

BACKGROUND

The State of Washington and the Washington Federation of State Employees, hereinafter referred to as the Union, entered into a Collective Bargaining Agreement covering several State Agencies. The Agreement in effect when the grievance arose began on July 1, 2009.

The Department of Ecology, hereinafter referred to as the Department, is one of the Agencies covered by the Agreement. The Department performs several functions throughout the State of Washington. One of the programs of the Department is the spill preparedness, prevention and response program. The Department has divided the State into four regions; Eastern, Central, Northwest and Southwest to provide coverage under this program. There are several different classifications that work in each of the Regions. The Responders are the employees mainly responsible for cleanup of any hazardous waste spills or other types of spills that could harm the environment. In addition to that job duty, they have other duties. These other duties include; practicing and maintaining their certification and training and maintaining vehicles and equipment they utilize for cleaning up any spills. This Section is on-call 24 hours a day, 365 days a year. The full-time responders work Monday-Friday. Each one is then on-call one week out of 4 to 6 weeks, depending on the Region. It is one in five in the Southwest Region. These employees are on-call in the evening and during weekends and holidays. At least two employees are on-call at all times. Employees who are on-call serve in that capacity for an entire week. The two employees respond to any emergency

that occurs after-hours. If there is a spill and more employees are needed, they will be called on their pagers which they must carry.

Some Regions, such as the Eastern and Central Region only have 1.5 FTE Responders. The Southwest Region has 8 FTE's. Given the need for two employees to be on-call at all times, the Department has trained other employees in the Department to respond to hazardous material spills. They have been designated as after-hours responders. These employees have other full time jobs. When it is their turn to be on-call, they respond in the same way as full-time responders, except their job is to assist the full-time responder. The full-time responder is in charge. This rotational system has been in place for over 20 years without objection by the Union or employees.

The State of Washington, like many States was experiencing a revenue shortfall during 2010-11. The Legislature met to address the shortfall. It passed a bill which declared: "that an unprecedented revenue shortfall necessitates immediate action to reduce expenditures during the 2009-2011 fiscal biennium." The bill required all State Agencies to cut their budgets. To accomplish that task, it allowed each Agency to develop a plan if it so desired to cover the shortfall. If an Agency chose not to develop its own plan, than the Legislature designated 10 days over a period of 10 months as furlough days. The first furlough day was July 12, 2010 and the last was June 10, 2011. These days were mandatory unpaid days. In passing the law, the Legislature recognized that certain functions needed to be carried out at all times. It, therefore, included exemptions to the mandatory layoff requirement. In some

cases, an entire entity was excluded, such as the University of Washington Medical Center and the Harborview Medical Center. Subsection 4(d) exempted: “Hazardous materials response or emergency response cleanup.”

The Union met with the State to negotiate over the implementation of the Law and its impact on the bargaining unit.¹ Representatives from the Agencies affected were part of the bargaining team. Polly Zehm, the Deputy Director, attended on behalf of the Department. She was questioned by the Union on July 7, 2010 on how Ecology would handle the furlough days. The bargaining notes from that session indicate she stated during a joint bargaining session:

In reading the Statute, we believe it was referring to hazardous response functions, not a program. How do we define spills response function, when the Agency is not open? Spill response is 24/7 activity, we have paid standby list. In defining exemptions on layoff day, we used our standby roster. That is how we selected the people who are exempt and already scheduled to be ready available for after-hours response on the days of temp layoff. We used normal duty roster, not seniority. It is a known and effective selection method for identifying employees for spill response.

The Union stated in response to her presentation it would “have to get back to you on that.” Several questions were then asked and at the end the Union indicated if it had “any other questions, we’ll get back to you.” Ms. Zehm explained the process a second time in a subsequent bargaining session.² Again, the Union indicated it would “have to get back to you on that.” The subject apparently did not come up again after this second reference. The

¹ The Union stated during negotiations that it did not agree with the requirement that there be furlough days and contested it in Court. Despite that fact, it realized if they were going to occur, negotiations over the implementation were needed.

² Employer Exhibit 34.

Parties did then sign a Memorandum of Understanding. Paragraph 15 of that MOU addressed the Responders. It provided:

If an employee is required to respond to an emergency during a temporary lay-off day specified in ESSB 6503, that employee will be considered exempt from the temporary layoff for that month.

The Office of Fiscal Management set the amount each Agency had to reduce its budget. The Department of Ecology had to reduce its budget by \$3.2 million. The Department decided not to offer an alternative plan to save funds so it was required to have furlough days. It considered several options such as exempting all full-time responders or only full-time responders being on-call on furlough days. In the end, it decided to use the regular rotation system and not exempt all full-time responders. On furlough days, two employees were on-call and paid and all others were furloughed. Depending on the rotation, the employees who were on-call could be full-time responders or the after-hours responders.³ The roster was modified after its initial preparation because many of the same employees would be on-call during the furlough days using the present rotation. To equalize it, modifications were made. Additional changes were made after that as employees traded days like they had done in the past to accommodate their own personal needs. Those not on-call were directed to turn off their pagers. Since these employees were overtime eligible, the Department did not want them to respond unless specifically called by the heads of the Department.

³ When an after-hours responder was exempted the employee would perform his or her regular duties until needed for an emergency. The full-time responder would do his or her normal duties as a responder until needed for an emergency.

The Legislature had listed ten days as furlough days. The Department was able to gain the required \$3.2 million savings in seven furlough days. The last three were then cancelled. The Department had decided in implementing the furloughs in the way it did it could increase the savings resulting from each furlough day by increasing the number of employees furloughed. That was the main reason it decided to use the on-call rotation rather than exempting all the full-time responders.

Several bargaining unit employees in the Southwest Region objected to the manner in which the Department implemented the layoffs. They felt all Responders were covered by the legislation and all should have been made exempt. They also felt that only full-time responders should have been on-call and not any after-hours responders. Grievances were filed after each of the furlough days.⁴ The grievances alleged violation of Articles 34.6, 42.1 and 42.22. Section 42.1 addresses “Pay Range Assignments and Section 42.22 covers “Assignment Pay.” Section 34.6 deals with temporary layoffs. This Section reads in pertinent part:

B. The Employer may temporarily layoff an employee for up to 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... The notice will specify the nature and anticipated duration of the temporary layoff.⁵

⁴ One of the grievances was filed on August 30, 2010. The furlough day it addressed occurred on August 6. The Department argues this grievance was untimely filed and should not be considered by the Arbitrator.

⁵ The Department did send layoff notices to each of the Responders for the days they were not on-call. The notice stated: “The basis of this temporary layoff is that it is required by law, as well as an unanticipated shortfall and lack of funds. This action is taken in accordance with ESSB 65023 and Article 34 of the collective bargaining agreement...”

D. A temporary reduction of hours or layoff will be in accordance seniority... in the job classification at the location where the temporary reduction of hours or layoff will occur.

The grievances in addition to citing the above Contract Articles also alleged:

Spill responders are specifically exempted from the furlough (temporary layoff under the enacting legislation Senate Bill 6503 (citing Section D of the legislation)...

Only two spill responders in the southwest region (including a non-full-time, or after-hours responder, from the hazardous waste program) were exempted for the furlough day by the Department of Ecology. As a result, the Grievants were wrongly prohibited from working (locked out) for the layoff day... and received less pay than than their contracted salaries...

The seven grievances each contained the same allegations. They were consolidated for this proceeding.

POSITION OF THE UNION

The grievance is arbitrable. Any doubt regarding arbitrability should be resolved in favor of arbitration. A grievance is defined to include questions of misinterpretation of a provision of the Agreement. The legislation could only be applied to these employees because of the language of Article 34.6, which permits temporary layoffs. Allowing the matter to be arbitrated also conforms to the Parties commitment to resolve matters through the grievance procedure and out of fairness to the employees.

The Department should have exempted all full-time responders. All of them are engaged in hazardous materials spill response. Given that fact, it is clear they all fell within the exemption in the Statute. This would conform to how these employees have been treated in the past when there have been closures

for other reasons. Other Agencies who also perform hazardous material response functions exempted all of their employees from the layoffs.

After-hours responders should not have been exempted. Their regular function was not handling emergency situations. They were not exempt under the Statute. It would have been possible to have only full-time responders report to work on furlough days and do their regular job until needed for an emergency response. The manner in which it was handled by the Department violated the Statute and the Collective Bargaining Agreement.

The decision to interpret the Statute to mean that only the hazardous response function was exempted rather than all the full-time employees involved in hazardous material response was contrary to the language of the Statute and violated the Agreement as well as past practice. The Statute exempted "spill response" and since the full-time responders perform that function daily, they all should have been exempted. It also jeopardized their ability to handle an emergency because they were directed not to carry pagers. This meant fewer people were available in case of a major mishap. The Department was not maintaining the function of hazardous response by having only two people available on what is a normal workday for businesses. They were providing even less coverage than was provided on weekends and holidays. The only reason the Department made the decision it did was so that it could gain the savings needed in as short a timeframe as possible. This goal did not give the Department the right to ignore the Statute.

The Department claims it needed to make the employees who were working on furlough days overtime eligible for the entire week as it regularly does. They could have simply made the full-time responders exempt and on-call for only the furlough day.

The Department ignored the language in Section 34.6 that requires temporary layoffs be made in accordance with seniority. The Employer contends this issue was never raised earlier, but all the grievances cited Section 34.6 as being violated. If the Arbitrator finds that not all of the spill responders should have been exempt, he should find the Department violated this Section by failing to follow the seniority requirements.

The August grievance was timely filed. It was filed as soon as the paycheck that included the furlough day was received. This was when Grievants were actually aggrieved.

The Department introduced considerable notes from the bargaining sessions that led to the MOU. While the methodology the Department was going to use was discussed, there is no evidence it was ever agreed to by the Union. These notes should carry no weight in this matter.

POSITION OF THE DEPARTMENT

The Union is asking the Arbitrator to interpret provisions of ESSB 603. Performing such a function would exceed the authority of the Arbitrator. Arbitration is a matter of contract and the Parties did not agree to allow the Arbitrator to review matters outside the Agreement. Only issues involving the interpretation and application of the Agreement are made arbitrable. The

Department cannot be compelled to arbitrate an issue beyond what it agreed to arbitrate under the terms of the Agreement. Both the United States Supreme Court and Washington State Courts have clearly stated this to be so. The Union contends the law is an extension of the Agreement. It is not. It is a legislative response to a fiscal emergency. The Union concedes temporary layoffs are permissible under the Agreement. Given that admission, it is apparent the Union is in reality seeking an interpretation of the Statute, not the Agreement. The Grievances should be dismissed for this reason alone.

The Union during the processing of the grievance took issue with the Department's interpretation of the Statute. It never argued seniority was involved or that the Department decision violated any seniority provision. It cannot now claim there is such a violation in light of the position it took previously. It would be unfair to the Department to allow the Union to change its argument at this juncture. It is the grievance document that governs the grievance and that document references the Department decision under the Law not to exempt all full-time responders, not a violation of seniority rights.

The Agreement must be read as a whole. The Management Rights clause was placed into the Agreement in conformity with State Statutes that set forth issues that were not to be negotiable. The Arbitrator should consider the implication of the Management Rights Clause not just Section 34.6 when deciding this issue. The Parties clearly stated in their Agreement that the State could take "whatever actions are deemed necessary" in emergencies. This language is dispositive. The Department has been granted considerable

discretion in how it handles an emergency. The decision on how to meet the financial needs of the Department has been left to the Department. This included the right to include the Grievants in the layoffs.

Even if the Arbitrator finds he can interpret ESSB 6503, he should still rule in the Department's favor. The Statute exempted activities and in some case entire Agencies or institutions. It distinguished between the two and specifically listed the name of the Agency or institution when exempting it. It did not do that for Ecology. It only exempted an activity, not the entire Section. The Legislature wanted to ensure the function was still covered, but did not say all responders were to be exempt.

A grievance involving a layoff must be filed within 21 days of the layoff. The Union filed a grievance on August 30 covering the August 6 layoff. This grievance was untimely filed.

DISCUSSION

There is no dispute that the State of Washington was faced with a budgetary shortfall which required emergency measures be taken. The Office of Financial Management concluded the Department needed to trim its budget by \$3.2 million as its share of savings needed State wide. This would have to come from unpaid furlough days. The Union in this proceeding does not take issue with the State for declaring a financial emergency or for requiring furlough days. It also concedes temporary layoffs are permissible under Section 34.6 and the reason they were done here falls within the terms of the Section.

What the Union does contest is the Department decision as to who should be temporarily laid off. It finds fault with the way the Department interpreted the Legislation. It believes the Arbitrator has authority to question the Department's interpretation of the legislation because of the language in Article 34.6. It argues since the layoffs can only take place by virtue of 34.6 then it must follow that any question about the interpretation of the legislation regarding who was to be laid off directly flows from Article 34.6. Specifically, it feels that the Legislature when it excluded "Hazardous material response or emergency response and cleanup" meant to exclude all the employees who perform the function. These are the full-time responders. The question is whether Article 34.6 does provide it with a vehicle to get to this issue?

The Arbitrator finds the answer to the question is no. An interpretation of Section 34.6 does not ipso facto require the Arbitrator to interpret the Statute that called for temporary layoffs. As the Employer concedes in its brief the use of external law in interpreting language in an agreement is sometimes required. It cited Elkouri and Elkouri, 6th Edition at p. 508:

The extent to which external law should be a factor in the arbitration of a dispute between parties to a collective bargaining agreement presents a difficult and thorny question. Many who have pontificated on the subject have regretted their word when faced with the arbitration of the next case. The only thing of which it is possible to be certain is that it would not be prudent to lay down broad rules on the subject without a degree of tentativeness and caution.

When external law is considered it is done to assist in the interpretation of specific language in the Agreement or it can be used to determine whether a provision in the Agreement is in some way contrary to a Statute? Article 34 is

the Article referenced by the Union. Article 34.6 (B) is the specific sub-section that permits temporary layoffs. This sub-section does not address who can be laid off. It has procedures to be followed elsewhere in the Article, but there is nothing in this sub-section that says when there is a temporary layoff, certain full-time employees must be exempted. The exemption is in the Statute not the Agreement. What the legislature meant may be an interesting question, but it is not one with which this Arbitrator must gravel. There is nothing in the Statute that is contrary to Article 34.6 (B) and there is nothing in 34.6(B) that addresses this exemption. Conversely, the State, including this Department, reserved certain rights to itself under Article 35, the Management Rights Clause. The right to make determinations regarding layoffs or deal with an emergency falls within those rights. As long as the determination does not violate any portion of the Agreement, then the decision is the Department's to make.⁶ The decision to interpret the exemption provided in ESSB 6503 to not exclude all full-time responders did not violate 34.6 or any other provision, and is not arbitrable.⁷

The State met with the Union prior to the first layoff to discuss how it would implement them. They had several bargaining sessions. During a few of those sessions, the discussion focused on the Department of Ecology. Ms. Zehm

⁶ The Union argued the procedure followed weakened the Department's ability to deal with an emergency. Whether the decision was a good one or bad one is not a question this Arbitrator can decide. It too falls under management rights.

⁷ The Department in reaching the conclusion it did compared this exemption with others listed in the legislation. It noted where the legislature intended to exempt an institution or agency or part of an agency it did so. That was not done in sub-paragraph d of the Statute. This rule of construction is not new. Arbitrators frequently avail themselves of this rule when trying to ascertain the intent of the parties. See Elkouri 6th edition at p. 462-7.

spelled out the process it would follow. It would utilize the regular rotation system it had used for at least two decades. The Union bargaining team had some questions and indicated it would get back to her if it had others. It did not get back to it. The Department takes this as acquiescence or agreement by the Union to this procedure. The MOU says that anyone called out in an emergency would be exempt for that month. That is the only reference in the MOU to emergency response, other than a provision regarding 4x10's rather than 5x8's, which is not relevant here. The rotational system discussed during negotiations is not referenced. The notes indicate the Union would let her know if there were questions, but they do not show there was agreement with this procedure. The Arbitrator finds that while the Department should be commended for explaining it as they did the silence by the Union was not acceptance by the Union with this procedure. The Arbitrator agrees with the Union that the bargaining over the MOU does not in some way bar the Union from arguing what it is now arguing.

The Department followed through with the procedure it had explained during negotiations. It made both full-time and after-hours responders eligible for on-call on the furlough days. The Union believes only full-time responders should have been on-call on these days. The Department has questioned whether this subject was ever broached by the Union during the processing of the grievance through the earlier steps of the grievance procedure. It views this as a seniority argument and believes seniority was never raised as an issue.

The exhibits show the Union did raise an issue over after-hours responders being allowed to be on-call during the furlough days during the grievance process. The September 16 letter from Ms. Zehm rejecting one of the earlier grievances notes one of the remedies requested by the Union was:

Implementation of the temporary layoffs be changed to utilize full-time responders instead of the after-hours spill response rotation.

While it appears the discussion again involved an interpretation of ESSB 6503 as to whether these employees performed the function listed and not 34.6, the Union did cite 34.6 in its grievance. There are five sub-paragraphs in the Article. The Department when sending out layoff notices specifically relied on the legislation and Article 34.6 as justification for their action. It did not just cite Section B of the Article. It cited the whole Article as it had it to do. It could not pick and choose the Sections it wanted applied and ask that the others be ignored. The Article must be viewed in its entirety. This means sub-section D involving the order in which individuals are to be laid off must be considered. The pertinent language in D is that layoffs be done by “seniority... in the job classification at the location where the temporary reduction in hours or layoff will occur.” These words must be given significance.

The Department has argued that the rotation system has been in place for years and has become a past practice. The rotational system puts all employees, both full-time and after-hours, on-call the same amount of time. Seniority it notes has never been a factor and the Union in the past has never complained that seniority language was not being followed. The evidence fully supports those facts. However, this appears to be the first time at least in

recent history there were to be furlough days. 34.6, therefore, had not had to be utilized for this purpose in the past. The normal practice cannot then be a binding past practice in a situation that has never previously arisen. This is especially so where the language now being utilized for the first time to justify the layoffs also has seniority language now also being used for the first time regarding the order in which they should be done.

Section 34.6 provides that layoffs should be done by seniority “among the group of employees with the required skills and abilities as defined in Section 34.8 in the job classification...” Section 34.8 states skills and abilities include certifications and duties as outlined in the job description. It is the responders per the job description that have all the required skills and abilities for emergency response, not the after-hours responders. While the after-hours employees possessed some of the skills, they did not possess the full panoply of skills required. The fact that the after-hours employee works under the full-time responder and that one of the two had to be a full-time responder highlights the difference in skill and abilities. The responders are in a different classification than the after-hours responders. The Arbitrator finds it is that classification that the Section covers. The Department included employees in a classification without all the needed skills with a classification that possessed them. This was “not in accordance” with sub-section D and thus a violation of the Agreement.

The Department had considered several options, including using only full-time responders before deciding to use the regular rotation system. It rejected

this option because of the limited number of responders in the Eastern and Central Regions. With only 1.5 FTE responders in these regions, they felt it was impossible to have only full-time responders on-call during the furlough days. It chose not to differentiate between regions in how it handled the furlough days. However, as the Union notes these grievances only involve the Southwest Region. In addition, 34.6 states seniority is to be utilized by classification and by location. This means the rules can be different in one region than another. While it might not be feasible to limit the on-call time to this classification in some regions, it was possible to do so in others, including the Southwest.

The Department also argued changing the rotation system for the week that encompasses the furlough day would mean the employee would have to be on-call for the entire week. It contends this would cause chaos with the entire rotation system. The Union notes there is no requirement in the Agreement the employee on-call on the furlough day had to be on-call the entire week. The Department could have simply put the employee on-call for the furlough day and then resume the regular rotation. The Arbitrator agrees with the Union on this point. While an employee has always been on-call for an entire week, that is not an immutable requirement. This was a very unique situation that carried its own unique problems and which implicated a contractual provision not previously utilized for this purpose. Thus, the mechanism for dealing with this unique situation required a deviation from the norm in order to comply with the contractual requirements it had to follow.

The question then is whether straight seniority among the full-time responders should have been used in deciding who would be on-call? In considering that question, the Arbitrator is cognizant of what transpired after the schedule first came out. The responders themselves changed it around to equalize the days employees would be off. The employees did not take the position the most senior employees should be the employees' on-call for each furlough day, nor has the Union argued that only the most senior employees had to be on-call.⁸

The Arbitrator was provided a list containing the names of the employees who worked on each of the furlough days and a different list with the names of the full-time responders in the Southwest Region. It appears from the two lists there were only three of the seven days where an after-hours employee was on-call. Nanette Brooks was on-call July 12 and October 11, 2010. Roger Sesna was on-call September 7. In the other four days, two full-time responders were on-call. It is thus only three days that are impacted by the findings made here.⁹ The full-time responders wanted to equalize the impact rather than follow straight seniority rules. The Arbitrator respects that choice and in-keeping with that desire finds that Grievants Stolz, Holcolm and Osweiller¹⁰ each shall

⁸ In this regard, the Department was not incorrect when it argued seniority was never an issue raised by the Union.

⁹ The Department questioned the timeliness of the August grievance. In August John Hansen and Andrea Unger worked. Both are full-time responders according to Organization Chart. Thus, August is not affected by this ruling so the Arbitrator need not rule on this question.

¹⁰ Stolz was not on-call on any of the days. The reason for that was the fact that he traded a day for a furlough day that was later cancelled. He is still entitled to pay under this ruling. Holcomb only worked one day and is on the top of the list for September. Osweiller also only worked one day and he is ahead of the only other person who only worked one day in October.

receive one day of pay equal to what they would have received if on-call for the day.¹¹

AWARD

1. The grievance is sustained in part and denied in part.
2. The issue regarding the interpretation of ESSB 6503 is not arbitrable.
3. The Department violated the Agreement when it included after-hours responder on the on-call list on temporary layoff days.
4. Grievants Stolz, Holcolm and Osweiller should each be made whole for loss of pay for one furlough day.
5. The Arbitrator shall retain jurisdiction for no less than 60 days to resolve any issues regarding the implementation of this Award.

Dated: February 17, 2012.



Fredric R. Dichter,
Arbitrator

¹¹ To be clear, it is one thing to not strictly enforce seniority within the given classification, responders, and a totally different thing to say that the Department can then use the normal rotation system, including employees out of the classification to cover the furlough days.