IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL and HEALTH SERVICES,	)	
Employer,	)	ARBITRATOR'S DECISION AND AWARD
and	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES,	)	AAA No. 75 390 00170 12
Union.	)	
(Edith Vance Arbitration)	)	

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I. INTRODUCTION

The Union contends that the Department violated the seniority provisions of the CBA when it designated Ms. Vance for four furlough days (a "temporary layoff" under the terms of the Agreement) in 2012. A less senior Social Worker 3 ("SW3") at the Department's Spokane facility, says the Union, should have been furloughed instead. The Department counters that the furlough was required by legislation designed to address a significant revenue shortfall in the

State, and that while employees providing "direct protective services to children" were exempt from temporary layoff under the legislation (ESSB 6503), the Department designated only those SW3's carrying active caseloads as falling within the statutory exemption. Because Ms. Vance did not carry an active caseload, argues the Department, she did not qualify for the exemption, and once properly laid off, Article 34.6(C) of the Agreement prohibited her from using her seniority during the temporary layoff to bump into a position held by a less senior SW3.

At a hearing held in Spokane, Washington on May 17, 2013, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed, and I have carefully examined the transcript in the course of my evaluation of the evidence. Counsel filed simultaneous electronic post-hearing briefs on June 28, 2013, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties were unable to agree on a precise statement of the issue to be decided, but they agreed that I should formulate the issue statement after hearing the evidence and argument. Tr. at 7-8. I find the following to be an appropriate statement of the issue:

> In implementing temporary layoffs pursuant to the requirements and limitations of ESSB 6503, did the Department violate Article 34.6 of the parties' CBA by designating Ms. Vance for four furlough days? If so, what is an appropriate remedy?

III. FACTS

Facing an unprecedented revenue shortfall in the second year of the 2009-11 biennium, the Legislature adopted ESSB 6503 during a special session in April 2010. The legislation directed specific dollar amounts of reduced spending on employee compensation by State

agencies, including the Department, and required the reductions to be accomplished through ten temporary layoff days during the remainder of the biennium. In the alternative, however, individual agencies could design compensation reduction plans to achieve equivalent savings through other means.[1] The legislation exempted certain State functions from the required temporary layoffs, including

> direct protective services to children and other vulnerable populations, child support enforcement, [and] disability determination services in the department of social and health services.

See, § 3(4)(b). ESSB 6503 did not specifically define "direct protective services to children," but in implementing the bill, the Department determined that SW3's carrying caseloads, i.e. those who had the cases of specific children assigned to them for processing through the system, would be treated as providing "direct protective services to children" and thus be exempt from temporary layoffs. Those SW3's who performed related functions but did not carry a caseload, on the other hand, would not be exempt.

At the time of the required temporary layoffs during the summer and fall of 2010, Ms. Vance was designated as a "family search" worker within the Department's Indian Child Welfare unit. In that position, she attempted to locate relatives of children who had been removed from their homes with the hope of finding an appropriate family placement for them. In performing that function, she did not carry a caseload of specifically identified children for whom she had overall responsibility, although the Department concedes that she performed "direct protective services to children" in her other role as a support person or backup to SW3's carrying caseloads, and during vacancies in such positions. Tr. at 76. Because that was her "secondary assignment," however, the Department did not treat her as exempt based on

[1] The Department devised a plan that met the salary reduction goals through just four furlough days.

performing those functions. *Id.*[2] Consequently, although there were many SW3's in Spokane junior to Ms. Vance on the four occasions in 2010 on which she was placed on a day of temporary layoff (July 12, August 6, September 7, and October 11), the Department did not recognize her greater seniority because it judged those junior employees to be exempt under its application of the statutory criteria, i.e. those junior employees were carrying caseloads, and Ms. Vance was not. On each occasion, the Union filed a grievance on her behalf which the parties were unable to resolve in the preliminary steps of their contractual grievance and arbitration procedure. These proceedings followed.

IV. DECISION

The issue before me requires an interpretation of the following Article of the parties' CBA:

> 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.
>
> * * * *
>
> 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 if the layoff was due to the lack of funds;
> 2. *Bump into another position*, or
> 3. Be placed on the layoff list.

Agreement, Article 34.6 (emphasis supplied). While the Department urges that I keep ESSB 6503 in mind when construing this contractual provision (and I agree that I should), I have no

[2] As an aside, it appears that the Department treated some SW3's working as "rate assessors," a function that also does not carry a caseload, as exempt from temporary layoff on the basis that they had other duties that met the "direct protective services to children" category. Exh. 6; *see also*, Tr. at 74-76. The evidence does not clearly establish why the Department did not consider Ms. Vance, in light of her "secondary assignments," as exempt under the same mode of analysis

power to interpret or apply external law under these circumstances. Rather, my sole task is to interpret the parties' CBA.[3] That is not to say that ESSB 6503 is totally unrelated to the analysis. The Department contends, for example, that it retained the management right to apply the somewhat uncertain statutory commands in the context of the Department's operations, and so long as it has done so reasonably and in good faith, the Arbitrator should not interfere. Reduced to its essence, in fact, the Department's argument is this: the agency retained the right to apply ESSB 6503 reasonably; it was reasonable to make the "caseload carrying versus non-caseload carrying" distinction in implementing the "direct protective services to children" exemption of the statute (and to lay off Ms. Vance as a result); and once having done so, Article 34.6 does not assist Ms. Vance because that Article expressly provides that a person on temporary layoff cannot "bump to any other position" (which, according to the Department, is what Ms. Vance seeks to do by arguing that she should have replaced one of the junior SW3's on each of the four days).

The Union, not surprisingly, approaches the problem from the opposite end, i.e. it begins with the contractual seniority language and argues that I need not even consider ESSB 6503 because nothing in the Agreement is contrary to the statute, nor does the statute require the Department to violate the contract. The Union's central argument is as follows: the CBA requires that temporary layoffs be accomplished by seniority "among the group of employees with the required skills and abilities . . . in the job classification at the location where the temporary reduction in hours or layoff will occur"; the "job classification" at issue here is SW3; Ms. Vance was senior to a number of SW3's at the location of the layoff who were not laid off, even though

[3] There are times, of course, such as when the parties incorporate statutory principles into their Agreement, that an arbitrator is justified in construing a statute or other provision of external law, *but only because the parties have made those principles part of their contract*. Here, however, as both parties have noted in their respective briefs, ESSB 6503 does not mention the parties' contract, and the contract does not mention ESSB 6503. Thus, there is no basis for me to exercise jurisdiction to interpret and apply ESSB 6503.

she clearly had the "skills and abilities" to perform SW3 work; nothing in ESSB 6503 authorized or required the Department to ignore the provisions of the CBA in implementing the required temporary layoffs; therefore, the Department violated the CBA in placing Ms. Vance on temporary layoff instead of junior SW3's in Spokane.

In evaluating these arguments, I begin by noting my agreement with the Department that in choosing its "caseload-carrying" standard to implement the exemption contained in ESSB 6503, "[a]s long as [that] determination does not violate any portion of the Agreement, then that decision is the Department's to make." *See*, e.g. *WFSE v. Dept. of Ecology*, AAA No. 75-390-00123-11 (Dichter, *unpublished*, 2012) (copy appended to the Department's brief). But if, as the Union argues, the Department's standard *did* violate Article 34.6 of the Agreement—no matter how reasonable it might have been in the absence of that contractual provision—the Department cannot avail itself of the principle enunciated by Arbiter Dichter. And after carefully considering the matter, I find the Union's argument that the Department violated Article 34.6 more persuasive than the Department's defense.

At the outset, I note that the Department's argument as outlined above blurs the difference between a "job classification," which is the touchstone contained in the contractual language, and a group of employees in "job assignments" that are all performing a *subset* of the duties within that job classification. That is, all of the employees at issue here were SW3's, but in applying Article 34.6, the Department only considered the relative seniority of SW3's "doing the same job," i.e. those carrying caseloads. Department Brief at 13. That sort of analysis seems inconsistent with the plain language of the CBA,[4] but in defense of that approach, the

[4] That is, Article 34.6 establishes a standard based on comparisons within an *entire* job classification, such as SW3, and does not provide that the comparisons should be based on the precise "job assignment" within the classification (which is how the Department applied it here), but rather on the "skills and abilities" to perform the *overall work* of that job classification at the involved location.

Department relies heavily on the testimony of OFM attorney Shane Esquibel who was involved in the negotiations—both those leading to the adoption of Article 34.6 and the "effects" bargaining concerning the temporary layoffs under ESSB 6503. Department Brief at 7. In his testimony, Mr. Esquibel noted that "it was never contemplated [during contract negotiations] that we would have a statute that protected certain functions," and "both parties understood [during effects bargaining] that there was some difficulty with the language in the contract about how we were going to accomplish this." Tr. at 57-58.

Based on this testimony, the Department argues that the effect of Article 34.6 should be limited to the kinds of situations the parties anticipated at the time they negotiated the language.[5] But parties to collective bargaining agreements often fail to anticipate every possible circumstance in which there might be a need to apply the language they have chosen, and thus it is common for arbitrators to be called upon to give appropriate meaning to agreed language in situations unforeseen by the parties. *See*, e.g. May, ed., *Elkouri & Elkouri's How Arbitration Works* at 9-18 (7th Ed., Bloomberg BNA, 2012), quoting *Superior Products Company*, 42 LA 517, 522-23 (Smith, 1964) ("Arbitrators are constantly required and expected to give meaning to contract provisions which are unclear, in situations which were not specifically foreseen by the contract negotiators").

But what standard should an arbitrator utilize in applying contract language to a situation the parties did not anticipate? Under these precise circumstances, it seems to me the interpretive approach most likely to effectuate the parties' reasonable bargaining expectations would be to give their language an objective reading and apply it as written unless it affirmatively appears to be unreasonable to do so. As noted in a previous footnote, with respect to Article 34.6, the

[5] The example Mr. Esquibel used in his testimony was that if half a building burned down and the Department could only accommodate half its workers pending repairs, seniority within classification would provide the basis for selecting the workers who would come to work. Tr. at 57.

parties clearly established an overarching approach to temporary layoffs, i.e. that such layoffs would be accomplished by seniority *within a job classification* at the location where the layoffs will occur and among those employees with the *required skills and abilities* in the job classification. Article 34.6(D) (emphasis supplied). In this case, it is undisputed that Ms. Vance possessed the requisite "skills and abilities" to perform the work of the SW3 classification in Spokane, including providing direct protective services to children. In fact, the Department concedes that she regularly exercised the latter skills as a "secondary assignment." Mr. Esquibel testified, however, that "it didn't seem realistic to reassign a social worker who was not case carrying to a case-carrying load for one day a month, and to take over that case-carrying load for one day." Tr. at 57-58. Precisely why that is so, however, is unclear to me in light of the fact that Ms. Vance often assisted caseload-carrying SW3's, including formal designation as a "secondary" social worker on a number of cases, and also served as backup and filled in for SW3's when they were absent or when positions were vacant. *See*, e.g. Tr. 22-25 (Vance).[6] In the absence of sufficient evidence for me to conclude that Ms. Vance could not have filled in for a day with a reasonable level of effectiveness when a junior caseload-carrying SW3 was on temporary layoff, I find that under Article 34.6 these temporary layoffs should have been accomplished by recognizing Ms. Vance's greater seniority within the SW3 job classification at this location.[7]

The grievances of Edith Vance must be sustained.

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[6] To the extent, if any, that the Department's arguments reflect considerations of "efficiency," e.g. that Ms. Vance was less likely to perform the SW3 duties as well as the designated caseload-carrying social worker, it is often the case that the application of a "sufficient ability" seniority clause will favor a senior employee over a junior employee who might be said to possess "greater skill and ability," at least under specific circumstances. *See*, e.g. *Elkouri* at 14-48 to 14-49.

[7] It appears to me that this conclusion only applies retrospectively to this one situation. That is so because the parties apparently have since "remedied the language" to make clear how temporary layoffs under these conditions will be accomplished in the future. Tr. at 58 (Esquibel).

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Department violated Article 34.6 when it placed Ms. Vance on temporary layoff out of seniority on four days in 2010; therefore,

2. The grievances must be sustained; and

3. Grievant shall be promptly made whole for lost wages and benefits.

4. The Arbitrator will retain jurisdiction for the sole purpose of resolving any disputes over implementation of the remedy that the parties are unable to resolve on their own; either party may invoke this reserved remedial jurisdiction by fax or email sent, or letter postmarked (original to the Arbitrator, copy to the other party) within sixty (60) days of the date of this AWARD, or within such reasonable extensions as the parties may mutually agree or that the Arbitrator may order for good cause shown; and

5. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 5th day of August, 2013

Michael E. Cavanaugh, J.D.
Arbitrator