IN THE MATTER OF ARBITRATION	)	
	)	AAA 75-390-00477-10
BETWEEN	)	
	)	ARBITRATOR'S OPINION
WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	AND AWARD
	)	
Union,	)	GRIEVANCE OF
	)	
and	)	CHERYL PEASE, ET AL
	)	
STATE OF WASHINGTON - DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
	)	
Employer.	)	

HEARING SITE:	Attorney General Offices Tumwater, Washington
HEARING DATE:	November 1, 2011
POST-HEARING BRIEFS DUE:	Postmarked January 6, 2012
RECORD CLOSED ON RECEIPT OF BRIEFS:	January 9, 2012
REPRESENTING THE UNION:	Sherri-Ann Burke Labor Advocate Washington Federation of State Employees 1212 Jefferson Street SE, Suite 300 Olympia, WA 98501
REPRESENTING THE EMPLOYER:	Donna J. Stambaugh Attorney General of Washington Senior Counsel/Assistant Attorney General 1116 W Riverside Avenue Spokane, WA 99201-1194
ARBITRATOR:	Gary L. Axon P.O. Box 190 Ashland, OR 97520 (541) 488-1573

I. INTRODUCTION

This case arises out of the reduction of hours worked by part-time employees to less than 20 hours per week as a result of legislative direction to Washington State agencies to reduce their budgets. The Washington Federation of State Employees (Union) filed grievances on behalf of Cheryl Pease (Grievant) and other part-time employees who saw their hours of work fall below 20 hours per week. The grievances alleged the Department of Social and Health Services (DSHS or Employer) violated Article 34.6 of the Collective Bargaining Agreement. When the grievances were not resolved in the lower levels of the grievance procedure, the Union advanced the case to arbitration. Prior to the hearing, the parties agreed to invoke the outcome of this proceeding and apply the result to a number of other pending and identical grievances relating to part-time employees of DSHS.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a statement of the issue. The formulation of the issue by counsel was extremely close. Based on the submissions of the parties, the Arbitrator formulates the issue to read:

> Did the Employer's action of requiring part-time employees to take temporary layoff days under Article 34.6.B and ESSB 6503 violate Article 34.6.A of the Collective Bargaining Agreement because it resulted in part-time employees working less than 20 hours per week? If so, what is the appropriate remedy?

If the grievance is denied, the issue of remedy becomes moot. If the Union prevails in this matter, the Arbitrator will retain jurisdiction for a period of sixty (60)

days after the issuance of the Award to assist with the implementation of a remedy, if any.

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 34
LAYOFF AND RECALL

...

34.6 Temporary Reduction of Work Hours or Layoff - Employer Option

A. The Employer may temporarily reduce the work hours of an employee to no less than twenty (20) per week due to an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or other unexpected or unusual reasons. Employees will normally receive notice of seven (7) calendar days of a temporary reduction of work hours. The notice will specify the nature and anticipated duration of the temporary reduction.

B. The Employer 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 other unexpected or unusual reasons. Employees will normally receive notice of seven (7) calendar days of a temporary layoff. The notice will specify the nature and anticipated duration of the temporary layoff.

...

Memorandum of Understanding Between the State of Washington and Washington Federation of State Employees
Er. Ex. 1.

Engrossed Substitute Senate Bill (ESSB) 6503
Jt. Ex. 8.

IV. STATEMENT OF FACTS

Cheryl Pease is a Financial Services Specialist 3 at DSHS working out of the Community Service Office in Spokane, Washington. Pease had worked for DSHS since December 29, 1990, and is currently working in a part-time position. She is employed for 20 hours per week (.5 FTE). Peace receives full state benefits.

The 2010 Washington Legislative session produced ESSB as part of a supplemental budget process, which occurred in the second year of the biennium and was an adjustment to the operating budget passed in 2009, the first year of the biennium. This legislation required budgetary reductions in compensation of state agencies as outlined in the Omnibus Appropriations Act. The amount DSHS was directed to reduce was approximately $16 million. Agencies were allowed to formulate a compensation reduction plan to achieve the legislatively mandated savings and submit the plan to the Director of Office of Financial Management (OFM) for approval. In the event the agency chose not to formulate a plan, they were directed to close the agency on ten specific dates outlined in the bill and institute temporary layoffs in order to achieve their savings level. DSHS chose not to adopt a compensation reduction plan, but to close and institute temporary layoffs as outlined in the legislation. There were a number of exemptions in the legislation, such as State Patrol Field Services and those providing direct care to children and vulnerable adults.

The legislation also noted the obligation to bargaining regarding the impact of the temporary layoffs. Negotiators from OFM's Labor Relations Office met with the Union on various dates in July 2010 to bargain the impact of the layoffs. The parties reached an agreement and entered into a Memorandum of Understanding

(MOU) regarding the impact of temporary layoffs. Er. Ex. 1. In a letter dated July 2, 2010, Cheryl Pease received a notice that stated in relevant part as follows:

> This is official notification that as required by ESSB 6503, you are scheduled for a temporary layoff from your position for your entire work shift on July 12, 2010. You will not receive pay for the temporary layoff day. You will return to work on your next scheduled work shift after July 12, 2010. You must not work more than your scheduled hours during the remainder of this workweek.
>
> The basis of this temporary layoff is that it is required by law, as well as an unanticipated revenue shortfall and a lack of funds. This action is taken in accordance with ESSB 6503, and Article 34 of the collective bargaining agreement between the state and the Washington Federation of State Employees. (WFSE).
>
> ...
>
> Jt. Ex. 3.

The other part-time employees who are subject to this grievance received similar letters. The Union filed a grievance dated July 19, 2010 asserting that Cheryl Pease:

> ... is a part-time employee scheduled 20 hrs per week and she works Mondays 4 hrs, Tues & Weds 8 hrs each day. With the furlough, her hours were dropped to 16 hrs which goes against Article 34.6. This is in direct opposition of not letting a part-time employees' hours fall below 20 hours in a work week.
>
> Jt. Ex. 4.

The Employer denied the grievance pointing to Article 34.6.B "which allows DSHS to temporarily layoff an employee for up to thirty (30) days due to, among other things, an unanticipated loss of funding or a revenue shortfall." Jt. Ex. 5.

The grievance was ultimately moved to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Post-hearing briefs

were timely filed. The grievance is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Union

The Union takes the position the Employer exceeded its authority and violated the Collective Bargaining Agreement by reducing part-time employee work hours to less than 20 hours each week in each month the state agencies imposed a reduction in operations. Union Negotiator Jeanine Livingston, who participated in the negotiations over Article 34.6.A and 34.6.B, testified that a temporary layoff was contemplated for a "block" or period of time when layoff would take place, versus simply an adjustment in hours over a protracted period of time. According to Livingston, Article 34.6.A contemplates an adjustment to hours of operation, much as a private enterprise would adjust hours of operation relative to their business needs. The Union submits this process falls squarely under Article 34.6.A.

Turning to the impact bargaining regarding ESSB 6503, the Union took the position that Article 34.6.A applied to this situation because the Employer was effectively reducing/altering the hours of work. The Union disputes that DSHS was initiating layoff in the traditional sense. The Union also disagreed with the Employer's interpretation that Article 34.6.B applied to the action the Employer took to reduce hours of part-time employees.

The Union argued that Articles 34.6.A and B are clear and unambiguous. When there is a reduction in hours, notice is required, and "[t]he employer may

temporarily reduce the work hours of an employee to no less than twenty (20) per week ... ." The Union claims this is clearly the scenario where the Employer is reducing operations by changing work hours and not laying off employees. Article 34.6.A was meant to address intermittent reduction of hours of work that would not reduce individual employee's hours to less than 20 hours. On the other hand, Article 34.6.B was to be followed for a block of time of up to 30 days. According to the Union, an eight-hour reduction in hours of operation during the course of a one-month period clearly falls under Article 34.6.A. Article 34.6.B anticipates a complete shutdown of the Employer's business for an extended period of time.

In sum, the Union concludes that both the contract and the legislation reflect a basic understanding that part-time employees would not fall below 20 hours of work per week. The Union also declared their intent at the impact bargaining to grieve DSHS's interpretation of the language in Article 34.6 and the drafting of the MOU related to the implementation of ESSB 6503. The Arbitrator should sustain the grievance and order the requested relief.

B. The Employer

The Employer begins by asserting the Union failed to prove by a preponderance of the evidence DSHS violated Article 34.6 when management instituted temporary layoffs of part-time employees. In the view of the Employer, Article 34.6 is clear and unambiguous in allowing management to conduct temporary layoffs and does not restrict this action to full-time employees. The clear meaning of the contract language in Article 34.6.B allows the Employer to temporarily layoff any employee, including part-time employees, for the stated reasons contained in the contract provided

proper notice is given. The only issue before the Arbitrator surrounding the application of Article 34.6 is whether part-time employees should be exempt from temporary layoffs. The Employer submits temporary employees are not exempt from temporary layoffs.

ESSB 6503 directed DSHS to achieve certain budgetary reductions relating to compensation. While there were a number of exemptions from the requirements of ESSB 6503, nothing in the legislation specifically exempted or excluded part-time employees. If the Union's position were allowed to proceed, an entire category of employees would receive an exemption not contemplated or ordered by the legislature.

Article 34.6 has two separate parts--one for temporary schedule changes and another for layoffs. According to the Employer, Article 34.6.B is modified by 34.6.A that reserves to management the right to determine which of the provisions would be implemented. Article 34.6.B allows management to implement temporary layoffs or a reduction in hours. Adoption of the Union's interpretation would render Article 34.6.A unnecessary and, therefore, meaningless. The Union's interpretation would lead to the absurd result that senior full-time employees would be subject to layoff while a less senior, part-time employee would be protected and exempt from layoff. The Employer submits this is an illogical, if not absurd outcome. There is no contractual prohibition on layoffs, permanent or temporary, for part-time employees.

It is a fundamental intent of labor relations that a party cannot get through arbitration what they could not obtain through negotiations. The Union unsuccessfully attempted to exclude part-time employees from the temporary layoffs in the impact bargaining for the MOU. The Union repeatedly tried to exclude part-time employees

working 20 hours per week or less from temporary layoffs but eventually agreed to their inclusion.

Regarding bargaining history, the testimony of Livingston is not persuasive. The various contract proposals to part-time employees were admitted and are shown in Employer Exhibit. 5. No reference to part-time employees in relation to temporary layoffs is found in any of these proposals, nor is there any indication they would be treated differently than full-time employees for purposes of temporary layoffs.

Grievant Pease' FTE designation was .5 FTE which did not change as a result of a one day per month temporary layoff. In the view of the Employer, there was no temporary schedule change, but rather temporary layoffs, which fully complied with the contract, the legislation, and the MOU between the parties.

For all of the above-stated reasons, the Employer requests the Arbitrator deny the grievance of Pease and the Union and find no violation of the contract article as alleged.

VI. DISCUSSION

The Arbitrator finds the Union failed to prove by a preponderance of the evidence the Employer violated Article 34.6 of the Collective Bargaining Agreement when DSHS temporarily laid off part-time employees that resulted in those employees working less than twenty (20) hours per week. Contract language and the evidence produced at the arbitration hearing support this conclusion. Accordingly, the grievance will be denied and dismissed in its entirety. The reasoning of the Arbitrator is set forth in the discussion that follows.

The fundamental goal of contract interpretation is to determine and give effect to the intent of the parties as expressed in the collective bargaining agreement. In issues of contract interpretation, arbitrators are controlled in the first instance by the contract language. Past practice and bargaining history may be important to ascertain the meaning of a contract in dispute where the language is ambiguous or unclear.

The chain of events that set in motion the circumstances leading up to this grievance was the passage in 2010 by the Washington State Legislature of ESSB 6503. DSHS was ordered by the legislature to achieve certain budgetary reductions relating to employee compensation. DSHS was given the option to adopt a comprehensive pay plan adjustment or close the agency for 10 days and to implement layoffs. DSHS elected to close the agency on the 10 days specified in the legislation. Pursuant to ESSB 6503, employees who were not exempt under the law would be temporarily laid off.

The legislature created several exceptions to the temporary layoff provision such as for those employed in public safety, information tech systems, and those employees making less than $2,500 per month. After careful review of ESSB 6503, I conclude there is no language in the legislation that supports a legislative intent to exempt part-time employees from the temporary layoff.

The Employer accepted the option under ESSB 6503 to close DSHS on the 10 days specified in the legislation. Following the legislative mandate, the Employer notified Grievant Pease and other similarly situated employees that they were "scheduled for a temporary layoff from your position for your entire work shift on July 12, 2010." Jt. Ex. 3. I find the Employer's implementation of the legislation to comport with

the obligations set forth in Article 34.6 of the Collective Bargaining Agreement. The title of Article 34.6 is "Temporary Reduction of Work Hours or Layoff - Employer Option." Emphasis added. I find the use of the words "Employer Option" in the section title is strong evidence that management reserved the option to reduce hours or to implement a temporary layoff. Article 34.6.A and 34.6.B begin with the phrase:

> A. The Employer may temporarily reduce the work hours of an employee to less than twenty (20) per week ... .
>
> B. The Employer may temporary layoff an employee for up to thirty (30) calendar days ... .

By the use of the words "The Employer may" in each of the above-quoted sections, I hold that management has broad discretion to determine whether to reduce the hours of employees or layoff employees. It is undisputed there was an "unanticipated loss of funding" that triggered the implementation of Article 34.6. Further, the parties agree that the notices of temporary layoff were properly provided to affected employees under Article 34.6.

The Employer exercised its discretion to temporarily layoff employees under Article 34.6.B. According to the Union, DSHS violated Article 34.6.A by reducing the hours of part-time employees to less than 20 hours per week. The Union reasons a one-day reduction in hours does not constitute a temporary layoff under Article 34. I disagree. DSHS closed its offices on July 12, 2010, and temporarily laid off all employees, including part-time employees. DSHS announced it would close its offices for the remaining nine days specified in ESSB 6503. I find the Employer properly exercised its broad discretion under Article 34.6 to close its agency offices and to temporarily layoff employees, including part-time employees.

Absent from Article 34.6.B is any reference that part-time employees were exempted from the temporary layoff provision. The language in Article 34.6.B refers to the temporary layoff of "an employee." Part-time employees are employees for the purpose of a temporary layoff. In order to adopt the Union's interpretation, I would have to create an exception for part-time employees. This Arbitrator has no power to add an exemption for part-time employees from the temporary layoff in the language of Article 34.6.B.

I must also reject the Union's interpretation to add the 20-hour floor in reduction of work hours found in Article 34.6.A to Article 34.6.B. Article 34.6.A concerns a reduction in hours and Article 34.6.B applies to the implementation of a temporary layoff. I find nothing in the contract language that would suggest the parties intended to graft the minimum 20 hours found in Article 34.6.A to Article 34.6.B. Arbitral authority teaches that when faced with different interpretations of a contract, one of which would render a provision meaningless, the arbitrator should choose the interpretation that would give effect to all provisions. Grafting the 20-hour minimum from Article 34.6.A to Article 34.6.B would render Article 34.6.A unnecessary and meaningless.

The Employer's position is further strengthened by the MOU. In the opening paragraph, the parties express that they had "bargained the impacts of the temporary layoff days referenced in ESSB 6503, Section 3(2)." Er. Ex. 1. In almost every section of the Memorandum of Understanding, the parties referred to the actions that were being taken as a "temporary layoff." Noticeably absent from the MOU are words to the effect, "temporarily reduce the work hours of an employee."

Section 5 of the MOU specifically addresses the subject of part-time employees. Section 5.a states:

> For part-time employees:
>
> a. Employees will be required to take the number of hours they are scheduled to work on a designated day of temporary layoff.
>
> Emphasis added.

The parties also used the words "temporary layoff" in subsection 5.b and d. No mention is made of reduction in hours of work in the MOU provision directly related to "part-time employees."

During the impact bargaining for the MOU, the Union repeatedly tried to exclude part-time employees working 20 hours per week or less from the temporary layoff provision. The Union's efforts were unsuccessful as there was no agreement to exclude part-time employees from the "temporary layoffs." I agree with the Employer that the Union should not be able to achieve through arbitration what they failed to obtain during bargaining. In sum, a review of the Memorandum of Understanding by this Arbitrator forces the conclusion that the parties themselves understood during impact bargaining that the issue being addressed is temporary layoffs on the days specified by the legislature. For the Union to now argue what the parties were really talking about was reduction in work hours is disingenuous at best.

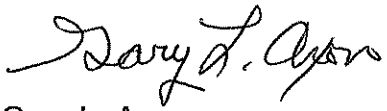
The Union argued that the layoff provision only applied to blocks of time where the employee would be temporarily laid off for thirty (30) consecutive days. There is nothing in Article 34.6.B that supports this conclusion. The reference in this section is "layoff an employee for up to thirty (30) calendar days." Emphasis added. I hold this language does not require the Employer to layoff employees for a block of time

rather than one day at a time. Therefore, I find the Union's evidence on bargaining history to be unpersuasive in the face of clear and unambiguous language contained in Article 34.6.

AWARD

Having reviewed all of the evidence and argument, and having had the opportunity to observe the demeanor of the witnesses during their testimony, I hold the Employer acted in conformance with Article 34.6 when DSHS implemented a temporary layoff for part-time employees that resulted in part-time employees working less than 20 hours per week. The grievance is denied and dismissed in its entirety. The fees and expenses of the Arbitrator are payable equally by the parties.

Respectfully submitted,



Gary L. Axon
Arbitrator
Dated: January 18, 2012