Spurgeon did not have the skills and abilities required for either of the other two vacant ESPC 2 jobs.

After reviewing the list of filled ESPC 2 positions held by employees with less seniority, Eckstein determined that Spurgeon had the skills and abilities for the position occupied by Grievant. As a result, Grievant's position initially was identified as Spurgeon's layoff option.

The Agency told Brewster and Spurgeon on June 23 about their respective layoff options. The Agency also told Grievant that she was at risk for layoff because her position had been identified as a layoff option for a more senior employee.

Brewster and Spurgeon accepted the layoff options identified. Before they transferred into those positions, however, the Agency became aware of a settlement agreement from 2008 regarding Brewster. Agency personnel reviewed the settlement agreement, and interpreted it to mean that Brewster could not take the vacant UI position the Agency had identified as her option.

Eckstein then re-examined the layoff options for Brewster. She determined that the first filled ESPC 2 position that was a fit for Brewster's skill set was Grievant's position. Since Brewster was more senior than Spurgeon, Grievant's position was identified as Brewster's layoff option.

That decision meant Eckstein had to find a new layoff option for Spurgeon. She determined that Spurgeon did not have the skills and abilities required for the vacant UI position initially offered to Brewster, so none of the three vacant ESPC 2 positions could be used as an option for Spurgeon. Eckstein next reviewed other filled ESPC 2 positions, and found a different filled ESPC 2 position as Spurgeon's layoff option.

The Agency notified Brewster and Spurgeon about the revised layoff options in early July. Both employees accepted the proposed options, and eventually transferred to those positions.

Once the Agency determined that Brewster would bump Grievant, Eckstein went through the layoff option process to identify positions available for Grievant. She found that Grievant did not have the required skills and abilities for any of the three vacant ESPC 2 positions. She also did not find any filled ESPC 2 positions for which Grievant qualified and which were occupied by less senior employees.

Under Section 34.9, if there are no vacant or filled positions for which the employee qualifies in the employee's current job classification, the next step is to

identify a vacant or filled position in a job classification the employee has held before. Applying that language, Eckstein found an ESPC 1 position to be the appropriate layoff option for Grievant.

The Agency notified Grievant on July 10, 2015, that she would be laid off from her ESPC 2 position on July 31, 2015. The layoff notice also advised Grievant of the layoff option of the ESPC 1 position.

Grievant decided to turn down the ESPC 1 layoff option and retire. She made that decision for several reasons. The ESPC 1 salary level would have been substantially less per month than her salary as an ESPC 2. In addition, taking the lower level position would have permanently affected her retirement benefits once she did retire. Also, accepting the lower level position would have significantly reduced her vacation leave payout at retirement. Finally, the work schedule for the ESPC 1 position–five 8s instead of four 10s–and extra commute both in miles and in the added day would have been a hardship for her.

On August 20, after Grievant retired, the Union filed a grievance for Brewster. That grievance had two elements. One part asserted that the layoff option the Agency offered to Brewster–Grievant's position–was incorrect, and that Brewster instead should have been offered the vacant UI position originally identified.[1] The Union based that contention on its view that the settlement agreement did not prohibit Brewster from working in the UI Division.

Also on August 20, the Union filed this grievance for Grievant. The grievance alleged a violation of Section 34.9 and made the following claim:

> The grievant was subjected to layoff on July 31, 2015. The agency did not follow the contract in determining layoff options. As a result of the agency's failure to abide by the layoff procedure, the grievant's position was incorrectly selected as a layoff option for another employee, when a vacant position was available that the other employee qualified for.

[1] The second part of the grievance concerned the pay level the Agency placed Brewster in after the layoff was implemented. That element of the grievance went to arbitration in September 2016.

Though the Union did not identify Brewster by name, she was qualified for the vacant UI position, and Spurgeon was not.

The Agency reviewed Brewster's grievance, and considered the Union's claim that the 2008 settlement did not bar her from working in UI. The Agency concluded that the Union's contention was correct.

That conclusion required the Agency to take another look Brewster's and Spurgeon's layoff options. Eckstein again determined that the vacant UI position initially identified was the appropriate option for Brewster. Based on that determination, Eckstein returned to her initial determination that Grievant's position was the appropriate layoff option for Spurgeon.

The Agency offered the UI vacancy to Brewster and Grievant's position to Spurgeon on October 22; both accepted the offers. Grievant remained retired and the Union continued its pursuit of this grievance on her behalf.

DISCUSSION

This dispute concerns the Agency's decision that Grievant's position was the appropriate layoff option for a more senior ESPC 2, which resulted in Grievant being bumped. For the reasons explained below, I conclude that the Agency acted in accordance with the contract.

In contract interpretation disputes, an arbitrator's role is to interpret and apply the contract language at issue, consistent with the parties' intent. The language itself is often the best evidence of their intent, but where the language is ambiguous, an arbitrator may consider bargaining history, past practice, or other extrinsic evidence. The Union bears the burden of establishing its claim that the Agency acted contrary to the contract language.

There is no dispute here about the meaning of Section 34.9, only about its application. The Union contends that the Agency violated that section by identifying Grievant's position as a layoff option for a more senior employee. The Agency

responds that it followed the required contractual procedures when it selected her position.

The Union argues that the Agency violated the contract in several ways. First, according to the Union, the Agency mistakenly failed to use the three vacant ESPC 2 positions as the layoff options for Brewster and Spurgeon. And by the time the Agency partially corrected that mistake and offered one of the vacancies to Brewster, Grievant had already been forced to retire.

I do not find that Union argument persuasive. After deciding to eliminate two ESPC 2 positions, the Agency went through the procedures set out in Section 34.9 to find layoff options for the incumbents–Brewster and Spurgeon–of those jobs.

The fact that there were three vacant ESPC 2 positions at the time is not the end of the inquiry. The contract requires the Agency, as part of the process of identifying layoff options, to determine whether the employees subject to layoff have the requisite skills and abilities to fill a vacant position. The Agency followed that process and concluded that Spurgeon, who ultimately took Grievant's position, did not have the skills and abilities for any of the three vacant positions. There is no evidence that the Agency's determination was incorrect.

The Union next argues that the Agency violated the contract by failing to offer Brewster and Spurgeon ESPC 2 positions that were occupied by employees with less seniority than Grievant. The Union claims that there were at least eight filled positions in UI for which Brewster was qualified that the Agency did not consider as options for Brewster because of its erroneous reading of the settlement agreement. That led to the Agency incorrectly allowing Brewster to bump Grievant.

I do not find that argument persuasive either. The Union is correct that the Agency, after discovering the settlement agreement, ruled out positions in UI for Brewster, and that as a consequence, Brewster was allowed to bump Grievant.

The Union's argument fails for at least two reasons, however. Apart from the Agency's mistaken reading that the settlement barred Brewster from a UI position,

there is no evidence that she in fact had the skills and abilities for any of the UI positions filled by someone junior to Grievant. ESPC 2 positions may require particular skills, and holding one such position does not mean that a person has the necessary skill set to handle a different one.

More critically, the Union's argument overlooks the fact that, in the end, it was not Brewster that bumped into Grievant's position, it was Spurgeon. Whether Brewster could have been offered one of the filled UI positions is immaterial. Even had she been, the Agency still had to find a layoff option for Spurgeon.

The Agency had previously determined that Spurgeon did not have the required skill set for the vacant ESPC 2 positions. So the question is whether Spurgeon should have been offered one of the filled ESPC 2 positions occupied by someone less senior than Grievant. There was no evidence offered that she had the skill set for any of those positions either.

The Union argues finally that the Agency violated the contract by incorrectly determining Grievant's layoff options. According to the Union, there were 17 ESPC 2 positions filled by employees with less seniority than Grievant, but the Agency apparently made no effort to determine if Grievant had the skills and abilities to bump into any of those jobs.

I note that this argument goes beyond the issue stipulated to by the parties. Nonetheless, though the Union did not expressly raise this claim in the grievance, it is implicitly a part of this dispute.

That said, the argument is unpersuasive. As discussed above, all ESPC 2 positions are not the same; the required skills and abilities may vary depending on the program area. There is no evidence in the record to show that Grievant possessed the skills and abilities needed either for any of the vacant ESPC 2 positions or for those filled by junior employees. There is likewise no evidence that the Agency failed to adequately analyze Grievant's skills in indentifying a layoff option for her.

In sum, the crux of the Union's grievance is that the Agency acted contrary to the layoff process set out in Section 34.9 by failing to offer a vacant position, instead of Grievant's, to Brewster. There may have been merit to that claim in August when the grievance was filed because the Agency had identified Grievant's position as Brewster's layoff option. After the Agency changed Brewster's option in response to her grievance, however, the basis for Grievant's was undermined, since the Agency then identified Grievant's position as Spurgeon's layoff option.

To successfully challenge that decision, the Union would have to establish that the Agency's review of options for Spurgeon was incorrect. In other words, the Union would have to show that Spurgeon was qualified for one of the two vacant ESPC 2 positions or there was a filled ESPC 2 position, occupied by someone with less seniority than Grievant, for which Spurgeon was qualified. There is no evidence to support either contention.

For all the foregoing reasons, I conclude that the Agency did not violate the contract by offering Grievant's position as a layoff option for a more senior employee. After correcting its mistake regarding Brewster and the vacant UI position, the Agency applied the contractually required analysis to determine Spurgeon's options, and found that Grievant's position was the first on the list that was a suitable option. I will deny and dismiss the grievance.

AWARD

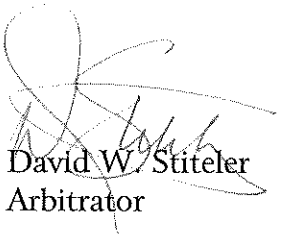
Having considered the whole record and for the reasons explained in the Discussion, I enter the following Award:

1. The Agency did not violate Section 34.9 when it offered Grievant's position as a layoff option to a more senior employee whose job was being eliminated.

2. The grievance is denied and dismissed.

3. The parties shall equally share my fees and expenses.

Respectfully issued this 12th day of January, 2017.



David W. Stiteler
Arbitrator