

**AMERICAN ARBITRATION ASSOCIATION
BEFORE MARTIN HENNER
ARBITRATOR**

IN THE MATTER OF AN ARBITRATION BETWEEN)	AAA Case No.
)	75 390 00394 08
WASHINGTON FEDERATION OF STATE EMPLOYEES)	
(Melodie Hess Grievance))	
)	
and)	OPINION
)	and
STATE OF WASHINGTON DEPARTMENT OF)	AWARD
LABOR & INDUSTRIES)	
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REPRESENTING THE UNION:	JULIE L. KAMERRER, ATTORNEY YOUNGLOVE & COKER, P.L.L.C.
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REPRESENTING THE EMPLOYER:	ROBERT BOUFFARD LABOR RELATIONS MANAGER WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES
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HEARING HELD ON:	JANUARY 22, 2009
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AT:	TUMWATER, WASHINGTON
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DATE OF AWARD:	MARCH 24, 2009
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INTRODUCTION

This arbitration arises out of a grievance filed by the Washington Federation of State Employees (Union) against the State of Washington Department of Labor & Industries on behalf of Melodie Hess (Grievant). In its grievance, the Union alleged that the Employer violated the parties' Collective Bargaining Agreement (Agreement) when it rescinded a promotion which had been offered to the Grievant and which she had accepted. The position was as an Administrative Assistant 4 (AA4) in the Division of Occupational Safety and Health.

In response, the Employer claimed that the manager who had offered the promotional position to the Grievant was not able to make such an offer. He was only able to tell the Grievant that he was recommending her appointment, and to verify that she still desired the position. The final step of the promotion process required the approval of the Department's Human Resources Office.

Since that approval was ultimately not given, the manager's provisional offer of employment was nullified. As no promotion had been actually offered or accepted, no violation of the Agreement occurred.

When the parties were unable to resolve this grievance through the regular grievance steps, the undersigned was selected from a panel of arbitrators provided by the American Arbitration Association.

The arbitration was heard on January 22, 2009, at the headquarters of the Washington State Department of Labor & Industries in Tumwater, Washington.

The Union was represented by Julie L. Kammerer of the law firm of Younglove & Coker of Olympia, Washington. The Employer was represented by Robert Bouffard, Labor Relations Manager, Washington State Department of Labor & Industries, Office of

Human Resources. Both parties were afforded a full opportunity to offer written evidence, examine and cross examine witnesses, and present arguments in support of their positions.

At the conclusion of the hearing, it was agreed that the parties would submit written closing arguments to the Arbitrator, to be postmarked no later than March 2, 2009, and to be sent directly to the Arbitrator. The arbitration briefs were timely mailed, with the final brief being received by the Arbitrator on March 5, 2009, on which date the record was closed and the matter submitted for decision.

Both advocates made excellent presentations in their case presentation, and in their closing briefs, in support of their parties' positions.

ISSUE

The parties were unable to stipulate to the precise wording of the issue, and left it to the Arbitrator to frame the issue statement submitted for determination. I have framed the issue for decision as follows:

Did the Employer violate the parties' Collective Bargaining Agreement when, after the Grievant had been offered a promotional appointment and had accepted that offer, the promotional offer was then rescinded and awarded to another employee?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 UNION RECOGNITION

1.1 This Agreement covers the employees in the bargaining units described in Appendix A, entitled "Bargaining Units Represented by the Washington Federation of State Employees," but it does not cover any statutorily excluded positions or any positions excluded in Appendix A. The titles of the jobs listed in Appendix A are listed for descriptive purposes only. This does not mean that the jobs will continue to exist or be filled.

ARTICLE 4

HIRING AND APPOINTMENTS

4.1 Filling Positions

The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification. Only those candidates who have the position-specific skills and abilities required to perform the duties of the vacant position will be referred for further consideration by the employing agency.

- A. An agency's internal layoff list will consist of employees who have elected to place their name on the layoff list through Article 34, Layoff and Recall, of this Agreement and are confined to each individual agency.
- B. The statewide layoff list will consist of employees who have elected to place their name on the statewide layoff list in accordance with WAC 357- 46-080.
- C. A promotional candidate is defined as an employee who has completed the probationary period within a permanent appointment and has attained permanent status within the agency.
- D. A transfer candidate is defined as an employee in permanent status in the same classification as the vacancy within the agency.
- E. A voluntary demotion candidate is defined as an employee in permanent status moving to a class in a lower salary range maximum within the agency.
- F. When filling a vacant position with a permanent appointment, candidates will be certified for further consideration in the following manner:
 - 1. The most senior candidate on the agency's internal layoff list with the required skills and abilities who has indicated an appropriate geographic availability will be appointed to the position.
 - 2. If there are no names on the internal layoff list, the agency will certify up to twenty (20) candidates for further consideration. Up to seventy-five percent (75%) of those candidates will be statewide layoff, agency promotional, internal transfers, and agency voluntary demotions. All candidates certified must have the position-specific skills and abilities to perform the duties of the position to be filled. If there is a tie for the last position on the certification for either promotional or other candidates, the agency may consider up to ten (10) additional tied candidates. The agency may supplement the certification with additional tied candidates and replace other candidates who waive consideration ~ with like candidates from the original pool.
 - 3. Employees in the General Government Transition Pool Program who have the skills and abilities to perform the duties of the vacant position may be considered along with all other candidates who have the skills and abilities to perform the duties of the position.
 - 4. If the certified candidate pool does not contain at least three (3) affirmative action candidates, the agency may add up to three (3) affirmative action candidates to the names certified for the position.

5. When recruiting for multiple positions, the agency may add an additional five (5) agency candidates and five (5) other candidates to the certified list for each additional position.

OTHER PERTINENT LAW AND REGULATIONS

WASHINGTON ADMINISTRATIVE CODE

WAC 357-19-395 What return rights must an employer provide to a permanent employee who accepts a non-permanent appointment?

At a minimum, the employer must provide the permanent employee who is leaving his/her position with the employer to accept a non-permanent appointment access to the employer's internal layoff list at the conclusion of the non-permanent appointment. If the employer agrees to return the employee to a position, the employee must notify the employer of his/her intent to return to a permanent position at least fourteen calendar days in advance of return, unless the employee and employer agree otherwise. Failure of the employee to provide proper written notice to the employer may result in forfeiture of any return rights. Upon return to a permanent position, the employee's salary must be determined by the employer's salary determination policy.

POSITIONS OF THE PARTIES

THE UNION

The Union contends that the Grievant competed for a promotional opportunity as an AA4 within the Division of Occupational Safety and Health (DOSH). After she had completed all of the steps in the selection process and had been included in the list of certified applicants, the hiring authority determined that she was the most qualified applicant and should be offered the position. The manager overseeing that recruitment offered her that position and she accepted.

Thereafter, the Office of Human Resources of the agency failed to approve the appointment and instead filled the open position with another employee whose name had not been included on the certified list of candidates for the position, as required by Article 4 of the Agreement.

The Union argues that the manager who offered the Grievant the appointment had the authority to make that offer and, upon the Grievant's acceptance of the offer, the position was hers. It was then improper for the Department to rescind it and award it to another individual.

Furthermore, the employee who was ultimately placed in the position for which the Grievant was competing did not have any right to return to that position, since he was then on a temporary assignment which had not ended.

THE EMPLOYER

The Employer's position is that any offer of employment made by a manager who is conducting a recruitment is only a provisional offer which must be ratified by a final approval of the Office of Human Resources. The Human Resources Office has the ultimate responsibility for determining that the position will properly be filled by the individual who is being proposed for it.

The Office of Human Resources may decline to approve such an appointment if it determines that other individuals have a right to be placed in that position. In this case, there was another employee who had permanent status in the Department in the classification Administrative Assistant 4.

That employee was then on temporary assignment as an Information Technology Specialist, but he had rights to return to his AA4 permanent classification at the conclusion of his temporary assignment. Accordingly, when the Office of Human Resources determined that the only AA4 position which might be available in the relevant time frame was the one for which the Grievant had competed, the Office of Human Resources was obligated to hold that position in order to fulfill its obligation to provide an AA4 position to the employee who had rights to such a position.

Since this employee already held a permanent classification as an AA4, it was not necessary for him to be screened and placed on the certified list.

This was in accordance both with the provisions of the Collective Bargaining Agreement as well as the provisions of the Washington Administrative Code.

FINDINGS AND DISCUSSION

The Union bears the burden of proof in this matter, having to prove its case by the preponderance of the evidence.

Facts

The essential facts of this case are not in dispute.

The Grievant, working in the Employer's Division of Occupational Safety and Health, competed for a promotional opportunity as an AA4. The recruitment had commenced in February, 2008, and the Grievant interviewed for it in March. Because of staff changes in the DOSH, the final decision to fill the position and to offer it to the Grievant was delayed until June, 2008.

On June 2, 2008, the Division's State-Wide Compliance Manager offered the promotional appointment to the Grievant, who accepted it. At that time they discussed when she might be available to assume the duties of the new position, but they did not actually set a starting date for it.

The following day, June 3, she was notified that she would not be receiving the AA4 promotion. The Human Resources Office notified the Division that there was another employee with return rights to an AA4, and they were required to give the open position to him.

The employee who was awarded this position had permanent status with the

Employer as an AA4. He was then on a temporary assignment as an Information Technology Specialist. When he had accepted the temporary assignment, the Employer, in accordance with WAC 357-19-395, had issued a letter granting him return rights to the AA4 classification at the completion of his temporary tour of duty.

In the period of early June, 2008, this employee had not yet been notified that his temporary assignment would be ending shortly. Accordingly, he had not submitted his name for this position, and his name was not on the certified list.

But the Human Resources Office staff had knowledge that the temporary assignment was ending. Since he had return rights to a position in that classification, they determined to hold the position for him. Agency staff viewed his return rights as comparable to the rights of an agency employee on layoff, under the Article 4.1, Paragraph A, and thus he was exempt from having to have his name certified.

His temporary assignment terminated at the end of June, and he was placed into the AA4 post on July 1, 2008.

Discussion

The Employer's rules are clear. A manager may complete the recruitment process and select the candidate to be awarded the position. But the actual appointment must be reviewed one last time by Human Resources which must sign off and give final approval. Until this final approval is given, the appointment has not been made.

The logic of this requirement is well illustrated by this case. At the time the recruitment commenced in February, 2008, there was no one who could exercise any rights of return to employment in that classification. But by June, 5 months later, there was such an individual who had such rights, which the Employer was bound to honor.

Such a procedure is reasonable. By the time a recruitment has run its course, especially if extended time has passed, other employees may be suffering layoff or completing temporary assignment. Such employees may have return rights, as occurred in this case. A final check is appropriate.

Alternately, the Employer could be faced with individuals returning from military service who have reemployment rights under Federal Law, who had compensable injuries from which they have now recovered and have reemployment rights under state law, or who now require some mandated accommodation that a transfer to the specific position involved might afford. Other individuals may have been granted special rights pursuant to grievance settlements and arbitration awards. Finally, because of staff changes which might have occurred in the interim, nepotism rules might interfere with an appointment. It would be the responsibility of the Human Resources Office to keep itself apprised of such situations.

The Employer's manager who made the job offer to the Grievant testified that he thought he had the authority to offer her the position, but then qualified his testimony by saying that 'routinely' such appointments are approved. He continued then in his testimony to admit he knew he didn't have the final authority to make the hire, and that his hire could be overturned by the appointing authority who is the Departmental Director, either directly or through her agent, the Human Resources Office.

It is unfortunate that he failed to be explicit when he spoke with the Grievant, informing her that she had been selected for the position. But he did not have final, ultimate authority to offer the Grievant the position.

Even had he thought he did, his act would still have been, in law, "ultra vires," and of no effect.

Accordingly, I must hold that the Grievant did not actually receive an appointment to the AA4 position she was seeking.

The Union also argues that the employee who was given the appointment was improperly selected. This is based on the grounds that he failed to apply for it and to have his name placed on the certified list. Furthermore, it is argued that until his temporary position terminated he was not in a layoff position, and thus he had no 'right of return' to a position with his AA4 permanent classification.

I must reject this narrow reading of the rules pertaining to a right of return.

The facts show that he did not apply for the AA4 position since he did not know his temporary appointment was ending. However, the Human Resources Office personnel were aware of this information, and they reasonably felt an obligation to him to be on the alert for an AA4 open slot that he could be placed into. This seems to be a reasonable and humane personnel practice. The Union has not met its burden of proof to show that it was not. And since he already was a permanent AA4, with return rights, it is not clear that he even had to be on the certified list.

The Union's argument that, until his temporary appointment terminated, he was not actually eligible to exercise his right of return is similarly rejected. To adopt the Union's position would have meant that the Grievant might have been appointed to the open AA4 position. But then, in just a few days, when the other employee's temporary position ended, he would have been entitled to bump back into an AA4 slot, leading to a domino effect that would eventually have dislodged the Grievant back to her old job. In the process, any number of individuals might have been shifted into different positions.

In any event, the temporary position of the employee who was awarded the AA4 position terminated on June 30, 2008. At that time he clearly had his 'right of return' as

provided for in the Washington Administrative Code and spelled out in his temporary appointment letter. He was placed in the AA4 position on July 1, 2008, after these 'return rights' became effective.

As the Union admits, the Human Resources Office had the option of freezing the recruitment and holding it open until July 1. Essentially it did so. Then, on July 1, when the other employee's temporary job had terminated and his 'right of return' had accrued, he was awarded AA4 position.

As a matter of management practice, it makes no sense to require that an employee's temporary assignment terminate before the Employer can seek a vacancy into which he can be placed. Such a requirement would only lead to delay and waste. I reject the Union's argument.

AWARD

The Grievance is DENIED.

Respectfully submitted on March 24, 2009 at Eugene, Oregon

Martin E. Henner, Arbitrator