In the Matter of the Arbitration

between Washington Federation of State Employees ("Union"), on behalf of grievant Jerry Saxon,

and

the State of Washington ("State"), Department of General Administration.

Findings, Discussion and Award.

Case Numbers:	American Arbitration Association case No. 75 390 305 11. Arbitrator's MA4.
Representing the Union:	Gregory M. Rhodes and Younglove & Coker, PLLC, PO Box 7846, Olympia, WA 98502-7846.
Representing the State:	Kara A. Larsen, Assistant Attorney General, PO Box 40145, Olympia, WA 98504-0145.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the offices of the Attorney General in Olympia, Washington, on February 21, 2011.
Witnesses for the Union:	Debbie Brockman, Richard Osberg, Jerry Saxon, and Anthony Jones.
Witness for the State:	Dawn Chillers, Thomas R. Henderson, and Joyce Turner.
Date of this award:	March 7, 2012.

This is a layoff/bumping dispute. The parties agree that the issue presented in arbitration is, Did the State violate Article 34 of the parties' 2009-2011 collective bargaining agreement when it failed to offer Jerry Saxon position #0770 as an option in the layoff process, and, if so, what is the appropriate remedy? There are no preliminary issues of substantive or procedural arbitrability, and the parties agree that the burden of proof is on the Union to show, more likely than not, that the State has violated the CBA as alleged. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Testimony was taken down by a court reporter. Both parties presented oral final argument at the close of hearing.

FACTS

This is the contract language in dispute:

ARTICLE 34
LAYOFF AND RECALL

34.8 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 at least three (3) months prior to the layoff.

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

* * *

34.10 Informal Options

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 is at the same or lower salary range as the position in which the employee currently holds permanent status. ***

Mr. Saxon. Mr. Saxon was first hired by the State in 2006 as a Painter. There is no dispute that his entire professional history has been in that trade; and his Amplified Employment History tracks his experience as a painter since 1966. His position was later reallocated to the Maintenance Mechanic 2 classification. The time allocation of the position description are:

80%: Perform a wide variety of painting and other trades-related work in assigned buildings. Typical duties include tape and mudding sheetrock walls, painting interior office space, exterior buildings, windows and other surfaces, graffiti removal, plastering stucco walls, street and parking lot striping, assist in framing and hanging doors, etc.; drywall installation; and minor electrical connections or switches and pulling wire...

15%: Develop project estimates ...

5% Other duties as assigned.

The General Qualifications begin with

- Journey-level standing as a Painter, as attested by:
  - a. Completion of recognized apprenticeship, OR
  - b. Full journey-level status in a Painters union.
- High school graduation, or GED equivalent.

There is no dispute that Mr. Saxon has been a valuable employee. The "Performance Feedback" comments of his supervisor in Mr. Saxon's most recent, February 2011, evaluation are exemplary.

Mr. Saxon also owns his own home and several rental houses and has long performed the repair and maintenance on all these structures. And his long experience in the painting industry has included repair and maintenance of a wide variety of associated equipment, including trucks and compressors.

On March 1, 2011, the Facilities Division Assistant Director officially informed Mr. Saxon that he was being laid off as of April 1 and that there were no formal options for his continued employment. Of the six informal options presented to him, Mr. Saxon chose as his first priority Mail Process Driver on the graveyard shift.

Position 0770. The position, which Mr. Saxon was not offered, is also classified Maintenance Mechanic 2. It is currently held by Mr. O'Brien, who was first hired, in that position, as a Maintenance Mechanic 1 in June, 2006. That makes him substantially junior to Mr. Saxon. The working title of position #0770 at the time of Mr. O'Brien's hire was "General Repairer," and the position description time allocation began with 90%"semi-skilled work in the

maintenance, repair, remodeling, alterations, and construction of buildings, grounds, facilities, and equipment..." And the General Qualifications did not include any education, training or experience component.

In October, 2007, Mr. O'Brien was permanently assigned to the Central Capital Campus HVAC operation. The position was reallocated upward to MM2 in October, 2007 due to the resulting change in duties. The general statement of Position Objective added two new elements:

> Performs P/M's and/or repairs systems such as air conditioning units, motors, fans, heaters, ponds, pumps and other related equipment.
>
> Also required from this position is the ability to accurately test and document the critical responsibility of water testing all hydronic loops on the Capital Campus. [Sic.]

The stated time allocations changed radically to this:

> 55% Field work - Including installation of plumbing fixtures, motors, pumps, chemical feeders; maintains equipment such as lubricating, belt changes, adjustment, alignments, cleaning, and inspection of this equipment and/or systems. Other independent activities include: filter changing, expected repairs, and verification of operation within the facilities...
>
> 35% Conducts and documents weekly water testing of the Capitol Campus hydronic loops. This involves taking samples of hydronic loop H20, w/the levels of clorides, posca, conductivity, nitrates, iron and pH. This involves the use of several different electronic meters, and chemical solutions. Repairing pumps, valves, hoses, and setting/adjusting of controllers to optimize the level of chemical usage.
>
> 5% Computer work...

And the position's General Qualifications were amended to add, "H. S. Graduation or GED and 4 years of general work experience on building and equipment maintenance construction or repair work or completion of recognized apprenticeship in skilled mechanic trade." As a "Special Requirement/Conditions of Employment" it requires "Attend and acquire a certificate of achievement for Water Treatment."

The Union grieved the Division's refusal to offer the formal option of position #0770.

DISCUSSION

The parties find two potential issues in this dispute: whether the definition of "Skills and Abilities" in Section 34.8 limits the State's obligation to considering a target employee's *employment* history—or, in this instance, whether the State was obliged to discover and consider Mr. Saxon's experience in repairing and maintaining his home and rental properties---and,

ultimately, whether the Union established that the State misapplied the CBA when it concluded that Mr. Saxon did not have "the required skills and abilities" for position #0770.

The State argues that the first issue is resolved by the language of Section 34.8 on its face, which, the State urges, requires the agency to match the documented skills and abilities of the position with the similarly documented skills and abilities of the employee at hazard of layoff. If we look at how the expression "skills and abilities" is used throughout the rest of the article, I agree that Section 34.8 is amenable to that interpretation. But that is simply because the use of that expression throughout the rest of the article would otherwise leave a hole: If "skills and abilities" applies *only* to the requirements for a position *and not* to the accomplishments of the employee, as the Union suggests, then the bargainers did not address at all the obvious question of how we shall determine the skills and abilities of the employee (as distinguished from the skills and abilities required for the position).

I agree with the Union that such an interpretation of Section 34.8 does not exactly jump right off the page, and the language of that section is somewhat infelicitous if intended to apply equally to the employee and to the position. (For example, must the employee have held a position permanently for the skills and abilities of that position to attach to him or her? The drafters were careful about this question throughout the rest of the article, but, if they understood 34.8 to measure the skilly and abilities of the employee exclusively by his or her employment history, they mysteriously left that qualifier out of the mix.) But the language alone certainly does not *require* the employer to consider skills and abilities that an employee may have picked up over the years quite apart from his or her employment history, and that interpretation must be the Union's goal in the dispute at hand.

Beyond the language of the contract itself, the record includes nothing about prior administration. It may be that the parties have in the past applied Section 34.8 both to the target position and to the accomplishments of the employee in question, but that does not appear in the record before me. On the other hand, the Union has the burden of proof here, and the record certainly does not show that the parties *have not* previously applied 34.8 to measure the accomplishments of the employee as well as to measure the requirements of the position.

There is limited evidence in the record of the bargaining history behind this provision. The Union pointed out that it had two interests here: preserving the significance of seniority as much as possible and making the layoff/bumping process as clear and unarguable as possible. Of course, those two interests do not inevitably match up. An emphasis on seniority would lead to language that allowed the senior employee to stay at work whenever he or she had the skills and abilities required for the position regardless of how those skills and abilities might have been acquired. But that "regardless..." part potentially opens up administrative uncertainties and makes room for disputes which would be avoided if the match-up process were to proceed purely in terms of the written employment record. In short, nothing in the record about the bargaining history behind this language shows, more likely than not, that the parties *did not* understand 34.8 to limit the measure of the employee's skills and abilities as well as to limit the measure of the position's skill and ability requirements.

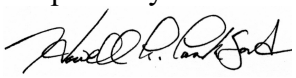
Because the Union did not show that the parties should have understood the limitations of Section 34.8 to apply *only* to the measure of skills and abilities required for the position *and not* to the measure of the skills and abilities of the employee, the Union cannot show that the State misapplied the CBA in this instance. That failure goes to the heart of this dispute, of course, and the facts of the case illustrate how central the interpretative issue is. The employer argued that it had actually gone the extra mile, with respect to Mr. Saxon, and determined that even with his skills and abilities acquired apart from formal employment he would not fit the requirements of the position. But #0770 requires "4 years of general work experience on building and equipment maintenance construction *or* repair work *or* completion of recognized apprenticeship in skilled mechanic trade," and Mr. Saxon testified that he has been doing building maintenance on his several properties since their acquisition in the 1980s. That is not an obvious misfit (although it is a bit of a stretch to get from small scale property management and maintenance to "building *and equipment* maintenance construction or repair). And the written special training requirement of #0770 is "Attend and acquire a certificate of achievement for Water Treatment," which is language that usually means an employee will be allowed to satisfy an education requirement after initial tentative placement on the job. The Agency notes that Mr. O'Brien was reclassified upward when that training requirement was added and argues that the option to train after placement would not apply to another employee transferring into the position; but that seems to be just the sort of argument that the parties went to some pains to reject by the narrow specifications of how to determine skills and abilities for the position. The agency is stuck with the written position description, and if it failed to remove an "attend and acquire" conditional requirement from the position, it is stuck with that conditional requirement come lay-off time.

In short, Mr. Saxon may very well be entirely correct in arguing that his complete life's experience gives him "the aptitude to learn all about any MM2 position. I bring a smile on my face, a positive attitude and a great work ethic." But the Union cannot show, more likely than not, that the parties should have understood the limitations in Section 34.8 to apply only to measuring the skills and abilities of the position and not to measuring the skills and abilities of the employee. The Union therefore did not show that the State violated the contract when it limited the determination of Mr. Saxon's skills and abilities to his formal employment history, and the grievance must be dismissed.

AWARD

The State did not violate Article 34 of the parties' 2009-2011 collective bargaining agreement when it failed to offer Jerry Saxon position #0770 as an option in the layoff process. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford
Arbitrator