

IN THE MATTER OF THE ARBITRATION

BETWEEN

WASHINGTON PUBLIC EMPLOYEES
ASSOCIATION,

UNION,

and

STATE OF WASHINGTON, DEPARTMENT
OF REVENUE,

EMPLOYER.

OPINION AND ORDER

Re: Grievance of Gabriella Herkert –
Denial of Flex Time Request

AAA Case #01-17-0003-3138

BEFORE

ERIC B. LINDAUER

ARBITRATOR

March 20, 2018

REPRESENTATION

FOR THE UNION:

KATHLEEN BARNARD
Schwerin Campbell Barnard Iglitzin et al
18 W. Mercer St., Ste. 400
Seattle, WA 98119

FOR THE EMPLOYER:

JANETTA ELIZABETH SHEEHAN
Assistant Attorney General
7141 Cleanwater Drive
Tumwater, WA 98504-0145

NATURE OF PROCEEDING

The Washington Public Employees Association and State of Washington, Department of Revenue, are parties to a Collective Bargaining Agreement which provides that any disputes arising out of the interpretation or application of the terms of the Agreement that cannot be resolved through the grievance procedure are to be submitted to arbitration. On December 9, 2016, the Association filed a grievance contending the Employer violated the terms of the Agreement when it denied a bargaining unit member's telework request. The Employer denied the grievance and the issue was submitted to arbitration.

The arbitration hearing was held on December 7, 2017, at the offices of the State of Washington Attorney General, in Tumwater, Washington. At the commencement of the hearing, the parties agreed the matter was properly before the Arbitrator and the Arbitrator would retain jurisdiction for a period of 60 days to resolve any disputes arising out of the Order should the Grievance be sustained. During the course of the hearing, each party had an opportunity to make opening statements, introduce exhibits, examine and cross-examine witnesses on all matters relevant to the issue in dispute. A court reporter was present during the hearing and prepared a transcript of the hearing which was provided to the parties and the Arbitrator.

At the conclusion of the hearing, the parties agreed to submit their respective positions to the Arbitrator in the form of written post-hearing briefs. Upon receipt of the post-hearing briefs, the hearing record was closed. The Arbitrator now renders this decision in response to the issue in dispute.

ISSUE

At the commencement of the hearing, the parties stipulated the issue to be decided by the Arbitrator in this matter to be as follows:

Did the Washington Department of Revenue violate the parties' Collective Bargaining Agreement when it denied Gabriella Herkert's telework request? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

In the opinion of the Arbitrator, the following provisions of the Collective Bargaining Agreement, Department of Justice policies, Executive Order, and the Revised Code of Washington are relevant to determine the issue in dispute.

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 24

USE OF PRIVATELY-OWNED AND STATE VEHICLES, COMMUTE TRIP REDUCTION, AND DUTY STATION(S)

- 24.1 Employees are responsible for providing their own transportation between their home and duty station or field site. The Employer shall make a good faith effort, subject to the agency's operating, business and customer service needs, to meet the commute trip reduction goals identified in RCW 70.94 – Washington Clean air Act and, where applicable, Executive Order 01-03.

ARTICLE 30

GRIEVANCE PROCEDURE

- 30.2 Filing and Processing

D. Authority of the Arbitrator

1. The Arbitrator will:
 - a. Have no authority to add to, subtract from, or modify any of the provisions of this Agreement;

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties.

**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:

- C. Direct and supervise employees;
- H. Establish or modify the workweek, daily work shift, hours of work and days off;
- M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;

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

**DEPARTMENT OF REVENUE
ADMINISTRATIVE POLICY**

Teleworking and Working Flexible Hours

Purpose: Teleworking and working flexible hours are:

- Work alternatives, approved by management, that are intended to benefit the agency, employees and the public.
- Tools that provide benefits related to productivity, job satisfaction and retention of a highly motivated workforce.

Teleworking is intended to reduce the miles or number of commute trips taken by employees, reduce pollutants, save energy and enhance job performance and satisfaction without impairing productivity or service to the public.

DEPARTMENT OF REVENUE
APPEALS DIVISION

Flex Place Policy

DEFINITIONS:

Flexplace – Means a telecommuting work arrangement whereby employees with management approval are allowed to perform the duties and responsibilities of their positions at an alternative work station.

NUMBER OF HOURS/DAYS FLEX PLACE ALLOWED

Flex place will be limited to one work day per week outside your official work station for staff who are working: a four-ten schedule, or two days per week for staff working a five day per week schedule. Other work schedule configurations require you to work in your official work station at least 24 hours per week between 8 a.m. and 5 p.m.

OFFICE OF THE GOVERNOR
EXECUTIVE ORDER 16-07
BUILDING A MODERN WORK ENVIRONMENT

WHEREAS, modern work environments, telework, and flexible work hours present opportunities to save taxpayers money;

WHEREAS, *Results Washington Goal 3; Sustainable Energy and a Clean Environment* establishes a measure to reduce transportation-related greenhouse gas emissions, and RCW 70.94.547 directs state agencies to take a leadership role in aggressively developing substantive programs to reduce commute trips by state employees;

For the purpose of this Executive Order, the following definitions apply:

- *Telework* is the practice of working from home or other alternative locations closer to home through the use of technology which allows the employee to access normal work material (email, telephone, electronic documents, etc.). Telework may be scheduled or done on an ad hoc basis. Telework is a subset of mobility.

REVISED CODE OF WASHINGTON

RCW 70.94.547

Transportation demand management – Intent – State leadership.

The legislature hereby recognizes the state's crucial leadership role in establishing and implementing effective commute trip reduction programs. Therefore, it is the policy of the state that the department of transportation and other state agencies ... shall aggressively develop substantive programs to reduce commute trips by state employees. Implementation of these programs will reduce energy consumption, congestion in urban areas, and air and water pollution associated with automobile travel.

SUMMARY OF FACTS

1. Background

The Appeals Review and Hearings Division of the Washington State Department of Revenue ("Division" or "Agency") provides administrative reviews of petitions filed by taxpayers who dispute the actions taken by the Agency. The petitions are reviewed by a Tax Review Officer ("TRO") and, if requested by the taxpayer, hearings are held on the taxpayer's appeal in the Agency offices in Olympia/Tumwater ("Thurston") and Seattle, Washington. The Division employs 17 TROs, twelve assigned to the Thurston office and five to the Seattle office. The TROs are represented by the Washington Public Employees Association ("Union"), and their rights and responsibilities are governed by a Collective Bargaining Agreement between the State of Washington and the Union ("Agreement"). (Jt. Exh. 1)

The Grievant in this case is Gabriella Herkert (Ms. Herkert). In 2015, Ms. Herkert accepted a position as a TRO with the Agency's Thurston office. Although Ms. Herkert lived in Seattle, Washington, she was informed before accepting the position that she

would be based in the Thurston office not the Seattle office, and would therefore need to commute, which she agreed to do. As a TRO, Ms. Herkert's job duties required her to review and process petitions for review that are filed by taxpayers disputing actions taken by the Department of Revenue. These administrative reviews can be culminated without a hearing, through a telephonic hearing, or through an in-person hearing, depending on the taxpayer's preference. Since the TROs in the Thurston office handle overflow cases from the Seattle office, Ms. Herkert would often elect to be assigned cases where in-person hearings were requested in Seattle. This would allow her to work out of the Seattle office to conduct these hearings and not have to commute to the Thurston office.

In November 2016, Ms. Herkert applied to modify her work schedule in order to spend more time in the Seattle office where she lives and where most of her work was assigned. (Emp. Exh. 10) Ms. Herkert's request was denied by Mary Barrett, the Division's Assistant Director. Following Ms. Barrett's denial, the Union filed a grievance contending that in denying Ms. Herkert's request, the Agency violated Article 24.1. and Article 36.2 of the Agreement. (Emp. Exh. 1)

2. The Agency's Telework Policy

Article 24.1 of the parties' Agreement states the Agency shall

...make a good faith effort, subject to the Agency's operating business and customer service needs, to meet the commute trip reduction goals identified in RCW 70.94, the Washington Clean Air Act and, where applicable, Executive Order 01-03.4.

As reflected in Article 24.1, the Agency is committed to reducing commute trips for its employees, consistent with RCW 70.94 and the Governor's Executive Order 01-03.

Executive Order 16.07 states that, consistent with *Results Washington Goal 3; Sustainable Energy and a Clean Environment*, state agencies shall "...take a leadership role in aggressively developing substantive programs to reduce commute trips by state employees." (Jt. Exh. 7) The Department of Revenue, consistent with the above-stated goal, has adopted a "Teleworking and Working Flexible Hours" policy which, in relevant part, states:

Teleworking and working flexible hours are:

- Work alternatives, approved by management, that are intended to benefit the agency, employees and the public.
- Tools that provide benefits related to productivity, job satisfaction and retention of a highly motivated workforce.
- Teleworking is intended to reduce the miles or number of commute trips taken by employees, reduce pollutants, save energy and enhance job performance and satisfaction without impairing productivity or service to the public. (Jt. Exh. 4)

The Agency has also adopted its own "Flex Place" policy whereby employees, with management approval, are allowed to perform the duties and responsibilities of their positions at alternative work stations; however, with the following limitations:

NUMBER OF HOURS/DAYS FLEX PLACE ALLOWED

Flex place will be limited to one work day per week outside your official work station for staff who are working: a four-ten schedule, or two days per week for staff working a five day per week schedule. Other work schedule configurations require you to work in your official workstation at least 24 hours per week between 8 a.m. and 5 p.m. (Jt. Exh. 5)

3. Ms. Herkert's Request for Alternative Work Schedule

During her employment as a TRO assigned to the Thurston office, Ms. Herkert made three requests to alter her work schedule under the Agency's Flex Place policy.

In May 2016, Ms. Herkert applied for, and was granted, an alternative work schedule that allowed her to work one day a week from her Seattle home and four days a week from the Thurston office. (Emp. Exh. 12) In October 2016, Ms. Herkert applied, and again was granted, an alternative work schedule that allowed her to work two days a week from her Seattle home and three days a week from the Thurston office. (Emp. Exh. 9) Finally, in November 2016, Ms. Herkert again applied for a modification of her work schedule under the Flex Place policy which would allow her to spend more time in Seattle, where she contended that most of her caseload was being assigned due to the high volume of in-person hearings requested in Seattle. In her application, Ms. Herkert requested a compressed four-day, 10-hours-a-day workweek with three days a week spent working in the Seattle office and one day a week working from her home. (Emp. Exh.10)

4. The Division's Denial of Ms. Herkert's Request

Ms. Barrett denied Ms. Herkert's request because it violated the Division's Flex Place Policy in that on a 4-10 schedule she was allowed only one workday per week to work outside her official workstation, which was the Thurston office. Ms. Barrett believed that Ms. Herkert was essentially asking the Agency to change her assigned duty station from the Thurston office to the Seattle office. Following Ms. Barrett's

denial, Ms. Herkert continued to work a five-day, eight-hours-a-day schedule, two days a week in Seattle and three days a week in the Thurston office.

On December 9, 2016, the Union filed a grievance contending the Division violated Articles 24.1 and 36.2 of the parties' Agreement when it denied Ms. Herkert's latest teleworking request. The parties being able to resolve the grievance submitted the issue to arbitration.

OPINION

The issue in this contract interpretation case is whether the Agency violated the Agreement when it denied Ms. Herkert's November 14, 2016 telework request. The Union contends the Agency failed to make a good faith effort to comply with commute trip reduction goals, as required in Article 24.1, when it denied Ms. Herkert's request. The Union argues that the vast majority of Ms. Herkert's cases involve in-person hearings in Seattle or is work that can be and normally is performed via email, telephone, and the Agency's electronic case management system. With her proposed telework schedule, Ms. Herkert would spend more time with her Seattle-based TRO colleagues than she currently spends with her Thurston-based TRO colleagues under the previously approved telework plan. The Union offered evidence that Ms. Herkert's telework request would result in a significant reduction in her commute, as well as \$11,000 in annual savings to the Agency for reduced travel expenses and lost productivity associated with on-duty travel. In the Union's view, the Agency offered no legitimate business reasons for denying Ms. Herkert's reasonable telework request and therefore violated both Articles 24.1 and 36.2 in denying that request.

The Agency contends that denying Ms. Herkert's telework request was well within the scope of its management rights as described in Article 36 of the Agreement. The Agency has the express right to determine employee schedules and assign work stations. With respect to Article 24.1, the Agency made a good faith effort to achieve commute trip reduction goals by implementing a Flex Place Policy, which significantly reduces commute trips by allowing employees to, among other things, work from home up to two days per week. This policy meets or exceeds the commute trip reduction goals identified in RCW 70.94 and Executive Order 01-03, and the Union offers no evidence indicating otherwise. The Agency further points out that Ms. Herkert's telework request does not comply with the Flex Place Policy and is an attempt to transfer her work station to the Seattle office. Finally, the Agency contends that it has legitimate business reasons for denying Ms. Herkert's telework requests. Accordingly, the Agency contends it did not violate the Agreement when it denied Ms. Herkert's telework request.

Based on the evidence and the arguments of the parties as set forth in their post hearing briefs, the Arbitrator has reached the following findings and conclusions.

I. The Union's Burden of Proof

This being a contract interpretation case, the burden of proving the contractual violation rests with the party asserting the violation, which in this case is the Union. The standard of proof in a contract interpretation case is proof by a preponderance of the evidence. Therefore, in this case, the Union must prove by a preponderance of the evidence that the Agency violated the Article 24.1 or Article 36.2 of the Agreement when it denied Ms. Herkert's November 2016 telework request.

II. The Contract Language

The dispute in this case centers around the language in Article 24.1 of the Agreement which requires the Agency to make "a good faith effort, subject to the agency's business and customer service needs, to meet the trip reduction goals identified in RVW 70.94 – Washington Clean Air Act and, where applicable, Executive Order 01-03." (Jt. Exh. 1) With respect to trip reduction goals, the Washington Clean Air Act requires "the Division of transportation and other state agencies ... shall aggressively develop programs to reduce commute trips by state employees." (RCW 70.94.521) Executive Order 01-03, which has been replaced by Executive Order 16-07, directs state agencies to build a modern work environment and reduce commute trips by implementing policies that encourage things such as teleworking and flexible work hours. The Executive Order instructs agencies to encourage a culture of "it's what you do, not where you do it." (Emp. Exh. 7) In terms of measuring the implementation of such a modern workplace, the Executive Order states that an employee is considered to participate in teleworking if they "regularly telework at least 1 to 2 days/month." (*Id.*)

In addition to Article 24.1, the Union's grievance also referenced Article 36.2 as one of the provisions the Agency allegedly violated. Article 36 is the Management Rights provision and Article 36.1 lists, in subsections A-P, the specific rights retained by management. Those rights include the right to: "direct ... employees" (subsection C); "determine ... the location of ... work sites" (subsection G); "establish or modify the workweek, daily work shift, hours of work and days off" (subsection H); "establish,

allocate, reallocate or abolish positions” (subsection J); and “transfer ... employees” (subsection K). (Jt. Exh. 1) Under Article 36.2, management agrees to exercise its rights in a manner that is “consistent with the provisions of this Agreement.”

The crux of this case is whether the Agency complied with Article 24.1. If it did, the Union makes no real contention that the Agency would have independently violated Article 36.2. If the Agency is found to have violated Article 24.1 of the Agreement, however, it will have necessarily violated Section 36.2. Accordingly, for the purposes of determining whether the Union has satisfied its burden of proof to establish a contractual violation in this case, the Arbitrator will focus on whether the evidence established a violation of Article 24.1.

III. The Agency Did Not Violate Article 24.1 of the Agreement

The Union’s evidence falls short of establishing that the Agency violated Article 24.1. The Arbitrator has reached this conclusion based on a consideration of the following factors: the nature of Ms. Herkert’s telework request; whether the agency made a good faith effort to comply with commute trip reduction goals; and whether the Agency identified legitimate business needs for denying Ms. Herkert’s telework request.

A. The Nature of Ms. Herkert’s November 2016 Telework Request

In accordance with the Agency’s Flex Place Policy, Ms. Herkert had previously applied for and received approval to work from her Seattle home two days per week. This eliminated two of her 100 mile-plus round trip commutes per week. Ms. Herkert also testified that she handled a significant number of overflow Seattle cases. As a result, a large portion of Ms. Herkert’s workload was on Seattle cases. Ms. Herkert

testified that because she can perform virtually all of her job functions from her home or the Seattle office, the days she is actually required to be in the Thurston office are very few. At least in Ms. Herkert's view, her physical presence is only required for in-person hearings, staff meetings or mandatory training sessions. Ms. Herkert inquired about the possibility of transferring to the Seattle office during her fall 2016 performance review and was told it would not happen, so she did not file any transfer requests.

On November 2016, Ms. Herkert submitted a telework request that is the subject of this proceeding. (Emp. Exh. 12) In that request, Ms. Herkert proposed a schedule whereby she would move to a "four tens" schedule, working three days in the Seattle office and one day from home, except when there was business need for her to be in Tumwater, in which case she would be there. Ms. Herkert testified as follows regarding her goal in proposing this schedule:

I was looking to stop commuting to Tumwater except when there was an actual business need to commute to Tumwater. So staff meetings, in-person in-Tumwater hearings, mandatory training. If it was scheduled in Tumwater, I would still commute. But other than that, not commute to Tumwater.

(Tr. 32)

Ms. Barrett denied Ms. Herkert's telework request because it was beyond what was allowed in the Flex Place Policy which was a maximum of two days of telework per week. Ms. Herkert's request clearly exceeds what is allowed under the Flex Place Policy and the Union makes no contention otherwise. The Union contends the Agency should nevertheless have granted Ms. Herkert's request due to her high Seattle-based caseload and Article 24.1 of the Agreement which encourages the parties to reduce commute trips.

In support of her November 2016 telework request, Ms. Herkert provided evidence that the majority of her workload consists of Seattle cases. Union Exhibit 1, which is a list of appeals cleared by each TRO, purports to show that Ms. Herkert handles more Seattle cases than even the TROs whose official duty station is in the Seattle office. Although the Agency questions whether the data in Union Exhibit 1 provides the complete picture, even if it does, the fact that the bulk of Ms. Herkert's workload is from Seattle cases is not the result of normal work flow in the Thurston office. Rather, Ms. Herkert has asked to be assigned the Seattle cases, which has effectively stacked her caseload with Seattle cases. Although this is not a problem, it does reflect that Ms. Herkert's high volume of Seattle cases is a result of her preference, not the natural workflow of a Thurston-based TRO. Ms. Barrett testified that, normally, Seattle overflow cases are randomly assigned to Thurston TROs so they are more evenly distributed. Considering that Ms. Herkert's high volume of Seattle cases is due, at least in part, to her request for Seattle cases over Thurston cases, her Seattle caseload is less convincing as justification for her November 2016 telework request.

Moreover, as the Agency points out, Ms. Herkert's telework request amounts to a request to transfer her duty station from the Thurston office to the Seattle office. Under her proposed schedule, Ms. Herkert would have no regular work days in the Thurston office and would work out of the Seattle office three days per week. Although Ms. Herkert agreed that if her request was granted she would commute to the Thurston office when the business needs required her to be there in person, she testified that

these days would be few. She testified that between October 2016 and November 2017, there were only 12 days where she had a business need to be in the Thurston office. (Tr. 44)

In the Arbitrator's opinion, although Article 24.1 requires the parties to pursue commute trip reduction goals, it does not give employees the right to completely control their work location and schedule if they can show that it will reduce or eliminate commute trips or provide other similar efficiencies. The language of Article 24.1 expressly states that efforts to reduce commute trips must be balanced with the Agency's "operating, business and customer service needs." (Jt. Exh. 1) Under Article 36 of the Agreement, the ability to determine those business needs rests exclusively with the Agency. In this case, Ms. Herkert is attempting to substitute her judgment in place of Ms. Barrett's and the Agency's judgment regarding its business needs.

The Arbitrator is also mindful of the fact that Ms. Herkert lives in Seattle. It is no secret that she would prefer to work in Seattle and, understandably, avoid making a 100 mile-plus round-trip commute to the Thurston office. Since accepting the position in 2015, knowing that she would be required to commute, the record reflects that Ms. Herkert has steadily sought to maximize her Seattle caseload and her ability to telework under the Flex Place Policy. She requested and received approval for two teleworking schedules, the latest of which allows her to work from her Seattle home two days per week. She also began requesting Seattle overflow cases over the Thurston cases. In the Arbitrator's opinion, her November 2016 telework request is

simply a step too far. The request far exceeds allowed telework days under the Flex Place Policy and, by virtually removing herself from having a physical presence in the Thurston office, it supplants the Agency's right to control and direct its workforce.

B. The Agency made a Good Faith Effort to Comply with Commute Trip Reduction Goals

Article 24.1 obligates the Agency to "make a good faith effort" to meet commute trip reduction goals set forth in Washington state law. Although RCW 70.94 and Executive Order 16-07 encourage a variety of strategies to modernize the workforce and reduce emissions by minimizing commute trips, they do not contain much in the way of specific, measurable goals. The only reference to measurable goals applicable to teleworking is found under item 4 of Executive Order 16-07, where employers are encouraged to increase the percentage of employees who participate in teleworking. (Emp. Exh. 7) Employees are deemed to be participating in teleworking if they "regularly telework at least 1 to 2 days/month". *Id.*

The record reflects that the Agency implemented policies to meet the commute trip reduction goals identified in RCW 70.94 and Executive Order 16-07. At least one such policy was the Agency's Flex Place Policy. According to the policy, "Flexplace - [m]eans a telecommuting work arrangement whereby employees with manager approval are allowed to perform the duties and responsibilities of their positions at an alternative work station." (Emp. Exh. 5) The policy further provides that an alternative work location can be an employee's home. Employees working a four-ten schedule are allowed to utilize one flex place day per week, while employees working a five-eight schedule are allowed to utilize two flex place days per week, subject to a supervisor's

approval. *Id.* Based on the reference in Executive Order 16-07 to encouraging employees to telework at least 1-2 days per month, Ms. Barrett felt that the Agency's policy significantly exceeds this goal. (Tr. 107, Emp. Exh. 2) The Arbitrator agrees.

In the Arbitrator's opinion, the Flex Place Policy is a meaningful and good faith step toward reducing commute trips for the Agency's employees. Based on both Ms. Barrett's and Ms. Herkert's testimony, Ms. Herkert and at least a few of the other 16 TROs utilize the teleworking options available under the Flex Place Policy. Although the evidence does not reflect exactly how many employees telework, or how often, the policy makes this option available up to 2 days per week, which is roughly four times greater than the teleworking frequency identified in Executive Order 16-07.

The Arbitrator further concludes that the Agency's denial of Ms. Herkert's November 2016 telework request was not in bad faith nor did this denial otherwise violate the Agency's obligations under Article 24.1. Rather than consider individual employee requests for teleworking arrangements or making such decisions on a case-by-case basis, it was reasonable for the Agency to implement a policy governing teleworking and communicating those options to all employees. Having adopted a policy that is reasonable and meets or exceeds the goals discussed in RCW 70.94 and Executive Order 16-07, the Agency cannot be said to have acted in bad faith by denying a teleworking request that exceeds what is allowed under the policy.

C. The Agency Identified Legitimate Business Needs

Article 24.1 specifically provides that the efforts to comply with commute trip reduction goals are "subject to the agency's operating, business and customer service

needs.” (Jt. Exh. 1) This conditional language reflects the need to balance the pursuit of commute trip reduction goals with the employer’s business needs. In the Arbitrator’s opinion, the Agency’s business needs were best described by Ms. Barrett in her step 2 grievance response:

Telecommuting poses logistical challenges of space planning and management challenges for adequate training and supervision. Our Seattle division has limited office space. I want staff spending time in either of our division spaces to be with the division. Tumwater has additional space within the division’s footprint when staff visit. Seattle often does not. Using available space elsewhere does not foster team, networking and makes direct contact with managers and peers more difficult. Ms. Herkert noted her role was one of individual contributor. This is only part of her role; the other part is contributor to the team. Physical proximity helps this occur. While our policy allows working from home, it is limited so that team and its advantages are not eroded. There may be a time in the office of the future where no ARHD staff person is assigned a DOR space. We are not there yet and until we are, I will continue an incremental approach to serve the needs of all staff, customers and the department.

(Emp. Exh. 2)

At the hearing, Ms. Barrett further explained:

“While all of our desires to figure out a way to be completely mobile and totally connected and lose nothing of the ability to communicate whether we’re physically available or virtually available, the reality is when you’re needing to have important discussions, it is better to have them face to face so that issues can get resolved in the moment.” (Tr. 91)

To further illustrate this point, Ms. Barrett noted that this is exactly why the Agency offers taxpayers the ability to request an in-person hearing on their petitions for tax review, “because there are times when it is simply better to have everybody in the room to talk about a particular exhibit or have a discussion about an interpretation or just observe body language.” *Id.*

The Union contends Ms. Barrett's comments about the occasional need for face-to-face communication and other business needs are overstated. Ms. Herkert testified that she rarely meets with supervisors or others in-person and that the vast majority of those interactions take place via phone or electronic communication. In Ms. Herkert's view, she can fulfill her duties with minimal in-person interaction and has done so throughout her employment with the Agency with good results. With respect to office space, Ms. Herkert testified regarding her use of the extra conference rooms in the Seattle office and, when those are unavailable, she has arranged to use office space in the Audit Division, which is just one floor above the Agency's Seattle offices.

The right to determine the Agency's business needs, including supervising employees, determining office locations and work sites, establishing the workweek and selecting employees for transfer, are all rights that are specifically reserved to the Agency under Article 36.1. (Jt. Exh. 1) Unless the Agency abuses its discretion regarding the exercise of its enumerated management rights, the Agency's determination on such matters will be upheld.

Here, Ms. Herkert's opinions regarding what is necessary to perform her job duties conflict with Ms. Barrett's opinions. In resolving that conflict, the Arbitrator must give deference to Ms. Barrett, in the absence of some abuse of discretion. Although the Union did provide evidence regarding the efficiencies that could be gained by allowing Ms. Herkert to work from the Seattle office instead of the Thurston office, there is no question that the proposed schedule goes well beyond what the Flex Place Policy allows. While Ms. Herkert may make a convincing case based on her individual

circumstances, she has the luxury of considering her needs and perhaps placing less emphasis on the needs of the Agency, or the Division as a whole. In the Arbitrator's opinion, Ms. Barrett articulated the legitimate need to balance the use of technology while not losing the ability to work as a team and that maintaining face-to-face interaction was critical in that regard. Ms. Barrett also articulated other legitimate business needs, or challenges that Ms. Herkert's proposed telework schedule would pose, such as office space availability and maintaining effective supervision. While Ms. Herkert may disagree regarding the importance or necessity of those business needs, or she may make arrangements to alleviate these challenges in her case, neither she nor the Arbitrator is in a position to substitute their judgment for management in the absence of an abuse of discretion. The Arbitrator found no such abuse of discretion in this case.

CONCLUSION

The Arbitrator has concluded the Agency did not violate the Agreement when it denied Ms. Herkert's November 2016 telework request. The Arbitrator reached this conclusion based primarily on the finding that the Agency's Flex Place Policy constituted a good faith effort to achieve commute trip reduction goals set forth in RCW 70.94 and Executive Order 16-07. The Arbitrator further concluded that Ms. Herkert's telework request exceeded the allowable telework days under the Flex Place Policy and was therefore properly denied. Moreover, the Arbitrator found that the Agency had the sole

right to determine its business needs pursuant to Section 36.1 of the Agreement and that the Union did not provide sufficient evidence that management abused its discretion in determining its business needs in this case.

Accordingly, the Union's grievance shall be denied. In accordance with Article 30, Section 2.E, the parties shall share equally in the arbitration costs.

IN THE MATTER OF THE ARBITRATION

BETWEEN

WASHINGTON PUBLIC EMPLOYEES
ASSOCIATION,

UNION,

and

STATE OF WASHINGTON, DEPARTMENT
OF REVENUE,

EMPLOYER.

ORDER

Re: Grievance of Gabriella Herkert –
Denial of Flex Time Request

AAA Case #01-17-0003-3138

The Arbitrator, in arriving at this decision, has reviewed the evidence, exhibits, hearing transcript, and has considered the arguments of the parties as set forth in their post-hearing briefs. In view of all the evidence and for the reasons set forth in this Opinion, it is the decision of the Arbitrator that the Employer did not violate the parties' Collective Bargaining Agreement when it denied Gabriella Herkert's telework request. Accordingly, the Union's grievance is DENIED. Pursuant to Article 30, Section 2.E of the Agreement, the costs of the Arbitration shall be shared equally by the parties.

Wm. B. Fisher

Eric B. Lindauer,
Arbitrator

March 20, 2018

ERIC B. LINDAUER
Attorney at Law

MEDIATION &
ARBITRATION

1000 SW Broadway
Suite 2400
Portland, OR 97205
503.223.2300 office
503.931.2161 cell
503.241.2249 fax

eric@lindauermediation.com

March 20, 2018

Kathleen Barnard
Schwerin Campbell Barnard Iglitzin et al
18 W. Mercer St., Ste. 400
Seattle, WA 8119

Janetta Elizabeth Sheehan
Assistant Attorney General
PO Box 40145
Tumwater, WA 98504-0145

Re: WPEA and State of Washington Department of Revenue
AAA Arbitration No. 01-17-0003-3138
Our File No. 2137

Dear Counsel:

Enclosed is the Opinion and Order in this arbitration. I am also enclosing my statement which, in accordance with Article 30, Section 2.E of the parties' Agreement, is to be shared equally by the parties.

I appreciated the excellent representation that you both provided at the hearing and in your post-hearing briefs. It was a pleasure to serve as your Arbitrator.

Best regards.

Sincerely,



Eric B. Lindauer
Arbitrator

EBL:sas
Enclosures

cc: Daphne Crayne, AAA