BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

STATE OF WASHINGTON

and

WASHINGTON ASSOCIATION OF FISH AND WILDLIFE PROFESSIONALS

Appearances:

Rhonda Fenrich, Fenrich & Gallagher, PC, 423 Lincoln Street, Eugene, Oregon, appeared on behalf of the Association.

Gil Hodgson, Assistant Attorney General, Labor and Personnel Division, 7141 Clearwater Drive SW, Olympia, Washington, appeared on behalf of the State and its subdivisions.

INTERIM ARBITRATION AWARD

The Washington Association of Fish and Wildlife Professionals, herein "Association" and the State of Washington, herein "State,"[1] jointly selected the undersigned from a panel of arbitrators supplied by the Washington Public Employment Relations Commission, to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Tumwater, Washington, on September 14 and 15, 2011. During the course of the hearing the parties agreed to limit this phase of the hearing to the second issue stated below. They did agree to state all of the potential issues as specified below. The parties agreed to file post-hearing briefs in the first phase, the last of which was received December 2, 2011.

ISSUES

The parties were agreed to a statement of the issues as follows:

1. Is the grievance arbitrable in whole or in part?

2. Did the Employer violate the collective bargaining agreement when it furloughed Grievant Mark Schuck during the period July 1, 2010, to June 30, 2011?

3. What, if any, of the class of other employees is subject to this grievance?

4. What is the appropriate remedy?

[1] I will refer to the Department of Fish and Wildlife as the "Agency."

The hearing and this decision are essentially limited to issue 2, except as noted in the discussion below.

RELEVANT AGREEMENT PROVISIONS

". . .

PREAMBLE

This Agreement is entered into by the State of Washington, referred to as the "Employer," and the Washington Association of Fish & Wildlife Professionals, referred to as the "Association."

The purpose of this Agreement is to promote mutual agreement and understanding between the parties and to set forth those matters pertaining to rates of pay, hours of work, and other employment relations matters, in accordance with RCW 41.80, which pertain to a respectful and productive labor relationship. The Preamble is not subject to the grievance procedure in Article 27.

. . .

ARTICLE 26

26.1 The Employer will not discipline any permanent employee without just cause.

. . .

ARTICLE 27

GRIEVANCE PROCEDURE

27.1 The purpose of this Article is to provide for an orderly method of resolving disputes over the provisions of this Agreement. . . . .

. . .

D. Authority of the Arbitrator

1. The arbitrator will:

    a. Have no authority to add to, subtract from, or modify any provision of this Agreement:

    b. Be limited in his/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 decision that would result in the violation of this Agreement;

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, 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 Association, the Employer and the grievant.

. . .

ARTICLE 31

LAYOFF AND RECALL

31.1 The Agency will determine the basis for, extent, effective date and the length of layoffs in accordance with the provisions of this Article.

31.2 Basis for Layoff

Layoffs may occur for any of the following reasons:

A. Lack of funds

B. Lack of work

C. Good faith reorganization

D. Ineligibility to continue in a position that was reallocated

E. Termination of a project

F. Fewer positions available than the number of employees entitled to such positions either by statute or other provision.

31.3 Voluntary Layoff, Leave Without Pay or Reduction in Hours

Appointing authorities may allow an employee to volunteer to be laid off, take leave without pay or reduce his/her hours of work in order to reduce layoffs. If it is necessary to limit the number of employees in an agency on unpaid leave at the same time, the Appointing authority will determine who will be granted leave without pay and/or reduction in hours based on seniority if all staffing needs are equal. Employees who volunteer to be laid off may request to participate in the General Government Transition Pool Program and/or have their names placed on the internal layoff list for the job classifications in which they held permanent status.

31.4 Permanent, Non-Permanent and Probationary Employees

Employees with permanent status will not be separated from state service through a layoff action without first being offered positions they have the skills and abilities to perform within their current job classification within the layoff unit currently held by non-permanent and probationary employees. Non-permanent employees will be separated from employment before probationary employees.

31.5 Temporary Reduction of Work Hours or Layoff - Agency Option

A. The Agency may temporarily reduce the work hours of an employee to no less than twenty (20) per week, up to thirty (30) calendar days, due to severe and inclement weather or natural disaster, unanticipated loss of funding, or lack of work. Employees will normally receive notice of five (5) calendar days of a temporary reduction of work hours.

B. The Agency may temporarily layoff an employee for up to thirty (30) calendar days due to an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or severe and inclement weather or natural disaster. Employees will receive notice of five (5) calendar days of a temporary layoff.

C. An employee whose work hours are temporarily reduced or who is temporarily laid off will not be entitled to:

1. Be paid any leave balance;

2. Bump to any other position; or

3. Be placed on the internal layoff list.

31.6 Layoff Units

A. A layoff unit is defined as the geographical entity or administrative/organizational unit in each agency used for determining available options for employees who are being laid off.

B. The layoff units for each agency covered by this Agreement are described in Appendix B, Layoff Units.

31.7 Skills and Abilities

Skills and abilities are documented criteria found in license/certification requirements, federal and state requirements, position descriptions, bona fide occupational qualifications approved by the Human Rights Commission or recruitment announcements that have been identified prior to the layoff.

31.8 Formal Options

A. Employees will be laid off in accordance with seniority, as defined in Article 30, Seniority, among the group of employees with the required skills and abilities as defined in Section 31.7 of this Article. The Agency will determine if the employee possesses the required skills and abilities for the position. Employees being laid off will be provided the following options to comparable positions in descending order within the layoff unit:

1. A funded vacant position for which the employee has the skills and abilities, within his/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/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/her current permanent position, within a job classification in which the employee has held permanent status. Options will be provided in descending order of salary range and one (I) progressively lower level at a time. Vacant positions will be offered prior to filled positions.

31.8.1 Informal Options

Employees being laid off will be offered funded vacant positions within their layoff unit provided they meet 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 permanent status. The Agency will determine if the employee possesses the required skills and abilities for the position.

. . .

31.14 Recall

A. The Agency will maintain layoff lists for each job classification that will include geographic availability. Permanent employees who are laid off will, at their request, have their name placed on the list for the job classification from which they were laid off or bumped and will indicate the geographic areas they are willing to accept employment. Additionally, employees may request to have their name placed on the layoff list for other job classifications in which they have held permanent status. An employee will remain on layoff lists for two (2) years from the effective date of his/her layoff.

B. When a vacancy occurs within an agency and when there are names on a layoff list, the agency will fill the position in accordance with Article 3, Filling of Vacancies. An employee who is offered a position two (2) times and refuses the offer each time will have his/her name removed from the layoff list.

. . .

ARTICLE 32

MANAGEMENT RIGHTS

32.1 Except as modified by this Agreement and applicable statutes, the Employer retains all rights of management, including, but not limited to, the right to:

A. Determine the Employer's functions, programs, organizational structure and use of technology;

B. Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;

C. Direct and supervise employees;

D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies;

E. Determine the Employer's mission and strategic plans;

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

G. Determine or consolidate the location of operations, offices, work sites, including permanently or temporarily moving operations in whole or part to other locations;

H. Establish or modify the workweek, daily work shift, hours of work and days off;

I. Establish work performance standards, which include, but are not limited to, the priority, quality and quantity of work;

J. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions;

K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer, and temporarily or permanently layoff employees;

L. Determine, prioritize and assign work to be performed;

M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;

N. Determine training needs, methods of training and employees to be trained;

O. Determine the reasons for and methods by which employees will be laid off; and

P. Suspend, demote, reduce pay, discharge, and/or taken other disciplinary actions.

. . . ."

FACTS

The Agency is responsible for the management of fish and wildlife in the state. The Association is the collective bargaining representative of various professional employees of the Agency. Grievant Mark Schuck is a Fisheries Biologist Project Leader responsible for hatchery evaluations and wild fish research. He is a member of the bargaining unit represented by the Association.

The Agency employs about 1,400 full-time employees and about 400 full-time equivalent seasonal employees as needed. About 93% of the total budget of the Agency is wages and benefits for all of its employees including managers.[2]

The Agency performs service for the U.S. Government and others under about 1500-2000 various contracts. These contracts account for about 40% of the Agency's total budget. The procedure for negotiating these contracts is for the Agency to estimate what the contract would cost to the contracting organization. If the organization accepts the foregoing officer, the organization enters into a contract with the Agency. The Agency performs the contract and provides a specific accounting. The final amount of the contract is adjusted for the labor and expenses actually incurred. The contracting organization then reimburses the Agency for the work. This is referred to herein as a "reimbursement contract." About one-half percent of those contracts are funded by the contracting agency in advance. Those contracts are referred to herein as a "funds-advanced contract."

Mr. Schuck is responsible for two different units, both of which are involved in Salmon and Steelhead research. The primary unit employs 8 full-time employees and 4-8 temporary employees. The second unit is in Aston County and has 3 full-time employees and 2 to 4 temporary employees. These units essentially administer various contracts from the Bonneville Power Administration (federal pass-through) and the U.S. Fish and Wildlife Service, Salmon Recovery Board. Mr. Schuck's salary and that of his subordinates is entirely funded by these federal contracts. The funds for these contracts are all accounted for in the State's general fund, federal, in its accounting system. The federal contracts provide an allowance of about 20 to 25% for overhead. Mr. Schuck is responsible to prepare the budget for these contracts and to negotiate the contracts with the contracting organizations.

The State's revenue shortfalls since at least 2008 set the background for the events leading to the temporary layoff in dispute. The State's budget process includes all of the funds in dispute, including funds reimbursed under federal contracts. The State suffered substantial reductions in revenues during the national financial crisis, starting in late 2008. The State made cuts to its prior budget based upon that reduction.

The State has a State Economist who makes quarterly economic predictions which the State uses to estimate its income. As of early, 2009, the state's economist was predicting a quick recovery from the recession and that revenues would rise accordingly. The State developed its 2009-11 biennial budget based on the state economist's June, 2009, revenue projection. The projection was based on a prediction that the national recession would end very quickly. Each successive projection was based on the assumption that the recession would end soon. Each of these proved incorrect. The State was required to makes successive reductions in its budget to adjust for the continuing recession's shortfalls.

When the situation first unfolded, the State cut the funding for the Agency for the 2009 fiscal year which ultimately resulted in a $23.6 million budget reduction. The Agency implemented the reduction by a major permanent reduction in the size of its work force.

---

[2] This is an estimate made by the Agency during the hearing. The estimate is assumed to be accurate for the purposes of decision.

In September, 2010, the state's economist made a severe downward correction to the June, 2009, prediction. The Legislature was then forced to deal with an unanticipated $760 million shortfall of revenue for the biennium in 2010 in the last year of the budget instead of the whole biennium. Another factor also had an impact on the Legislature at that time. In December, 2009, the Washington Supreme Court ordered the State to repay a $150 million refund to direct sellers from the State General Fund.

The Legislature met commencing January 15, 2010 and what became ESSB 6503 was introduced shortly after the session began. The gist of the legislation was that State agencies except agencies such as the State Patrol would be required to reduce salaries by being closed on 10 specified days and laying off employees for those days. The budget and spending authority of the agencies would each be reduced by a specified amount estimated by the Legislature to be the savings from those 10 days of layoff. Agencies were allowed to come up with alternative savings plans from compensation, but in the absence of such a plan they were required to implement the 10 specified days. The savings were required to be solely from compensation. The savings were dictated not only for employees funded through the State General Fund, but also employees funded from other sources such as federal contracts even though there were no reductions in the funds available from those sources. ESSB 6503 and related ESSB 6444 were both passed by the Legislature.[3] ESSB 6503 passed April 10, 2010. Section 13 thereof declared an "emergency" as follows:

> This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

The legislation also provided for bargaining between the State and the labor organizations with respect to the effects thereof on the wages, hours and conditions of employment of represented employees, but not with respect to the decisions made therein.

Thereafter, the parties met to negotiate the impact of ESSB 6503. They reached agreement on a memorandum of understanding with respect thereto in late June, 2010, which was signed in late August, 2010. The MOU did not waive the Association's right to grieve herein.

Turning to the specific impact on the Agency, ESSB 6503 required that the Agency reduce its budget by $1.2 million from its State General Fund budget and $1.885 million from its other funds including, but not limited to, federally financed funds in which there was no shortage of potential revenue. The total was about $3.1 million. The Legislature also reduced the appropriation (authority to spend) of the Agency consistent with its requirement that the Agency close on the specified layoff days. The reduction in authority applied to General Fund, Federal, from which Mr. Schuck's salary was funded. The reduction in the General Fund, Federal accounted for about 21% of the $3.1 million reduction.

Joe Stohr is the Deputy Director of the Agency and the person responsible for the implementation of the ESSB 6503. He testified as follows. The Agency was required to reduce expenditures by $3.1 million. The amount of the required reduction was based on an erroneous assumption and, therefore, even if the Agency laid off all of the employees subject to layoff under ESSB 6503, the savings would not be sufficient to meet the required $3.1 million. He

[3] Governor Gregoire vetoed Section 2 of the ESSB 6503 on April 27, 2010. The veto was sustained.

unsuccessfully tried to the get the State to make a correction for that error. Instead, he was told that if the Agency did not achieve the required savings through the layoffs, the remainder would still be taken out of the Agency budget. The reductions were targeted to all of the accounts funding employee wages and salaries, including the general fund, federal. This was true even though there were federal funds available to cover the salaries paid out of the General Fund, Federal. The Agency was not given much time to deal with the implementation of the required cuts. The Agency set a priority on retaining as many employees as possible because of the impact of the layoffs which occurred as a result of the early budget cuts at the beginning of the financial crisis. The Agency did not submit an alternative compensation reduction plan contemplated by ESSB 6503 and, therefore, was required to serve the specified ten days of layoff. The Agency did exempt some fish counters because it had to do so to be able to perform the required fish counts. This was approved by the Office of Financial Management. It did not pursue other exemptions. It did not believe others would be approved. In any event, it tried to maximize employee participation in the layoffs because, otherwise, the funds would have to come out of the general Agency budget. In his view, the Legislature cut the appropriation for each fund and, therefore, the Agency did not have the authority to spend money equivalent to the required layoffs even though federal funds would ultimately be available. The Agency did not consider exempting funds-advanced contracts for the following reasons:

1. They were a very small percentage of the Agency's contracts,
2. It would be difficult to administer because employees can choose when to work on a specific contract,
3. The appropriation reduction applied to those as well,
4. The advanced payments were estimates which could be adjusted after work was completed.

As a result of the foregoing decisions, the State required Mr. Schuck to serve 10 non-consecutive days of temporary layoff during the period July 1, 2010 to June 30, 2011. Ten days of layoff amounted to approximately 3.8% of Mr. Schuck's salary.

Mr. Schuck filed a grievance on August 2, 2010, protesting those temporary layoffs. The same was processed to the arbitration herein.

POSITIONS OF THE PARTIES

ASSOCIATION:

The Employer violated Article 31.5 by its decision to furlough employees whose salaries were not funded by the State General Fund (herein "SGF"). The Employer violated Article 31.5 in two independent ways. Article 31.5 provides that the Agency will determine the basis for, extent, effective date and length of layoffs in accordance with this provision. In order to temporarily layoff or furlough employees, the provision requires a showing of ". . . an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or severe and inclement weather or natural disaster" prior to being permitted to temporarily layoff employees. While the Association does not dispute the fact that the Employer had a series of revenue shortfalls in its general fund, it did not experience any revenue shortfall in the funds supporting the positions in dispute. It had an increase in those other fund sources. Both the Legislature and the Agency admit that but for ESSB 6503 there would have been no need for the Agency to reduce its expenditures. Thus, it is the Legislature which usurped the authority of the Agency to determine the number of days of layoff and the specific days to be served. Similarly, the Legislature mandated the disputed furloughs even though federal funds were available to pay the salaries. The statements made by relevant officials indicate that the real reason for the decision to furlough the Grievant and similarly employees was merely to achieve the appearance of "fairness." The Agency Deputy Director, Joes Stohr and the Governor's budget representative, Julie Murray each described the furlough issue in dispute as an issue of fairness. The contract term in issue is clear and unambiguous. In any event, Association President, Jeromy Jording, testified that the purpose of this provision was to limit the State's ability to layoff an employee unless the conditions specified in Article 31 had previously been met. He also testified that the decision was to be made for each individual employee and not on a group basis. The State's chief negotiator, Garrett reluctantly admitted as well that a layoff decision was typically made on an individual basis. Article 31.1 requires an analysis on the basis of individual's situations when it requires the Agency to determine the necessary extent of layoffs.

The very nature of layoffs is that they are a reflection of an effort to reduce employee compensation costs due to a lack of work. The State readily admits that there was no lack of work, lack of funding, or a loss of non-SGF revenues for Grievant Schuck and other similarly situated employees. The State, but for its own decision to pass ESSB 6503, would not have needed to furlough these individuals. It did not save SGF funds, nor improve its budget positions by doing so. The fact that the Legislature made a global declaration of a "revenue shortfall" without any analysis of individual revenue streams, or, for that matter, the enhanced revenue stream for the Agency, violated Article 31.

The State has not shown that there was a "lack of funds" or "revenue shortfall" related to the actual layoffs. The State's assertion that any revenue shortfall justifies an Agency-wide layoff is nonsensical. The State did not have a non-SGF revenue shortfall. In fact, the State had increased non-SGF revenue.

The State's treatment of other employees shows that its revenue does not justify its treatment of Grievant and similarly situated employees. It exempted almost 67% of all State employees from ESSB 6503. This shows that the State's decision to layoff Mr. Schuck and other employees where there was no lack of funds for their position was arbitrary. The State could not use any outside funding sources to balance SGF revenue shortfalls.

The State cannot claim a lack of funds or unanticipated revenue shortfall when it has the funds but elects not to spend them. It could be argued that in all reality, the State had not experienced an unanticipated loss of SGF revenue. The State continues to experience less revenue collections than it had predicted. Nonetheless, the State actually did anticipate the possibility that its revenue projections might not be accurate. Governor Gregoire had ordered each agency to engage in multiple budget exercises based upon assumptions that revenues might decline more than its predictions showed. The Agreement allows for temporary layoffs to deal with short term budget shortages, but not as a means to address long-term budget shortages. This is shown in the limitation of Article 31.5 which limits the use of such layoffs to thirty calendar days. This is designed to allow the State to bridge a definitive gap or exercise negotiation dates outlined in RCW 41.80.10. Here, the Legislature knowingly and willingly cut all funding sources to the Agency, even without a revenue shortfall, thereby creating its own anticipated loss of revenue.

Similarly, the State cannot legislate around a previously ratified agreement. According to RCW 41.80.10(6) the State is required to address revenue shortfalls by renegotiating the contract in such a manner as to achieve ". . . mutually, agreed upon modification[s] of agreement." The

Legislature and State ignored this statutory section. It acted in an irresponsible manner violating the very contracts it had ratified and had funded a year earlier. ESSB 6503 required only impact bargaining which left intact the contractual requirements of proving a loss of revenue. ESSB 6503 cannot be construed to retroactively change RCW 41.80.10(6) according to the rules of statutory construction. In any event, it is absurd to take the view that the State is entitled to legislate around its own contractual agreement.

ESSB 6503 did not modify the Agreement. Thus, the Agency's failure to provide an alternative compensation reduction plan for those employees whose funding sources did not experience an unanticipated loss of funds also constitutes a violation of Article 31.5.

The State's actions violated the clear terms of the Agreement. There was no "lack of funding" for Mr. Schuck. The State actually had to RETURN funds garnered by Mr. Schuck to pay his and his subordinate's salaries (as well as a 25% administrative surcharge for Agency overhead). Mr. Schuck and his work group had difficulty fulfilling the receivable requirements of those contracts. Ms. Murray admitted that neither the State, nor the Agency reviewed the terms of those contracts to determine whether the State's actions violated those contracts. This is true even though it might have violated the State Constitution to have done so. The Association asks that the grievance be sustained and that the State be ordered to repay Mr. Schuck and all similarly situated employees for the impermissible reduction in their salary.

EMPLOYER:

The Association bears the burden of proof in this case to establish that the State violated the collective bargaining agreement. Section 31.5 and the management rights provisions, Section 32.1of the Agreement are based upon the statute and are facially similar. Therefore, any ambiguities in the relevant provisions of the Agreement should be interpreted in a manner consistent with the statutes. The grievance should be denied because the plain language of the Agreement authorizes the State to take "whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies." Based on the "emergency" clause alone, this grievance should be dismissed. The financial condition of the State amounted to an "emergency" under the facts of this case. The Legislature has twice recognized an "emergency." The Employer's authority to deal with emergencies is expressly recognized in the agreement and its reaction is consistent with that authority. The record establishes that the Legislature determined it had a financial basis for layoff, and that the Agency made the same determination to shoulder its share of a bad situation through the appropriation process. The state method of financial forecasting is a common public sector method of financial planning and the situation which occurred is a situation which can occur when a state uses that method. These are contractually protected management rights. In any event, Section 31.5 specifically reserves to the Employer to "temporarily layoff an employee for up to thirty (30) calendar days due to an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or severe and inclement weather or natural disaster." The common sense of the language is that temporary layoffs of the type in dispute are allowed by this provision.

The Agency employs over 1300 employees funded out of 16 different accounts, at least one of which has 1500 to 2000 different contracts. Those contracts do not necessarily coincide with the State's fiscal year. Employees have discretion as to how they allocate their time between those contracts. It would frustrate the purpose of Article 31.5 by requiring the Agency to analyze all of the variables on each individual employee for each day of layoff. It would make it virtually impossible for the State to use that provision. The unanticipated $3.1 million reduction in funding for the Agency is an unanticipated revenue shortfall within the meaning of Article 3.5. The Agreement should not be read to frustrate the use of Article 3.5.

There was a direct correlation between the overall revenue shortfall and the loss of funding at the Agency and the Agency's decision to include the grievant in widespread temporary layoffs. The total Agency budget is approximately $326 million of which about 40% is federally funded. The Agency spends about 93% of its budget on salaries and benefits. The record is incorrect as to the amount of federal funding. The Omnibus Appropriations Act reflects that effective May, 2010, the total State General Fund Federal authority of the Agency was cut from $86,330,000 to $85,799,000. Using the 93% figure DFF employee wage and benefit compensation from that fund would be $39,896,535. This means that the $60 million figure used during cross examination was off by more than $20 million. Further, those figures completely ignored the fact that the Employer had to continue to pay benefits even through the furloughs.

The facts are clear the Agency fell $360,000 short of the $3.1 million in mandated savings even after it furloughed affected employees for the ten mandated days. The documentation was not available during hearing, but the parties have agreed that the State could provide that documentation.[4]

In any event, the Association has not met its burden of demonstrating that the Agency violated the Agreement even if one accepted the proposition that a "lack of funds" or "revenue shortfall" must be assessed account by account or that the financial situation was not a "crisis." The Agency is subject to seasonal variations and the majority of its contracts are reimbursed rather than cash advance. It was a reasonable decision to include the grievant in the 10 days of layoff where the State mandated reductions which exceeded the savings the Agency could make complying with the 10-day layoff requirement. This is true because the Agency still had to "eat" some of the losses in funding connected to this bill. The Employer asks that this grievance be denied.

DISCUSSION

I. Arbitrator's Role

Pursuant to Article 27, the role of the arbitrator is confined to interpreting and applying the provisions of the Agreement to the dispute at hand. When the terms of a collective bargaining agreement are clear and unambiguous as it relates to a dispute, the arbitrator is bound to apply the terms of the parties' agreement as written.[5] However, when the agreement's terms are ambiguous, the fundamental role of the arbitrator is to determine the intent of the parties.[6] An agreement is ambiguous if it is fairly susceptible to more than one interpretation.[7] When an agreement is ambiguous, arbitrators use time honored methods of interpretation. They look to the context of the disputed provision, and other provisions of the agreement. They look at the bargaining history of the parties. They may look at the purpose of the disputed provision and, in that regard, may choose an interpretation which is consistent with the law over one which is not

[4] That document is Appendix A attached to the Employer's brief.
[5] Tondevold v Blaine Sch. Dist., 91 Wn. 2d 632, 635, 590 P.2d 1268 (1970); Hamsen v. City of Seattle. 45 Wn. App. 214, 221, 724 P.2d 371 (1986)
[6] National Academy of Arbitrators, Ted St. Antione, Ed., The Common Law of the Workplace: The View of the Arbitrators, Sec. 2.2 (BNA, 2d Ed.)
[7] Common Law, *supra*, Sec. 2.4

consistent with the law.[8] They also follow principles of contract construction which have historically been applied by arbitrators and courts.[9]

The State has argued that portions of the Agreement may be unlawful under RCW 41.80.040 or superseded by the State's authority under RCW 41.80.040(4) to "take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies." Article 31.5(A) expressly limits the number of days that the State may use temporary layoffs and sets a minimum number of hours which the State must provide in a reduction-of-hours situation. The parties have not agreed to submit the issue of the State's authority to disregard the terms of the Agreement or the extent to which the provisions of the Agreement are unlawful to arbitration in this proceeding. Under those circumstances, Article 27 limits the authority of the arbitrator to applying the terms of the agreement as it is written. No opinion is expressed or implied as to whether any term of the Agreement is unlawful or whether the State has statutory authority under the disputed facts and circumstances to take action in derogation of the Agreement.[10]

The Association has based some of its arguments on its allegation that an award allowing the State to take the actions herein might effectively allow the State to violate the underlying federal contracts, divert funds from them, or perform them poorly. I do not have authority to determine any matters relating to those contracts. Nothing herein is expressed or implied as to the correctness of any action the State has taken with respect to its obligations under those contracts.

II. Procedural Matters

The State has challenged the arbitrability of this dispute on a number of grounds. Under Article 27, issues of arbitrability are ordinarily decided prior to hearing the merits of the dispute. However, the parties have expressly agreed at the outset of the hearing to reserve the issue of arbitrability until the substantive issue as to Mr. Schuck is decided. I note this phase of the hearing is limited to determining whether the State violated the Agreement only with respect to Mr. Schuck and not to issues of the class of similarly situated employees. I do, however, address the issue of whether the State violated the Agreement as to any work which Mr. Schuck may have under any agreements which were funded by outside sources in advance of the work being done. The preponderance of the evidence is that there were none, but the principles of judicial economy require that I address that sub-issue anyway. The sub-issue was fully litigated at hearing herein.

III. Authority of the Legislature

The Association contends that because Article 31.1 uses the term "Agency" in lieu of "Employer" as defined in the Preamble, Article 31.1 forbids the Legislature or others outside the Agency from making any determination of "the basis for, extent, effective date and length of layoffs" under Article 31. The Agreement is ambiguous as to whether it restricts the Legislature in making decisions which limit the Agency's choices under Article 31.1. Neither this provision, nor any other provision of the Agreement expressly precludes the Legislature from

---

[8] Common Law, *supra*, Sec. 2.12, 2.15
[9] Common Law, *supra*, Sec. 2.7, Tondeville, *supra*
[10] The foregoing does not constitute an express or implied opinion about the meaning of Article 32.1(D).

making determinations which restrict the Agency's choices in that regard. While this provision could be read to be restrictive of the Legislature's authority, this provision also could reasonably be read to merely state the procedure which the Agency ought to follow after the Legislature has made any decision which requires the Agency to exercise authority under Article 31. I conclude that the latter is the better view.

The structure of the Agreement supports the view that Article 31.1 does not restrict the authority of the Legislature. The structure of the agreement is that the rights of the State are reserved to the State unless expressly abridged by the other terms of the Agreement. In the absence of specific phrasing restricting the exercise of rights to "only" the Agency in Article 31.1, the Legislature retains its right to act in the area as well. Article 32.1 provides:

> Except as modified by this Agreement and applicable statute, the Employer retains all rights of management, including, but not limited to: [Emphasis mine.]

Article 32.1 specifically reserves to the "Employer" as a whole (including the Agency), the right to determine the size of the Agency work force, the financial basis for layoffs, modify the work week, and determine the reasons for and methods by which employees will be laid off. In this regard, Article 31.1 essentially is in the form of reiterating Article 32 to insure that certain decisions are primarily management decisions. See, for example, Article 31.3 (reserving power to the appointing authority) and 31.8 (Agency to determine if employee has the required skills).[11]

Similarly, a review of the other provisions of Article 31 make it unlikely that the drafters would have intended to preclude the Legislature from making decisions which would restrict the Agency in making determinations under Article 31.1. For example, Article 31.1 requires that the Agency determine the "basis" for layoff, but in Article 31.2(F) expressly allows a layoff when the Legislature eliminates a position.

The purposes of Article 31 support the view that Article 31 is focused on insuring an orderly process of adjustment. In general, the Article is concerned with protecting the job security of senior employees by generally requiring the forced layoff of junior employees and avoiding potential layoff situations from being used as a pretext to get rid of employees for non-economic reasons or to circumvent the just cause provision.

The bargaining history and circumstances surrounding the drafting of Article 31.1indicate that the parties never contemplated the potential that the Legislature might want to exercise as much authority in restricting the Agency as it has in the circumstances in dispute. Article 31 was drafted before situations of this nature occurred. Article 31 has remained unchanged from the prior agreement.[12] The length and depth of the financial crisis the State faces is virtually unprecedented in modern history.[13] Further, most states have experienced similar problems because of the deep and prolonged recession. In this regard, the language of Article 31 was drafted well before the financial crisis and also before the national fad of dealing with similar crises by imposing temporary layoffs or furloughs. Thus, it is very unlikely that the drafters intended to restrict the Legislature's authority. It is more likely they never expected it to do what it has done in the circumstances in dispute.[14] Accordingly, the fact that Section 31.1 uses the

---

[11] But see article 31.7 which implies some restriction.
[12] References to the transcript of proceeding herein are marked "Tr. p." See, Tr. p. 39.
[13] Tr. p. 165
[14] See, tr. p. 247-9.

term "Agency" rather than Employer does not preclude the Legislature from taking the actions it has.[15]

IV. Violation of Article 31.5[16]

The Association next contends that the State violated Article 31.5 in that there is no shortage of funds to fund Mr. Schuck's position because Article 31.5 does not authorize the use of temporary layoffs when there is no loss of funds for a specific position.

Article 31.5(B) states:

> The Agency may temporarily layoff an employee for up to thirty (30) calendar days due to an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or severe and inclement weather or natural disaster. Employees will receive notice of five (5) calendar days of a temporary layoff.

The Association is correct that this provision is intended to be one of limited use in only the above-quoted circumstances. The objective of this provision is to give the State alternatives to the cumbersome process of using the formal layoff procedure to achieve temporary savings in salaries, while preserving as much as possible the job security of long term employees from being economically forced from their livelihoods. The terms of this provision demonstrate that the parties carefully considered when the terms could be invoked. A comparison of Article 31.5(A) and Article 31.5(B) shows that a temporary layoff, but not a reduction of hours is available for a "revenue shortfall" or "shortage of material." This provision would not have been drafted this way had the parties not intended the restrictions to have substantive meaning. Other provisions also express limitations to protect employee interests. Article 31.5, itself, limits the number of hours per week and the period of time in which the State may use a reduction of hours.

The parties also dispute what role the arbitrator has in resolving a dispute as to whether or not the Employer is entitled to invoke the provisions of this provision. The Agreement is silent on this point and, thus, also ambiguous. One of the time-honored rules is that arbitrators will prefer that construction of an agreement which leaves a provision with meaning over one which leaves it without meaning.[17] The limitations of Article 31.5 would have no value if the arbitrator would be unable to review whether the State properly invoked the provisions of Article 31.5

Article 31.5 taken in conjunction with Article 32.1 (B). (D), (H), (J) and (O), make it clear that the decision to invoke its provisions is primarily that of the State and not the arbitrator. There is support in unrelated parts of Article 31 for the proposition that the parties contemplated that the arbitrator's authority to review the State's actions should be limited. In Article 31.2(C) the parties expressed the limited standard of review of "good faith." For the purposes of this decision, I conclude that if the State has invoked the provisions of Article 31.5 and it has a

---

[15] The Association's argument that the State as a whole (Agency and Legislature) may not force the layoff of an employee without making an individualized determination that fiscal circumstances require the layoff of a specific employee. It is not necessary to address that argument directly because I conclude under the facts and circumstances of this case, the circumstances support a determination to layoff Mr. Schuck.

[16] There is no allegation that the State's action here is improperly motivated or directed at Mr. Schuck individually. This award does not addresss situations of that nature.

[17] See, for example, Ruben, Ed., Elkouri and Elkouri: How Arbitration Works, p. 463 (BNA, 6th Ed.)

substantial basis supported by some evidence for its decision, the State is entitled to the benefits of Article 31.5.[18]

The Association's main contention is that there never was a shortage of federal funds to fund Mr. Schuck's work and, therefore, the State's revenue shortfall is in the State General Fund and does not justify invoking Article 31.5. It essentially argues that the State's only reason for laying off Mr. Schuck was to give the appearance of "fairness" to its other actions. The preponderance of the evidence establishes that a substantial motivation of the State in choosing to lay off federally funded employees was its view that it would reduce its cash outlay from the general fund to perform the work until it was reimbursed by federal funds at the end of the various federal contracts. This is referred to herein as a "cash flow" concern. Julie Murray, the Legislative director of the Office of Financial Management, provided the main testimony for the State as to the decisions made at that level. She testified that reducing the cash flow for funding federal contracts and other projects was a significant issue in framing the State's approach to the financial crisis.[19] She represented the Governor with the Legislature in the development of ESSB 6503. She also worked with legislative leaders. Thus, I conclude that this was a substantial motivation behind the State's decision to use temporary layoffs for federally funded employees such as Mr. Schuck. I conclude that the decision by the State to require a ten day temporary layoff of Mr. Schuck is reasonably related to the State's need to deal with its revenue shortfall crisis and there is substantial evidence to support the State's decision.

The Association next contends that the Agency did not comply with Article 31.1 in that it did not specifically relate the decision of the State to Mr. Schuck individually. Most of this argument is effectively addressed above. However, the Association contends that some of Mr. Schuck and other employees' federal contracts were funds-advanced contracts and, thus, not affected by the need for the State to save cash flow. In its view, the Agency should have addressed whether these employees should have been treated differently and allowed to work on those contracts during the temporary layoff days. It is apparent that the State did not specifically consider whether those working on funds-advanced contracts should be treated differently.[20] It is unclear whether Mr. Stohr actually gave any thought to treating them separately

The available evidence indicates that the State handles its cash flow by accounting in separate funds for all money received, but actually lumps them all together for cash flow purposes in a concentration account.[21] If advanced federal funds are lumped into this account, the State would be able to use the cash-advanced funds longer if it slowed down work on cash-advanced federal contracts. Thus, the cash flow concern applies to cash-advanced contracts as well.

In any event, Mr. Stohr's testimony is that cash-advance contracts are less than one-half percent of the agency's contracts.[22] He credibly testified as follows. It would be difficult to segregate cash-advance work because employees choose when to do it. The Agency only had a short period to implement the legislation. I conclude it was impractical to attempt to segregate the small amount of cash advance work. I conclude that the State did not violate Article 31 in

[18] Cf. the exercise of the writ of certiorari in Washington, Saldin Sec. v. Snohomish County, 134 Wn.2d 288, 946 P. 2d 370 (1998)
[19] See tr. page 170-3, 186-7 and 218.
[20] See, tr. p. 187. 218.
[21] See, tr. pp. 170 and 172.
[22] Tr. pp. 260-1

any respect by the way in which it implemented its rights under Article 31 with respect to Mr. Schuck.

Finally, I have issued this award as an "interim award" in order to afford the parties an opportunity to decide if there are any further issues which must be addressed from those the parties agreed to defer pending the result as to the issue decided herein. I have ordered that the parties notify me within fifteen (15) days of the date of this interim award if either desires further proceedings as to those issues.

INTERIM AWARD

That grievance filed herein is denied as to Mr. Schuck. The parties shall notify me within 15 days of this interim award as to whether any party seeks further proceedings as to any other issue.

Dated at Madison, Wisconsin, this 24th day of January, 2012,

Stanley H. Michelstetter II

Stanley H. Michelstetter II
Arbitrator