

BEFORE THE ARBITRATOR

In the arbitration of a grievance dispute between)	
)	
STATE OF WASHINGTON)	
)	
and)	ARBITRATION AWARD
)	PERC 24551-P-12-1019
)	(Maria Mayrhofer Grievance)
PROFESSIONAL & TECHNICAL)	
EMPLOYEES, LOCAL 17)	
_____)	

Robert M. McKenna, Attorney General, by *Andrew F. Scott*, Assistant Attorney General, appeared on behalf of the employer.

Kristen Kussmann, Union Representative, appeared on behalf of the union.

Selecting from a list provided by the Public Employment Relations Commission (PERC), the parties to this proceeding chose Marvin L. Schurke of Olympia, Washington, as the impartial arbitrator to hear and decide a grievance. The State of Washington (employer) and Professional & Technical Employees, Local 17 (union) are parties to a collective bargaining agreement which is effective from July 1, 2011 through June 30, 2013, and establishes procedures for the final and binding arbitration of grievances.¹ Among other agencies, the employer operates a Department of Licensing, a Department of Transportation, and the Washington State Patrol. The union represents employees who work in a variety of classifications in those departments, among which a Department of Transportation bargaining unit historically known as RU-152 and persons in “transportation planning specialist” classifications are of immediate interest here.²

The union initiated a grievance under the contractual procedure on October 21, 2011, concerning a reduction-in-force (RIF) notice issued to bargaining unit employee Maria Mayrhofer on October 12, 2011. The union alleged that the employer had improperly bumped the grievant from her bargaining unit “Transportation Planning Specialist 3” (TPS3) position in order to make

1 The current collective bargaining agreement was stipulated in evidence as Exhibit 1 in this proceeding.

2 Your Arbitrator’s first involvement with this bargaining unit occurred years before the parties selected him as their arbitrator for this case. These parties certainly knew or should have known they were selecting the person who served as the Executive Director of PERC for more than 30 years, and who signed the unit clarification decision accepting the parties’ agreement that this bargaining unit did not contain any supervisors. See, State-Transportation, Decision 8500 (PSRA, 2004).

room for a person being demoted from a non-represented “Transportation Planning Specialist 4” (TPS4) position.³ The union requested reinstatement of the grievant to the position she previously held, together with other remedies as appropriate. The grievance was processed with Department of Transportation representatives acting by and for the employer,⁴ but was not resolved. In February of 2012, representatives of both parties signed a “Pre-Arbitration Review Meeting” form indicating the parties were at impasse and the grievance was ripe for arbitration. On February 9, 2012, the union both advanced the grievance to the arbitration step of the contractual procedure and filed a request with the Public Employment Relations Commission for issuance of a list of arbitrators from its Dispute Resolution Panel.

The parties notified the Arbitrator of his selection by means of a letter dated March 12, 2012. On May 12, 2012, the Arbitrator confirmed that June 14, 2012, had been set as the date agreed-upon for an arbitration hearing.

The Arbitrator held the hearing on June 14, 2012, at Tumwater, Washington. Witnesses testified under oath, and documentary exhibits were admitted in evidence. A court reporter was present, and provided a transcript of the proceedings. The record was completed on August 9, 2012, when your Arbitrator received the last of the parties’ written closing arguments.

THE ISSUES

The parties were unable to stipulate the substantive issue(s) to be determined by the Arbitrator.⁵ At the outset of the hearing, the parties stipulated: (1) To have the Arbitrator frame the issue(s) based on the evidence and arguments presented; and (2) To bifurcate the hearing and come back

3 A copy of the RIF notice was stipulated in evidence as Exhibit 2 in this proceeding.

4 The parties’ relationship is regulated by the Personnel System Reform Act of 2002 (PSRA), Chapter 41.80 RCW. The governor or governor’s designee represents the employer in collective bargaining under RCW 41.80.010(1), but the first three (of five) steps in the grievance procedure in this contract calls for employer responses at the “Responsible Supervisor and/or Manager”, “Appointing Authority or Designee”, and “Agency Head or Designee” levels within the operating department where the grievance arises.

5 The employer did not raise a procedural arbitrability issue until its opening statement at the hearing, and then only as to the portion of the union’s argument attacking a Washington Administrative Code (WAC) rule.

for another hearing on remedy, if that is appropriate. Your Arbitrator thus frames the ultimate issues in this proceeding as:

1. Did the Department of Transportation violate the parties' collective bargaining agreement when it displaced the grievant from her bargaining unit TPS3 position, and gave that position to the person it had laid off from a non-represented TPS4 position?
2. If so, what is the appropriate remedy?

Your Arbitrator rules that the employer violated the parties' contract when, purporting to act in conformity with a civil service rule that conflicts with the collective bargaining agreement, it displaced the grievant from her bargaining unit position to make room for the particular non-represented person named in this record.⁶ The union is entitled to the "reinstatement" remedy requested in the grievance. The evidence suggests the grievant suffered no loss of pay or benefits by being moved to another bargaining unit position in the TPS3 classification, so there would only be basis for a supplemental hearing or an award of back pay in this proceeding if the union makes a timely claim that the grievant has suffered some financial harm due to subsequent events.

ISSUE 1 – WAS THERE A CONTRACT VIOLATION?

By the evidence they produced at the hearing, and by the arguments they advanced at the hearing and in their written statements, the parties have framed multiple sub-issues, as follows:

- A. Does the parties' 2011-2013 collective bargaining agreement allow non-represented persons to "bump" into bargaining unit positions?

⁶ Your Arbitrator has framed this issue narrowly - and rules narrowly - to focus on the facts of this particular case. In doing so, your Arbitrator declines to embark on the slippery slope of prognosticating about what the proper interpretation or application of the parties' contract might be under different facts. Beginning with its opening statement at the hearing, the employer has admitted that the non-represented person involved in this grievance never held permanent status in the TPS3 classification. The union has asserted the existence of distinction in bumping rights if a non-represented person has held permanent status in the bargaining unit classification where he or she is placed, but that distinction is not actually operative here. One can speculate about whether this bumping might have gone without challenge from the union if the non-represented person had actually held permanent status in the TPS3 classification, but any dispute about such a fact situation would be for another arbitration proceeding some time in the future.

- B. Do the union's bargaining proposals in 2010 and/or the positions it took in negotiations for the current contract undermine its position in this case?
- C. What is the effect, if any, of the new civil service rule concerning bumping rights of non-represented persons, as adopted effective July 1, 2005?

The arguments, facts, pertinent legal authorities, analysis and conclusions on those sub-issues are set forth under separate headings, below.

SUB-ISSUE A: THE PRESENCE OR ABSENCE OF CONTRACT LANGUAGE.

Citing both the "Recognition" language in Article 1 of the collective bargaining agreement and the "Layoff and Recall" language in Article 36, the union argued in its opening statement at the hearing that the parties' contract prohibited the non-represented person named in this record from "bumping" into the bargaining unit represented by the union. The union's brief describes as its core argument that the employer did not follow the negotiated rules for placing the non-represented person in the TPS3 position formerly held by the grievant, but then goes on to renew its reliance on Article 36. The employer acknowledged in its opening statement that the non-represented person who bumped the grievant was not covered by the collective bargaining agreement, but then argued that the collective bargaining agreement could have no power or effect or governance over non-represented persons unless they were to be referenced in the contract article at hand; and that there is nothing in Article 36 about non-represented persons. The employer asserts in its brief that Article 1.1 of the parties' contract covers the bargaining units described in Appendix A., but not statutorily excluded positions or other non-represented persons. The employer's brief then reiterates its assertion that Article 36 does not explicitly prohibit persons laid off from non-represented positions from bumping into the bargaining unit.

Your Arbitrator rejects the employer's arguments, and rules that the contractual silence pointed out by the employer actually contradicts the outcome desired by the employer in this case. The situation at hand brings to mind *Gould, Inc.*, 56 LA 712 (Schurke, 1971), where the undersigned Arbitrator was called upon to interpret/apply language in a collective bargaining agreement that

specifically gave certain non-represented persons a right to return to the bargaining unit. That contract included:

In the event an employee who has been promoted to a job excluded from the bargaining unit returns to the bargaining unit, his [sic] seniority shall be retained for the time worked in the bargaining unit but shall not accumulate for work outside of the bargaining unit.

The grievant in the *Gould, Inc.* case had 10 years of seniority in that bargaining unit and was a union official when the employer promoted him to a non-represented “Plant Personnel Manager” position. After another nine years passed, the employer laid off that grievant from the non-represented job. That grievant then cited the contract language quoted above as his basis for seeking return to that bargaining unit, but that employer did not want its labor relations expert back in the bargaining unit. That employer’s arguments were rejected, and the undersigned Arbitrator ordered reinstatement of that grievant to a bargaining unit position commensurate with his 10 years of preserved seniority. In the case at hand, the union aptly cites two earlier grievance arbitration decisions similar to the *Gould, Inc.* case: *Gordon Fisheries Company*, 2 LA 629 (Horvitz, 1945), and *United States Radium Corp.*, 36 LA 1067 (Loucks, 1961).

To justify the outcome it desires in this case, the employer would have needed to negotiate for and obtain the union’s agreement on contract language explicitly giving non-represented persons a right to “bump” into the bargaining unit. For the reasons discussed under the headings that follow, the absence of such language from the parties’ contract is fatal to the employer’s case.

Statutory changes underlying the parties’ contract have a bearing in this case. The contract language cited by both parties was negotiated in a new and different legal setting than had existed in the past. From 1960 until at least 2002 (and arguably until July 1, 2004), State of Washington employees covered by the State Civil Service Law, Chapter 41.06 RCW, had only limited-scope collective bargaining rights concerning matters left to agency discretion under the civil service rules adopted by the State Personnel Board (SPB) or its successor, the Washington Personnel Resources Board (WPRB).⁷ From 1960 until 2002, the SPB and WPRB had authority

⁷ Only a limited number of person holding “exempt” positions were excluded from the coverage of the civil service law and rules. The Washington Management Service (WMS) was created in the early 1990’s, but WMS employees were subject to a separate set of rules adopted within the civil service system.

to determine appropriate bargaining units, and they approved bargaining units which included a mix of supervisors and non-supervisory employees.⁸ Against that background, the Legislature passed and the Governor signed the Personnel System Reform Act of 2002 (PSRA) early in 2002, with effective dates staggered over a transition period in excess of three years:

- Some PSRA provisions (including transferring jurisdiction over representation and unit determination proceedings from the WPRB to PERC) went into effect on June 13, 2002;
- Most PSRA provisions (including those establishing full-scope collective bargaining rights for the first time) did not take effect until July 1, 2004; and
- Collective bargaining agreements negotiated under the new full-scope bargaining process could not be made effective before July 1, 2005.

Important to the controversy now before the Arbitrator, the PSRA required a clear separation of supervisors from bargaining units containing their rank-and-file subordinates:

RCW 41.80.005 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means any agency as defined in RCW 41.06.020 and covered by chapter 41.06 RCW.

(2) "Collective bargaining" means the performance of the mutual obligation of the representatives of the employer and the exclusive bargaining representative ...

(3) "Commission" means the public employment relations commission.

(4) "Confidential employee" means an employee who, in the regular course of his or her duties, assists in a confidential capacity persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies, or who assists or aids a manager. ...

(5) "Director" means the director of the public employment relations commission.

(6) "**Employee**" means **any employee**, including employees whose work has ceased in connection with the pursuit of lawful activities protected by this chapter, **covered by chapter 41.06 RCW, except:**

(a) Employees covered for collective bargaining by chapter 41.56 RCW;

(b) **Confidential employees;**

(c) **Members of the Washington management service;**

(d) Internal auditors in any agency; or

(e) Any employee of the commission, the office of financial management, or the office of risk management within the department of enterprise services.

⁸ The WPRB even permitted inclusion of Washington Management Service (WMS) personnel in bargaining units created for the limited-scope collective bargaining process.

(7) "Employee organization" means any organization, union, or association in which employees participate and that exists for the purpose, in whole or in part, of collective bargaining with employers.

(8) "Employer" means the state of Washington.

(9) "Exclusive bargaining representative" means any employee organization that has been certified under this chapter as the representative of the employees in an appropriate bargaining unit.

(10) "Institutions of higher education" means

(11) "Labor dispute" means any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment with respect to the subjects of bargaining provided in this chapter, regardless of whether the disputants stand in the proximate relation of employer and employee.

(12) "Manager" means "manager" as defined in RCW 41.06.022.

(13) **"Supervisor" means an employee who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, or to adjust employee grievances, or effectively to recommend such action, if the exercise of the authority is not of a merely routine nature but requires the consistent exercise of individual judgment.** However, no employee who is a member of the Washington management service may be included in a collective bargaining unit established under this section.

(14) "Unfair labor practice" means

[2011 1st sp.s. c 43 § 444; 2002 c 354 § 321.] Emphasis by **bold** supplied.

RCW 41.80.070 Bargaining units — Certification.

(1) **A bargaining unit of employees covered by this chapter existing on June 13, 2002, shall be considered an appropriate unit, unless the unit does not meet the requirements of (a) and (b) of this subsection.** The commission, after hearing upon reasonable notice to all interested parties, shall decide, in each application for certification as an exclusive bargaining representative, the unit appropriate for certification. In determining the new units or modifications of existing units, the commission shall consider: The duties, skills, and working conditions of the employees; the history of collective bargaining; the extent of organization among the employees; the desires of the employees; and the avoidance of excessive fragmentation. However, **a unit is not appropriate if it includes:**

(a) **Both supervisors and nonsupervisory employees. A unit that includes only supervisors may be considered appropriate if a majority of the supervisory employees indicates by vote that they desire to be included in such a unit;** or

(b) More than one institution of higher education.

(2) The exclusive bargaining representatives certified to represent the bargaining units existing on June 13, 2002, shall continue as the exclusive bargaining representative without the necessity of an election.

(3) If a single employee organization is the exclusive bargaining representative for two or more units, upon petition by the employee organization, the units may be consolidated into a single larger unit

[2002 c 354 § 308.] Emphasis by **bold** supplied. Thus, the Legislature impliedly rejected the unit determination policies which had been applied by the SPB and WPRB, and instead embraced a clear separation of supervisors that is more similar to the standards applied in the private sector under the National Labor Relations Act, as amended. At a minimum, this discredits employer arguments suggesting there is or should be some sort of seamless transition between non-represented status and bargaining unit status.

The Public Employment Relations Commission adopted WAC 391-35-026, to facilitate bringing the bargaining units that existed on June 13, 2002, into conformity with the new standard:

WAC 391-35-026 Special provision — State civil service employees. In addition to the circumstances described in WAC 391-35-020, bargaining units of state civil service employees may be modified under this section until RCW 41.80.050 and 41.80.080 take effect on July 1, 2004.

(1) Bargaining units of state civil service employees in existence on June 13, 2002, shall be subject to being "divided" into separate units of supervisors and nonsupervisory employees under this section.

(a) A petition to have an existing unit divided may be filed by the exclusive bargaining representative, by the employer, or by those parties jointly.

(b) The separation of bargaining units shall be implemented on or before July 1, 2004.

(2) Bargaining units of state civil service employees in existence on June 13, 2002, shall be subject to being "perfected" under this section. ...

[WSR 03-03-064, § 391-35-026, filed 1/14/03, effective 2/14/03.] Emphasis by **bold** supplied. The Department of Transportation filed a unit clarification petition under WAC 391-35-026, concerning the bargaining unit identified as "RU152" in Appendix A to the parties' collective bargaining agreement.⁹ That petition was later withdrawn with indication that the bargaining unit did not include a mix of supervisors and non-supervisory employees. See, Decision 8500, supra.¹⁰ In the absence of any claim or evidence that the person who bumped the grievant in this case qualified for the "confidential" exclusion, these developments support inferences that: (1) the person involved in this case and others in the TPS4 classification were supervisors; and (2) the Department of Transportation successfully maintained that the persons in the TPS4

9 Case 18169-C-04-1160.

10 Apart from any personal recall of actions taken as the Executive Director of PERC, any such decisions and the history they contain are a matter of public record in PERC docket records.

classification were to be excluded from the contractual rights conferred on employees represented by this union.

The employer's arguments gloss over or ignore the significant statutory changes. In fact, the PSRA created two separate and distinct workforces with a much larger gulf between bargaining unit status and non-represented status than had ever before existed under the State Civil Service Law, Chapter 41.06 RCW. Private sector employers and public sector employers without civil service systems confront a similar gulf when seeking to attract and retain their non-represented workforces. Employers can and often do give their non-represented workforces other incentives, but cannot unilaterally confer bargaining unit rights on their non-represented workforces.

Finally, the union aptly asserts that it has a right under collective bargaining precedents to defend the scope of work historically performed by bargaining unit employees. In a long line of PERC decisions dating back to *South Kitsap School District*, Decision 472 (PECB, 1978), citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), employers have been found guilty of unfair labor practices for unilaterally contracting out (i.e., transferring work to employees of another employer) or skimming (i.e., transferring work to its own employees outside of the bargaining unit) of work historically done by bargaining unit employees. Your Arbitrator is mindful of those long-standing PERC precedents even if the persons who negotiated on behalf of this employer may have been oblivious to them: If charged with a "skimming" violation for giving this grievant's bargaining unit work to a supervisor, this employer would have needed clear contract language to establish a waiver by contract defense.

The parties' contract addresses the subject of job security, which is a core subject of collective bargaining.¹¹ Article 36 of the contract includes:

Article 36
Layoff and Recall

- 36.1 Layoff is an employer-initiated action ... that results in:
- A. Separation from service ...,
 - B. Employment in a class with a lower salary range,

¹¹ One of the earliest PERC decisions held that layoff and recall procedures are a mandatory subject of collective bargaining. Federal Way School District, Decision 232-A (EDUC, 1977).

- C. Reduction in the work year, or
- D. Reduction in the number of hours worked.

The Employer will determine the basis for, extent, and effective date and the length of layoffs

From the point of view of bargaining unit employees, any of the outcomes listed in paragraphs A. through D. of Section 36.1 will normally be regarded as a bad thing to be avoided. Your Arbitrator subscribes to the principle set forth by National Academy of Arbitrators member (and former Public Employment Relations Commission Chair) Janet L. Gaunt, as follows: “It has often been said that if wage provisions are the heart of a collective bargaining agreement, seniority provisions are its soul.” Wapato School District, 91 LA 1156 (Gaunt, 1988).

The importance of negotiated job security provisions cannot be minimized or ignored here. Different from representing newly-organized employees who are seeking job security where none had existed before, the union in this case was negotiating a first contract in 2004 on behalf of employees who had a long history of seniority-based job security under the civil service system which had existed under Chapter 41.06 RCW since 1960.¹² Under the PSRA, three important things happen once the employees in a bargaining unit choose to be represented by an employee organization (union) for the purposes of collective bargaining:

First, the employer must deal with that exclusive bargaining representative on all matters of wages, hours and other terms and conditions of employment of the bargaining unit employees;

Second, the state civil service law, Chapter 41.06 RCW ceases to regulate any wages, hours and other terms and conditions of employment of bargaining unit employees that are mandatory subjects of collective bargaining under Chapter 41.80 RCW and included in a collective bargaining agreement; and

Third, the job security rights of bargaining unit employees can then be entirely regulated by whatever collective bargaining agreement is negotiated and ratified between the employer and their exclusive bargaining representative.

¹² Exhibit 205 in this record is a copy of WAC 356-30-330, titled “Reduction in Force ... Procedure”, which includes amendments adopted through January 19, 2005. That rule contained multiple references to “seniority” or to displacement of the least-senior employee in classifications and/or positions.

None of those three things apply to persons who hold non-represented positions, and who remain under the civil service rules.

The employer does not contest that the grievant's former TPS3 position is a bargaining unit position. The union provided credible and uncontroverted testimony that it was attempting to replicate the seniority protections of the civil service system, as much as possible, in the 2004 negotiations for the parties' first contract. Article 35 of the parties' contract defines seniority,¹³ and Sections 36.2 through 36.15 of the contract detail both the accepted reasons for layoffs (in Section 36.2), and how employees are to be treated in various situations. Rather than insulating all bargaining unit employees from the economic and political realities recognized in Section 36.2,¹⁴ Article 36 imposes, a "seniority" qualifier to allocate the pain of those economic or political realities:

Article 36
Layoff and Recall

- ...
- 36.7 Formal Options
- A. Employees will be **laid off in accordance with seniority, as defined in Article 35, Seniority**, among the group of employees with the required skills and abilities. Skills and abilities for layoff purposes are documented qualifications that have been identified at least three (3) months prior to the layoff and require a reasonable period of time to acquire. ...

As with implementation of any seniority-driven system, the ultimate effect of the contract language is to identify which bargaining unit employee(s) will be given preference to retain their jobs and which bargaining unit employee(s) are to be displaced or go out the door in the event of a layoff. This contract clearly does not contain language of the type enforced by your Arbitrator in *Gould, Inc.*, supra. If the employer's negotiators failed to recognize the difference between the former civil service environment and the new collective bargaining environment in 2004, it is the employer and its non-represented workforce that must suffer the consequences now.

13 Section 35.1.A. begins with: "Seniority for full-time employees will be defined as the employee's length of unbroken state service."

14 The reasons for layoff listed in Section 36.2 are limited to "lack of funds", "lack of work", "good faith reorganization", "ineligibility to continue in a position that was reallocated", "termination of a project", and "fewer positions available than the number of employees entitled to such positions either by statute or other provision".

Rather than affecting all State of Washington employees or even all Department of Transportation employees (as the civil service system may have done), the coverage of Articles 4 and 36 is limited by Article 1 of the parties' contract:

Article 1
Union Recognition

- 1.1 This Agreement covers the employees in the bargaining units described in Appendix A ... but does not cover any statutorily excluded positions or any positions excluded in Appendix A.

Consistent with collective bargaining principles and precedents, your Arbitrator interprets the words "employee" and "employees" in Article 36 as limited to the "employees in the bargaining units described in Appendix A" as that phrase appears in Article 1. Persons holding non-represented positions would need some contractually-established pathway if they are to acquire jobs and/or seniority rights under the collective bargaining agreement.

The union's brief makes reference to Article 4 without heavy reliance. Your Arbitrator has read the article, and notes a few provisions that are worthy of comment:

Article 4
Hiring and Appointments

- ...
- 4.2 An Agency's internal layoff list will consist of **employees** who have elected to place their name on the layoff list through Article 36, Layoff and Recall, of this Agreement and are confined to each individual agency.
- 4.3 The statewide layoff list will consist of **employees** who have elected to place their names on the statewide layoff list in accordance with WAC 357-46-080.
- ...
- 4.8 Types of Appointment
- A. Permanent
1. The **most senior candidate** on the agency's internal layoff list with the required skills and abilities who has indicated an appropriate geographic availability will be appointed to the position. ...

Emphasis by **bold** supplied. While the Washington Administrative Code (WAC) provision mentioned in Section 4.3 may refer to a layoff list that exists or has a parallel under the state civil service law, the absence of a similar WAC reference in Sections 4.2. and 4.8. provides basis for

an inference that the agency-internal list described is only available to bargaining unit employees. Section 4.8.A.1. also confirms the propriety of a focus on the relative seniority among bargaining unit employees, consistent with the testimony of a union witness who was present when the current contract language was negotiated in 2004.

Your Arbitrator notes that another Article 4 provision seriously undermines the employer's arguments in the collective bargaining context applicable to this case, in light of the *Gould*, *Gordon Fisheries*, and *United States Radium*, line of arbitration precedent:

Article 4
Hiring and Appointments

- 4.8 ...
- B. Non-permanent
- ...
3. A permanent employee that accepts a non-permanent appointment within his or her agency will have the right to return to a position in the permanent classification he or she left at the completion of the non-permanent appointment; provided that the employee has not left his or her original non-permanent appointment.

Your Arbitrator has encountered numerous situations in the past where employers have complained of difficulty getting qualified persons who have some established job security rights (e.g., “permanent” or “seniority”) to apply for or accept jobs that are important to the employer but have lesser status for the employee (e.g., “non-represented” or “temporary”). Collective bargaining is a two-way street on which employers can seek contract language that meets their needs, and Section 4.8.B.3. of this contract appears to be mutually beneficial to the employer and bargaining unit employees: A promise of a pathway back to full job security could help the employer in recruiting to fill needed non-permanent jobs that might otherwise be unattractive to bargaining unit employees, while having a pathway back to full job security protections could encourage bargaining unit employees to accept less protected jobs that meet employer needs. This employer could easily have proposed contract language such as that enforced in *Gould, Inc.*, supra, to give some protection to persons it had recruited and/or promoted to non-represented positions. The already-noted omission of such contract language is even more glaring here, in light of the language protecting the return of employees from non-permanent positions.

The strict enforcement of negotiated job security provisions is doubly-important in the context of this bargaining relationship, because the PSRA also eliminated the right of individual bargaining unit employees to challenge a layoff that is claimed to be improper. Under the civil service system created by Chapter 41.06 RCW, each individual had legal standing to file and process an appeal, and such disputes were resolved by means of adjudication before a state administrative agency (i.e., the SPB while it existed, the Personnel Appeals Board (PAB) while it existed, or the WPRB today). That administrative adjudication process was supplanted for bargaining unit employees by the grievance and arbitration machinery which must be included in collective bargaining agreements negotiated under the PSRA:

RCW 41.80.030 Contents of collective bargaining agreements — Execution.

(1) The parties to a collective bargaining agreement shall reduce the agreement to writing and both shall execute it.

(2) **A collective bargaining agreement shall contain provisions that:**

(a) **Provide for a grievance procedure that culminates with final and binding arbitration of all disputes arising over the interpretation or application of the collective bargaining agreement** and that is valid and enforceable under its terms when entered into in accordance with this chapter; **and**

(b) **Require processing of disciplinary actions or terminations of employment of employees covered by the collective bargaining agreement entirely under the procedures of the collective bargaining agreement.** Any employee, when fully reinstated, shall be guaranteed all employee rights and benefits, including back pay, sick leave, vacation accrual, and retirement and federal old age, survivors, and disability insurance act credits, but without back pay for any period of suspension.

Emphasis by **bold** supplied. This reinforces a conclusion that the PSRA placed job security protections squarely within the collective bargaining environment. The only way for the person who displaced the grievant in this case – or any other individual - to enforce any rights under the collective bargaining agreement (including the right to acquire and hold seniority in a bargaining unit position) is by means of a grievance processed under the contract and advanced to arbitration by the union under Article 32 of the collective bargaining agreement.

The logical extension of the employer’s theory would be open to mischief. Review of the current (post-PSRA) civil service rules offered in evidence by the employer readily discloses that the seniority-driven system which existed under WAC 356-30-330 has been replaced by a system driven by classifications and pay grades, together with “position uniquely sensitive to disruption” and “employment retention rating” and “competencies and other position

requirements” concepts in WAC 357-46-020 and WAC 357-46-035. If your Arbitrator were to accept the employer’s arguments in this case, it would permit some future employer official to destroy the job security of bargaining unit employees by a three-step process:

1. Hiring an excessive number of non-represented persons; and
2. Triggering a reduction-in-force among its non-represented workforce, and having those laid off from non-represented positions “bump” into bargaining unit positions; and
3. Laying off bargaining unit employees, by seniority, to make room for the non-represented persons who had bumped into the bargaining unit.

Thus, the logical extension of the employer’s argument here would permit a serious undermining of the seniority rights of bargaining unit employees up to and including their complete replacement by persons selected by one or more mischief-motivated employer officials. Your Arbitrator finds no evidence in this record to support even an inference – let alone a firm conclusion – that these parties agreed to leave the door open for any such possibility when they negotiated, ratified and signed their initial full-scope collective bargaining agreement in 2004 (for 2005-2007). Nor is there any indication of such a possibility when they negotiated, ratified and signed any of their subsequent collective bargaining agreements (for 2007-2009, for 2009-2011, and for 2011-2013) that largely repeated the language negotiated in 2004.

Conclusion on Sub-Issue A. Your Arbitrator rules that various job security provisions in the parties’ 2011-2013 collective bargaining agreement prohibited the employer from injecting the person it laid off from a non-represented position into the bargaining unit to the detriment of the grievant in this case and/or any other bargaining unit employee.

SUB-ISSUE B: DO THE PARTIES’ RECENT NEGOTIATIONS AFFECT THIS CASE?

The employer contends that the union is trying to win something in arbitration that it was unable to obtain at the bargaining table during negotiations for the current contract. The union argues that it proposed changes to Article 36 in the negotiations for the current contract only because it: (1) Became concerned about the possibility of layoffs in one or more of the departments where it represents employees; and/or (2) Became aware of the change of the rights of non-represented

persons under the civil service rule that is now relied upon by the employer; and/or (3) Wanted to “clarify” its intent and understanding of the contract language negotiated in 2004. Your Arbitrator rejects the employer’s argument for the reasons set forth in the paragraphs that follow.

The language proposed by the union in 2010 would not have helped it in this case, since it would only have clarified (or codified) the distinction that the union has claimed to exist in the contract.¹⁵ The employer generally resisted the union’s proposals at the bargaining table. The simple fact was and remains, however, that the particular non-represented person who displaced the grievant in this case would not have qualified for that distinction.

The employer missed an opportunity to obtain the contract language it would need to prevail in this case. Although it is painfully evident that the persons who negotiated for the employer in 2010 continued to act as if the PSRA had not created the previously-described gulf between bargaining unit status and non-represented status, the testimony of one employer witness suggests the employer at least considered proposing – and may even have made a side-bar proposal - to amend the collective bargaining agreement to expressly permit any non-represented employee to bump into a bargaining unit position.¹⁶ The employer’s negotiators appear to have backed off at the first sign of resistance from the union, and evidently did not pursue the matter even when the union modified its stance late in the negotiations. Thus, it is the employer – rather than the union – that is properly accused of trying to win something in this arbitration that it failed to obtain through collective bargaining negotiations.

Conclusion on Sub-Issue B. Your Arbitrator rules that the parties’ proposals and discussions during their collective bargaining negotiations in 2010-2011 for their current 2011-2013 contract did not alter the historical absence of contract language giving laid off non-represented employees a pathway into bargaining unit status.

15 See Footnote 6, above. The union’s initial proposal would only have amended the contract to state that a person who had once held permanent status in a bargaining unit classification would have a pathway back to that bargaining unit classification in the event he or she was laid off from a non-represented position.

16 The testimony of Jeff Pelton at transcript page 109, line 19 to page 110, line 1 includes: “I do recall ... [the employer’s chief negotiator] coming back to our caucus room maybe after a hallway conversation because we had contemplated trying to put on the table for the union consistent rules with the WAC so we would have more of a universal process and flow. But my understanding is that that was rejected [by the union].”

SUB-ISSUE C: WHAT IS THE EFFECT, IF ANY, OF WAC 357-46-035?

The employer has cited a civil service rule that took effect on July 1, 2005, and essentially claims that: (1) The law applicable to this case includes the civil service rule that was already in effect when the current contract was negotiated in 2010-2011; and (2) The union's attack on the civil service rule is untimely; and (3) The civil service rule gave the person demoted from the TPS4 job an "indisputable legal right" to bump the grievant in this case. As to the jurisdiction of the Arbitrator, the employer questions whether Washington law would allow a collective bargaining agreement to extinguish the legal rights of non-represented civil service employees, and it asserts, in essence, that the Arbitrator has no power to affect the rights of the person demoted from the non-represented TPS4 job. The union counters that: (1) The civil service rule relied upon by the employer only took effect after the first full-scope collective bargaining agreement was negotiated and signed under the PSRA; (2) This grievance is timely as to the first incident where a bargaining unit employee was actually affected (bumped) by purported implementation of the civil service rule; and (3) The civil service rule must fail as conflicting with the parties' collective bargaining agreement. Your Arbitrator is persuaded by the union's arguments.

The history of bargaining is relevant here, because witnesses called by both parties made it abundantly clear that the layoff-recall language found in Article 36 of the parties' current (2011-2013) collective bargaining agreement remains virtually unchanged from the layoff-recall language found in the parties' first (2005-2007) collective bargaining agreement negotiated under the PSRA. Rejecting the employer's "current law applies" argument, your Arbitrator interprets the current contract language in light of the circumstances in effect when these parties negotiated that language into their first full-scope collective bargaining agreement.

The grievance presents a timely challenge to the first application of the cited rule to displace a bargaining unit employee from a bargaining unit job. Counsel for the employer and witnesses called by the employer made it abundantly clear that this is a case of first impression, and that there is no applicable WPRB precedent concerning application of the cited rule. Your Arbitrator does not excuse the union from its obligation to be vigilant concerning legislative and administrative actions that could affect bargaining unit employees, but any attempt by the union

to file and process a grievance in 2005 would necessarily have taken on the appearance (and all of the inherent problems) of a declaratory ruling proceeding: The union would have been asserting a legal challenge in a vacuum devoid of any actual facts; the employer would have been attempting to defend a rule which it had never actually applied. The employer does not contest that the union filed a timely grievance when Ms. Mayrhofer received notice she was to be bumped. The union's claim of a conflict between the civil service rule and the collective bargaining agreement is an inherent part of that grievance, and is properly before the Arbitrator.

The cited civil service rule affects only non-represented jobs, where the wages, hours and working conditions remain subject to the State Civil Service Law, Chapter 41.06 RCW, and the civil service rules adopted by the Director of Personnel.¹⁷ As briefly described in the discussion of Sub-issue A, above, even a cursory reading of the new civil service rules indicates that the Director of Personnel has chosen to largely (or perhaps entirely) eliminate "seniority" as a factor in making job security determinations. Further, the new civil service rules have added at least

17 The authority of the Director of Personnel is circumscribed by collective bargaining under the PSRA:

RCW 41.06.133 Rules of director — Personnel administration — Required agency report. (1) The director shall adopt rules, consistent with the purposes and provisions of this chapter and with the best standards of personnel administration, regarding the basis and procedures to be followed for:

- (a) The reduction, dismissal, suspension, or demotion of an employee;
- (b) Training and career development;
- (c) Probationary periods of six to twelve months ... except as follows:
- (d) Transfers;
- (e) Promotional preferences;
- (f) Sick leaves and vacations;
- (g) Hours of work;
- (h) **Layoffs when necessary and subsequent reemployment, except for the financial basis for layoffs;**
 - (i) The number of names to be certified for vacancies;
 - (j) Subject to RCW 41.04.820, adoption and revision of a state salary schedule to reflect the prevailing rates in Washington state ...;
 - (k) Increment increases within the series of steps for each pay grade ...;
 - (l) Optional lump sum relocation compensation ...;
 - (m) Providing for veteran's preference as required by existing statutes ...;
- (2) Rules adopted under this section by the director shall provide for local administration and management by the institutions of higher education
- (3) **Rules adopted by the director under this section may be superseded by the provisions of a collective bargaining agreement negotiated under RCW 41.80.001 and 41.80.010 through 41.80.130. The supersession of such rules shall only affect employees in the respective collective bargaining units.**

[2011 1st sp.s. c 43 § 407; 2011 1st sp.s. c 39 § 5. Prior: 2010 c 2 § 3; 2010 c 1 § 2; prior: 2009 c 534 § 2; 2009 c 5 § 2; 2002 c 354 § 204.] Emphasis by **bold** supplied.

the “position uniquely sensitive to disruption” and “employment retention rating” and “competencies and other position requirements” concepts which are not found in the pre-PSRA civil service rule. It is neither the place nor the intent of your Arbitrator to comment on the wisdom or merit of WAC 357-46-020 or WAC 357-46-035. As to timing, the effective date of the first full-scope collective bargaining agreements under the PSRA would seem to have been a likely occasion for the employer to act if it wanted to change the job security provisions applicable to its non-represented workforce. Nothing in this arbitration award prevents the employer from implementing its new civil service rules to effect bumping among non-represented jobs. That does not resolve this case, however.

The WAC rule conflicts with the collective bargaining agreement, by improperly attempting to create a pathway for the employer’s non-represented workforce into the bargaining unit represented by the union. The PSRA specifies the scope of collective bargaining:

RCW 41.80.020 Scope of bargaining. (1) Except as otherwise provided in this chapter, **the matters subject to bargaining include wages, hours, and other terms and conditions of employment**, and the negotiation of any question arising under a collective bargaining agreement.

(2) The employer is not required to bargain over matters pertaining to:

(a) Health care benefits or other employee insurance benefits, except as required in subsection (3) of this section;

(b) Any retirement system or retirement benefit; or

(c) Rules of the human resources director, the director of enterprise services, or the Washington personnel resources board adopted under RCW 41.06.157.

(3) Matters subject to bargaining include the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits. However, ... negotiations regarding the number of names to be certified for vacancies, promotional preferences, and the dollar amount expended on behalf of each employee for health care benefits shall be conducted between the employer and one coalition of all the exclusive bargaining representatives subject to this chapter. ... For agreements covering the 2011-2013 fiscal biennium, any agreement between the employer and the coalition regarding the dollar amount expended on behalf of each employee for health care benefits is a separate agreement and shall not be included in the master collective bargaining agreements negotiated by the parties.

(4) The employer and the exclusive bargaining representative shall not agree to any proposal that would prevent the implementation of approved affirmative action plans or that would be inconsistent with the comparable worth agreement ...

(5) The employer and the exclusive bargaining representative shall not bargain over matters pertaining to management rights established in RCW 41.80.040.

(6) Except as otherwise provided in this chapter, if a conflict exists between an executive order, administrative rule, or agency policy relating to wages, hours, and terms and conditions of employment and a collective bargaining agreement

negotiated under this chapter, the collective bargaining agreement shall prevail. A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

(7) This section does not prohibit bargaining that affects contracts authorized by RCW 41.06.142.

[2011 1st sp.s. c 50 § 939; 2011 1st sp.s. c 43 § 445; 2010 c 283 § 16; 2002 c 354 § 303.]

Emphasis by **bold** supplied.

RCW 41.80.040 Management rights — Not subject to bargaining. The employer shall not bargain over rights of management which, in addition to all powers, duties, and rights established by constitutional provision or statute, shall include but not be limited to the following:

- (1) The functions and programs of the employer, the use of technology, and the structure of the organization;
- (2) The employer's budget and the size of the agency workforce, including determining the financial basis for layoffs;
- (3) The right to direct and supervise employees;
- (4) The right to take whatever actions are deemed necessary to carry out the mission of the state and its agencies during emergencies; and
- (5) Retirement plans and retirement benefits.

[2002 c 354 § 305.] The PSRA statute entitled the union to bargain for seniority-driven layoff and recall provisions protecting bargaining unit employees who have higher seniority and hold higher-level classifications within the bargaining unit, as well as protecting the union's work jurisdiction. Although layoff and recall are mentioned in RCW 41.06.133, nothing in that section or RCW 41.80.020 or RCW 41.80.040 gives the Director of Personnel exclusive authority over that subject matter, and RCW 41.06.133(3) specifically recognizes that the rules adopted under that section can be superseded by a collective bargaining agreement negotiated under the PSRA. Explicitly rejecting the employer's argument, your Arbitrator rules that the PSRA most certainly permits collective bargaining agreements to exclude non-represented persons from the contractual job security rights secured for bargaining unit employees. The parties to this case have, in fact, agreed upon a seniority-driven job security system in their collective bargaining agreement.

Conclusion on Sub-issue C: The layoff and recall provisions of the parties' 2011-2013 collective bargaining agreement protected the grievant from being bumped from her position. Your Arbitrator rejects the employer's attempt to have the civil service rule take precedence over –

rather than being superseded by – the collective bargaining agreement. As the employer would have it applied in this case, WAC 357-46-035 conflicts with the parties' collective bargaining agreement. Under RCW 41.80.020(6), the collective bargaining agreement must prevail.

ISSUE 2 – REMEDY

The grievant is entitled to reinstatement to her former position. Further proceedings on remedy will be appropriate if the union makes a timely claim that she is owed some back pay or benefits.

Your Arbitrator expressly declines to adopt the union's suggestion that the remedial order should require the employer and union to bargain about the status and rights of the person who improperly displaced the grievant. Any such remedial order would be logically inconsistent with the rulings herein that the employer had no legal basis to insert this particular non-represented person (or any similarly-situated non-represented person) into the bargaining unit.

AWARD

Based on the foregoing, and the record as a whole, it is the award and decision of the Arbitrator that the employer violated Article 36 of the parties' collective bargaining agreement when it permitted the employee it laid off from the non-represented TPS4 classification to displace the grievant from the bargaining unit TPS3 position she held under Article 4 of the collective bargaining agreement. THE GRIEVANCE IS SUSTAINED.

To remedy its violation of the collective bargaining agreement, the employer shall immediately reinstate grievant Maria Mayrhofer to the TPS3 position she held as of October 12, 2011, with all rights and benefits as if she had never been "bumped" from that position.

The Arbitrator retains jurisdiction to receive and act upon a union request for further proceedings limited to claims that grievant Maria Mayrhofer has suffered some loss of pay, status or benefits

by reason of the employer's improper action to bump her from the TPS3 position she held as of October 12, 2011. A motion for further proceedings will be considered timely only if it is filed with the Arbitrator and served upon counsel for the employer within thirty (30) days following the issuance of this arbitration award.

Issued at Olympia, Washington, on the 8th day of September, 2012.

Marvin L. Schurke, Arbitrator