AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	**OPINION AND ORDER**
	)	
UNION,	)	Re: Grievance of Michael Low – Contract Interpretation – Article 34
	)	
and	)	
	)	
STATE OF WASHINGTON, DEPARTMENT OF LABOR & INDUSTRIES,	)	WFSE No. 21-09-LNI
	)	
EMPLOYER.	)	AAA Case No. 75-390-00369-09

BEFORE

ERIC B. LINDAUER

ARBITRATOR

May 25, 2010

REPRESENTATION

FOR THE UNION:

SHERRI-ANN BURKE
Labor Advocate
Washington Federation of State Employees
1212 Jefferson St. SE, Ste. 300
Olympia, WA 98501-2332

FOR THE EMPLOYER:

VALERIE B. PETRIE
Assistant Attorney General
Office of the Attorney General
PO Box 2317
Tacoma, WA 98401-2317

NATURE OF PROCEEDING

The Washington Federation of State Employees and the State of Washington, Department of Labor & Industries, are parties to a Collective Bargaining Agreement which provides that any disputes arising over 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 May 19, 2009, the Union filed a grievance contending the Employer violated the provisions of Article 34 of the Agreement by returning an exempt employee to his previous position in the Information Technology Department of the Department of Labor & Industries, resulting in the displacement of an employee from his permanent ITS 5 position and placing him in an ITS 3 position at a lower rate of pay. The Employer denied the grievance, and the issue was submitted to arbitration.

The arbitration hearing was held on February 26, 2010, at the offices of the Attorney General, in Olympia, Washington. At the commencement of the hearing, the parties agreed the matter was properly before the Arbitrator and the Arbitrator would retain jurisdiction in this matter 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.

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 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 issues to be decided by the Arbitrator in this matter to be as follows:

> Did the State of Washington, Department of Labor & Industries violate Article 34 of the Collective Bargaining Agreement by returning an exempt employee, Brian Criss, to his previous position and thereby bumping the Grievant, Michael Low, from his permanent ITS 5 position and placing him in an ITS 3 position. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

In the opinion of the Arbitrator, the following provisions of the Collective Bargaining Agreement, Statutes and Administrative Policies are relevant to determine the issue in dispute.

COLLECTIVE BARGAINING AGREEMENT

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.

1.2 The Employer recognizes the Union as the exclusive bargaining representative for all employees in bargaining units described in Appendix A and Section 1.3.

1.3 If the Public Employment Relations Commission (PERC) certifies the Union as the exclusive representative during the term of this Agreement for a bargaining unit in general government, the terms of this Agreement will apply.

ARTICLE 29 – GRIEVANCE PROCEDURE

29.3 Filing and Processing (Except Departments of Corrections and Social and Health Services Employees)

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Step 5 – Arbitration:

D. Authority of the Arbitrator

1. The arbitrator will:

   a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;

   b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;

   c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;

   d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

2. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, through written briefs, immediately prior to hearing the case on its merits, or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration, it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties.

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 33 – SENIORITY

33.1 Definition

A. Seniority for full-time employees will be defined as the employee's length of unbroken state service...

ARTICLE 34 – LAYOFF AND RECALL

34.1 Definition

Layoff is an Employer-initiated action, taken in accordance with Section 34.3 below, that results in:

A. Separation from service with the Employer,

B. Employment in a class with a lower salary range,

C. Reduction in the work year, or

D. Reduction in the number of work hours.

34.9 Formal Options

A. Employees will be laid off in accordance with seniority, as defined in Article 33, Seniority, among the group of employees with the required skills and abilities, as defined in Section 34.8, above. 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 job classification.

3. A funded vacant or filled position held by the least senior employee for which the employee has the skills and abilities, at the same or lower salary range as his or her current permanent position, within a job classification in which the employee has held permanent status.

WASHINGTON ADMINISTRATIVE CODE

WAC 357-19-195

If a permanent employee in a classified position accepts an appointment to an exempt position, what is the employee's right to return to a position in the classified service?

A permanent employee who accepts an appointment to an exempt position has the right to return to classified service at any time as long as the employee was not terminated from an exempt position for gross misconduct or malfeasance.

The employee's right is to a position in the highest class in which the employee previously held permanent status or to a position of similar nature and salary. The return right is to the most recent employer with which permanent status in the highest class was held. A position in the highest class does not necessarily mean return to the most recent employer.

If upon an employee being returned to a classified position there are fewer positions than there are employees entitled to such positions, the employer's layoff procedure applies.

REVISED CODE OF WASHINGTON

RCW 41.06.070

***

(3) ***

Any person holding a classified position subject to the provisions of this chapter shall, when and if such position is subsequently exempted from the application of this chapter, be afforded the following rights: if such

person previously held permanent status in another classified position, such person shall have a right of reversion to the highest class of position previously held, or to a position of similar nature and salary.

Any classified employee having civil service in a classified position who accepts an appointment in an exempt position shall have the right of reversion to the highest position previously held, or to a position of similar nature and salary.

SUMMARY OF FACTS

1. Background

The Washington Department of Labor and Industries ("LNI" or "Employer") provides a wide range of services to over three million workers covered by the state workers' compensation system. The information technology required to support LNI services is provided by classified employees who are represented by the Washington Federal of State Employees ("Union"). The rights and responsibilities of the classified employees are governed by the terms of a Collective Bargaining Agreement ("Agreement") between the Union and LNI. Article 34 of the Agreement governs the layoff and recall of employees.

On May 19, 2009, the Union filed a grievance on behalf of Michael Low ("Grievant" or "Mr. Low") an Information Technology Specialist ("ITS"). In its grievance, the Union alleges LNI violated Article 34 of the Agreement when it returned an exempt employee, Brian Criss, to his previous ITS position, which resulted in the Grievant being bumped from his ITS 5 position to an ITS 3 position. The Employer denied the grievance and, the parties being unable to resolve the issue through the grievance procedure, submitted the issue to arbitration.

2. The Grievant's Displacement from his ITS 5 Position

The Grievant has been employed by LNI as an Information Technology Specialist for four years. LNI hired the Grievant as an ITS 5, and he was assigned responsibility for the design of the LNI website. (Jt. Exh. 10). In May 2009, LNI informed the Grievant that Brian Criss, the former holder of the Grievant's ITS 5 position, was seeking to return from his exempt position to his former position.

On May 15, 2009, Mr. Criss emailed Sandi LaPalm, LNI Personnel and Payroll Manager, requesting that he be returned from his exempt status as an employee of the Department of Information Services ("DIS") and placed back in the permanent position he previously held as an ITS 5. The position Mr. Criss was seeking to return to, Position 1791, was held by Mr. Low. Ms. LaPalm assessed Mr. Criss's skills and abilities and his seniority standing in order to determine whether to return Mr. Criss to his former position. During Ms. LaPalm's review, she considered whether there were any vacant positions that would be equivalent to Mr. Criss's former position. Ms. LaPalm concluded no vacancies existed. Ms. LaPalm did not consider other ITS positions because Mr. Criss did not possess the skills and abilities required for those positions. Ms. LaPalm also considered placing Mr. Criss in other ITS 5 positions being held by employees with less seniority than Mr. Criss and determined they were not a good match, again based on the fact that Mr. Criss's skills and abilities were dissimilar to other ITS 5 positions.

After a review of all of the ITS positions, LNI determined that Position 1791 was the only position that Mr. Criss could be returned to, based on his skills and abilities. Accordingly, LNI returned Mr. Criss to ITS Position 1791, his former position as an ITS 5,

which was the position occupied by Mr. Low. Because Mr. Low had less seniority than Mr. Criss, he was subject to layoff pursuant to Article 34 of the Agreement. Since Mr. Low did not possess the necessary skills and abilities for any of the ITS 5 positions held by employees with less seniority, Mr. Low, rather than being placed on layoff, accepted an ITS 3 position. Thereafter, the Union, on behalf of Mr. Low, filed this grievance.

OPINION

The issue in this contract interpretation case is whether the Employer violated Article 34 of the parties' Collective Bargaining Agreement when it returned an exempt employee to his previous position within LNI, thereby displacing the Grievant Michael Low from his permanent ITS 5 position and re-assigning him to an ITS 3 position at a lower pay level. The decision in this case focuses on two underlying issues. First, whether the issue is governed by statutory law or by the terms of the parties' Labor Agreement; and, second, if the issue is governed by the Labor Agreement, did the Employer's decision to displace Mr. Low from his ITS 5 position upon returning an exempt employee, violate Article 34 of the Agreement.

The Employer contends the return rights of exempt employees are governed by Washington statutes and the Washington Administrative Code and not by the Labor Agreement. Therefore, the issue is not subject to the grievance procedure of the Labor Agreement and not appropriately before the Arbitrator. Further, even if the Arbitrator concludes the exempt employee's return to a classified position is governed by the terms of the Labor Agreement, the Employer submits that LNI did not violate the terms of Article 34 when it returned the exempt employee to a position held by Mr. Low.

It is the Union's contention the Employer failed to follow the procedures set forth in Article 34 when it removed Mr. Low from the ITS 5 position and placed him in the ITS 3 position. As a remedy, the Union requests LNI return Mr. Low to his previous ITS 5 position and make him whole for his loss of income.

The Arbitrator has reviewed the evidence and considered the arguments of the parties as set forth in the post-hearing briefs. Based on this record, the Arbitrator concludes the issue in dispute is governed by the terms of the parties' Labor Agreement, however, the Arbitrator has also concluded the Employer did not violate Article 34 of the Agreement when it returned an exempt employee to his previous position which resulted in the displacement of Michael Low from his permanent ITS 5 position to an ITS 3 position. The Arbitrator has reached this decision based on the following findings and conclusions.

1. Article 34 of the Labor Agreement Governs the Issue

The threshold determination in this case is whether the issue before the Arbitrator is governed by the State of Washington Statutes ("RCW") and Administrative Code ("WAC") or by the parties' Labor Agreement. The Employer argues the placement of an exempt employee in the ITS 5 position is not a matter of contract interpretation nor is it subject to the grievance procedure. It is the Employer's contention the "...CBA has no applicability to (Mr. Criss's) return to classified service." (Emp. Post-Hearing Brief, Page 6) In support of this contention, the Employer relies on RCW 41.06.070 (3) which states that classified employees who accept employment in an exempt position "...shall have the right of reversion to their highest class of position previously held, or

to a position of a similar nature and salary." (Jt. Exh. 4) Similarly, the Employer contends WAC 357-19-195, under the authority of RCW41.06, in part, states:

> A permanent employee who accepts an appointment to an exempt position has the right to return to classified service at any time ... The employee's right is to a position in the highest class in which the employee previously held a permanent status or to a position of similar nature and salary. ... (Jt. Exh. 3)

Applying these provisions to the facts of this case, the Employer contends that until Mr. Criss, as an exempt employee, was appointed to Position 1791 at LNI as an ITS 5 on July 1, 2009, he was not covered by the terms of the Labor Agreement. The crux of the Employer's contention is that when Mr. Criss expressed his intent to return to classified service on May 15, 2009, he was still an exempt employee of DIS. (Jt. Exh. 1) The Employer argues Mr. Criss remained an exempt employee until his appointment to Position 1791, a classified position, on July 1, 2009. Therefore, the Employer submits Mr. Criss's return was governed by the provisions of RCW 41.060.070 (3) and WAC 357-19-195 and not by the provisions of the Labor Agreement. The Arbitrator disagrees.

The concluding provision of WAC 357-19-195 specifically states that in situations, such as in this case, where an exempt employee is being returned to a classified position and there are fewer positions than there are employees entitled to such positions, "...the employer's layoff procedure applies." (Jt. Exh. 3) In the judgment of this Arbitrator, the WAC does not state nor require the exempt employee formally become a classified employee before the layoff provisions become operative. Further, this is a grievance filed by a classified employee contending a contractual violation. In

his grievance, Mr. Low contends the Employer violated the terms of Article 34 when it bumped him from his ITS 5 position to an ITS 3 position. The grievance procedure is the appropriate process to challenge the Employer's decision.

Furthermore, the parties stipulated the matter was properly before the Arbitrator and the agreed upon issue was "Did the LNI violate Article 34 of the CBA ...by returning an exempt employee, Brian Criss, to his previous position ...". (Tr. Page 3) Although the Employer at the outset of the hearing raised the issue of reversion process of exempt employees returning to a classified position, the Employer made no effort to bifurcate the hearing on the issue of whether the grievance was subject to the arbitration process or whether the arbitrator had jurisdiction to consider the matter in dispute. The issue, as framed and agreed upon, relates to Mr. Low's contractual rights under Article 34, not Mr. Criss's rights under the Washington statutes, administrative code, or State Civil Service Law, although the Arbitrator acknowledges the two are interrelated.

Finally, the Employer's contention, if adopted, results in an exercise in futility. The parties would be exactly where they are now if Mr. Low filed his grievance after Mr. Criss had been appointed to Position 1791 as an ITS 5 on July 1, 2009. At that point he would have been a classified employee. The issue before the Arbitrator would be no different than it is now -- did the employer, by returning Mr. Criss to his former ITS 5 position, violate Article 34 in displacing Mr. Low from his permanent ITS 5 position and either placing him on layoff or offering him a lower-paying ITS 3 position. Arbitrator Martin Henner reached the same conclusion in a similar LNI case, but in a different context, when he concluded that:

> As a management practice, it makes no sense to require that an employee's temporary service assignment terminate before the Employer can seek a vacancy into which he can be placed. (State of Washington Department of Labor and Industries, AAA Case 75-3009-00394-08) (Un. Exh. 12)

Accordingly, the Employer's contention that Article 34 of the Labor Agreement is not applicable to this dispute on the basis the terms of the Agreement did not apply until after the exempt employee was appointed to a classified position is found to be without merit.

2. The Employer Did Not Violate Article 34 When it Displaced Michael Low from his Permanent ITS 5 Position

This being a contract interpretation case, the Union has the burden of proving, by a preponderance of the evidence, that the Employer violated the provisions of Article 34 of the Agreement when it returned an exempt employee, Brian Criss, to Position 1792, which resulted in the displacement or "bumping" of the Grievant, Michael Low, to a lower-paying ITS 3 position. In support of its contention the Employer violated the Agreement, the Union advances two principles arguments. First, that Brian Criss, the exempt employee seeking to return to his former position, was not entitled to bump into Position 1791, the ITS 5 position held by Mr. Low; and second, the Employer failed to offer Mr. Low the opportunity to bump into ITS 5 positions held by less senior employees following his displacement by Brian Criss. The Arbitrator has considered the Union's contentions and makes the following findings.

A. As an Exempt Employee, Brian Criss had the Right to Return to his Former Position 1791 as an ITS 5.

On May 15, 2009, Mr. Criss sent an email to Sandi LaPalm, LNI Personnel Payroll Program Manager, indicating "... my notice of wishing to return to my previous position at L&I once my exempt position here at DIS ends on June 30." (Jt. Exh. 1) The "previous position" held by Mr. Criss was Position 1791 as an Information Technology Specialist (ITS) 5, a position held by Mr. Low. Ms. LaPalm, upon receiving this notice, researched Position 1791 to determine whether this position was similar or unique to other ITS 5 positions in order to determine whether there were vacant positions that Mr. Criss could be assigned that were consistent with his skills and abilities. Ms. LaPalm concluded no vacancies existed. Ms. LaPalm also considered other ITS 5 positions held by less senior employees; however, Mr. Criss did not possess the skills and abilities necessary to perform the duties of those positions. Mr. Criss was subsequently returned to Position 1791 effective July 1, 2009. (Jt. Exh. 2) As a result, two permanent employees, Mr. Criss and Mr. Low, held the same position. Since Mr. Criss was an exempt employee returning to his former permanent position, his return was subject to RCW 41.06.070 (3) which, in part, states:

> Any classified employee having civil service status in a classified position who accepts appointment in an exempt position shall have the right of reversion to the highest class of position previously held, or to a position of similar nature and salary. (Jt. Exh. 4)

Similarly, the Washington Administrative Code, WAC 357-19-195, in addressing the right of an exempt employee to return to a classified position, in part, states:

> The employee's right is to a position in the highest class in which the employee previously held permanent status or to a position of similar nature and salary. (Jt. Exh. 3)

The Union makes a compelling argument that the Employer was not required by statute or code to return Mr. Criss, as an exempt employee, to Position 1791, but only to "a similar position" within LNI. The Union argues that while Mr. Criss had the right as an exempt employee to return to "a" ITS 5 position or to "a similar position," he did not have the right to return to "the" 1791 position, the position he previously held as a web manager. In support of its contention, the Union cites decisions by the Washington Personnel Appeals Board and an arbitration award. (Un. Exhs. 11, 12 and 13)

Although acknowledging the language of the statute and administrative code refers to "a" position as opposed to "the" position, the Employer submits the language of the RCW and WAC must be read in context of the entire provision which states the returning exempt employee is to be returned the position previously held "...or to a position of similar nature and salary." The Department of Personnel (DOP) guidelines define "similar in nature" and "similar in salary." (Un. Exh. 19) These definitions establish the exempt employee is to be returned to a job classification and position that are similar in nature and salary to the position the employee previously held.

The Arbitrator concludes the Employer's options in returning Mr. Criss as an exempt employee to an ITS 5 position in LNI were limited. Although the language of the statute and the administrative rule is clear in indicating the exempt employee's right to return is to "a position of similar nature and salary" and not to "<u>the</u>" position

previously held, it does not necessarily follow the Employer is precluded from returning the exempt employee to "the" position previously held, if it was the highest classification, in this case ITS 5, and was of a “similar nature and salary.”

Joan Gallagher, Union Council Representative, testified convincingly regarding her extensive research on the application of these provisions to the reversion rights of exempt employees. The Arbitrator found Ms. Gallagher's testimony persuasive and thorough. However, the Arbitrator also found that each application of these provisions is unique to the employee and the position. In this case, Ms. LaPalm testified that since there were no ITS 5 vacancies at the time Mr. Criss returned to LNI, she considered other positions that were a match for his skills and abilities. In reviewing the record in this case, the Arbitrator finds Ms. LaPalm made a determined effort to find an ITS 5 position that was similar to Position 1791, to see if there were other options for Mr. Criss’s placement that were consistent with the requirements of the statute and administrative code. Ms. LaPalm testified she also considered ITS 5 positions held by less senior incumbents than Mr. Criss to determine whether he had the skills and abilities for those positions. Ms. LaPalm determined, after evaluating several positions, that Mr. Criss did not have the knowledge, experience or ability required for the positions held by less senior employees. (Jt. Exh. 12, 13 and 14) Following this analysis, Ms. La Palm recommended Mr. Criss be returned to Position 1791 on his return as an exempt employee to LNI.

> And the reason for my recommendation that that should be where he returns is because it is -- it's a unique position. There is no other position like it. It has a fairly unique set of skills and abilities that are required. It's located in a different organization physically than our other IT positions. There are no other IT positions that have those duties, so it seemed reasonable, based upon the statute, that he had the right to return to the highest classification that he held permanent status in or to a position with similar nature and scope, that this was the only position of its kind in the agency. (Tr. 126) (Emphasis added.)

Although to a certain degree self-serving, Mr. Criss also acknowledged he did not have the skills and abilities to perform the positions held by employees who had less seniority. Mr. Criss went through each of the positions considered by Ms. LaPalm and indicated, to the satisfaction of the Arbitrator, he did not, for a variety of reasons, possess the requisite skills and abilities to perform the positions held by the less senior employees. (Tr. 141-45)

Based on this record, the Arbitrator concludes the Employer did not abuse its discretion, violate the Labor Agreement, or fail to comply with the procedural requirements of the RCW, WAC or DOP Guidelines when it returned Mr. Criss to Position 1791 as an ITS 5. Instead, the Arbitrator finds the Employer made a concerted effort to look at similar positions, in nature and salary and consistent with Mr. Criss' skills and abilities, before concluding his placement in Position 1791 was the only option available under the unique set of skills required for the position. Regrettably, this resulted in the bumping of Mr. Low from the 1791 position. The remaining issue is whether the Employer violated Article 34 when it failed to offer Mr. Low the opportunity to bump into less senior ITS 5 positions following his displacement from Position 1791 by Mr. Criss.

B. The Employer Did Not violate Article 34

Article 34 governs the layoff and recall of classified employees. Article 34.3 states the Employer may invoke a layoff for a number of reasons including "Fewer positions available than the number of employees entitled to such position either by statute or other provisions." (Article 34.3. F) (Jt. Exh. 8) The DOP Guidelines state that when, as in the facts of this case, the agency does not have a funded vacant position for the returning exempt employee, the agency, is required to:

> Return the employee to a filled position (i.e. double-fill a position) and the least senior incumbent (or the employee with the lowest employment retention rating) is laid off. (Un. Exh. 19)

On July 1, 2009, Mr. Criss was an exempt employee returning to a filled classified position, Position 1791, held by Mr. Low. Since Mr. Low was junior in seniority to Mr. Criss, he was subject to layoff under Article 34.3 (F) and the DOP Guidelines. Article 34.9 sets forth the options for employees who are subject to layoff. Article 34.9 A (1) states 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 job classification. (Jt. Exh. 8)

In this case, since there were no funded vacant ITS 5 positions, Mr. Low's formal options under Article 34.9 (A) (1) were limited to seeking a filled ITS 5 position held by an employee junior in seniority to Mr. Low. Mr. Low did not have the right under the

formal options to bump into ITS 4 and ITS 3 positions because he had not previously held permanent status in those positions. (Jt. Exh. 15) The seniority list of LNI employees holding the ITS 5 positions established that Mr. Low had seniority over only three employees. (Jt. Exh. 16) The Union argues the Employer violated Article 34 by not allowing Mr. Low to bump into ITS 5 positions held by less senior employees.

> Mr. Low was not offered in a descending order other ITS positions for which he may have been qualified as described by the procedure in Article 34. (Union Post-Hearing Brief, Page 55)

The critical language is "...for which he may have been qualified." Article 34.9 A (2) clearly requires that the employee have the "...skills and abilities ...", as determined in Article 34.8, to perform the duties of the position being sought by the laid off employee. Ms. LaPalm testified that Mr. Low did not possess the skills and abilities to perform any of the ITS 5 positions held by the less senior employees. Since Mr. Low had no other formal layoff options available, Ms. LaPalm testified she utilized the "informal option" under Article 34.10 which states:

> An employee being laid off may be offered a funded vacant position to job classifications he or she has not held permanent status within his or her layoff unit, provided the employee meets the skills and abilities required of the position and it is at the same or lower salary range as the position in which the employee currently holds a permanent status. (Jt. Exh. 8)

Ultimately, rather than being placed on layoff, Mr. Low accepted an ITS 3 position under the informal option process, although he indicated on the Layoff Option Form that he "...did not agree with appropriateness of the layoff process ...". (Jt. Exh. 9)

The Union argues the Employer could have implemented the same process for Mr. Criss and avoided placing Mr. Low on layoff status. However, this argument ignores the Employer's statutory obligations under the reversion process. Ms. LaPalm testified that, had the Employer not followed the civil statutory requirements, Mr. Criss could have challenged the decision through a rule violation procedure at the Department of Personnel, Personnel Resources Board. (Tr. 131-32) The Union also argues that Mr. Criss could have been transferred to one of the ITS 4 or ITS 3 positions, one of which was created for Mr. Low, rather than bumping Mr. Low from his permanent position. Again, Ms. LaPalm and Mr. Robert Lanourette, Program Manager for Applications and Data Management, both testified that Mr. Criss's skills and abilities were not transferable to the positions held by the less senior employees holding ITS 5 positions. (Tr. 126. 146) Mr. Lanourette testified in detail regarding the adverse consequences on the agency if it placed Mr. Criss in a less senior ITS 5 position. (Tr. 164) Mr. Lanourette, as did Ms. LaPalm, went through each position and established, to the satisfaction of the Arbitrator, that Mr. Criss did not possess the necessary skills and abilities to perform the functions of those ITS 5 positions, although they were held by employees less senior than Mr. Criss. It was apparent from the evidence the ITS 5 position held by Mr. Low was the only position that Mr. Criss could be returned to from his exempt status.

Ultimately, the decision in this case must necessarily be based on management's judgment of the skills and abilities of Mr. Criss, the returning exempt employee, and Mr. Low, the Grievant in this proceeding. This is particularly significant in seniority

cases involving the bumping of employees, where the issues of competence are of a technical nature and there is no objective basis to determine the respective skills and abilities of the competing employees. Therefore, the Arbitrator's responsibility in such cases is to determine from the evidence whether the Employer abused its managerial discretion in denying a senior employee's right to bump into a less senior position, based on the lack of contractually mandated "skills and abilities."

> Arbitrators recognize a company's prerogative to deny bumping rights to senior employees who fail to meet contractually specified fitness and ability qualifications ...
>
> Elkouri and Elkouri,
> *How Arbitration Works,*
> (BNA Sixth Edition) Page 789

Although Mr. Low made a favorable impression at the hearing and is an acknowledged competent employee, the issue before the Arbitrator is whether the Employer violated the terms of Article 34 by returning an exempt employee to the position held by Mr. Low and thereby bumping him from his permanent position to a lower paying position. Based on the record in this case, the Arbitrator concludes the evidence failed to establish a contractual violation. Accordingly, the Union's grievance shall be denied.