IN THE MATTER OF THE ARBITRATION BETWEEN

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| WASHINGTON FEDERATION OF STATE EMPLOYEES, AFSCME COUNCIL 28, AFL-CIO, | ) | ARBITRATOR'S RULING ON EMPLOYER'S MOTION TO DISMISS |
| UNION, | ) | LAURIE DAHMEN GRIEVANCE |
| and | ) | |
| STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, | ) | AAA NO. 75 390 00361 13 TAFL |
| EMPLOYER. | ) | |

For the Employer: Valerie B. Petrie, Senior Counsel, Office of the Attorney General

For the Union: Debbie Brookman, Labor Advocate, WFSE

## Introduction

The Employer and the Union ("Parties") agreed to bifurcate the hearing in this case so they could obtain a ruling from me on the procedural and substantive arbitrability of the grievance. The Parties agreed on a briefing schedule, and they submitted the briefs to me in accord with the agreed schedule. I received the last brief on May 9, 2014.

## Background

**The Grievance Procedure in the Parties' Collective Bargaining Agreement**

**1.** The Grievance Procedure in the Parties' collective bargaining agreement ("Agreement") provides in Section 29.2C that the time limits contained in the Grievance Procedure "must be strictly adhered to unless mutually modified in writing."

**2.** The Grievance Procedure also provides in Section 29.2D as follows: "Failure by the Union to comply with the timelines will result in the automatic withdrawal of the grievance."

**3.** Section 29.3A of the Grievance Procedure provides that a non-disciplinary grievance "must be filed within twenty-one days of the occurrence giving rise to the grievance or the date the grievant knew or could reasonably have known of the occurrence.

**4.** Section 29.3D.1.a of the Grievance Procedure provides that an arbitrator acting under the Agreement has "no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement." Section 29.3D.1.b provides that an arbitrator acting under the Agreement is limited in his or her decision "to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it.

**Relevant Facts Concerning Ms. Dahmen's Employment History**

**5.** Ms. Dahmen became a permanent employee in ES3 Position 3786 in the Department of Ecology's Water Resources Program on November 15, 2005 and left the position on or about September 30, 2011. From October 1, 2004 until November 15, 2005, Ms. Dahmen completed an "in-training" program for the ES3 Position.

**6.** On October 1, 2011, Ms. Dahmen moved laterally to ES3 Position 2448 in another Department program, Waste 2 Resources. The Department, effective January 1, 2013, reallocated Position 2448 to an Environmental Specialist 4 through the addition of higher level duties to the position. Ms. Dahmen remains in that position.

**Changes in Position 3786 that Occurred After Ms. Dahmen Vacated the Position**

**7.** ES3 Position 3786 remained vacant from October 1, 2011 until March 31, 2013.

**8.** The Department transferred Position 3786 from Water Resources to the Office of Columbia River.

**9.** The Office of Columbia River reallocated Position 3786 from an ES3 to an HG4 effective February 27, 2013.

**10.** The March 21, 2013 recruitment announcement for the HG4 Position listed the position at Pay Range 66. When Ms. Dahmen held Position 3786 from 2004 or 2005 until September 30, 2011, the position was at Pay Range 49. The pay difference between Range 49 and 66 is approximately 42.5%.

**The Grievance**

**11.** When Ms. Dahmen saw the recruitment announcement for the reallocated Position 3786, she was surprised by the pay difference. She talked to colleagues familiar with the job who told her that the duties had not changed for Position 3786 despite the reallocation.

**12.** Ms. Dahmen filed a grievance on April 5, 2013, which is approximately fourteen (14) days after Ms. Dahmen saw the March 21, 2013 recruitment announcement. April 5,

2013 is also more than eighteen months after Ms. Dahmen vacated Position 3786 for another position with the Department.

**13.** Ms. Dahmen's grievance, submitted on an official grievance form, described the nature of the grievance as follows: "I (grievant) became grieved on March 22, 2013 when a position I held in Water Resources from October 1, 2004 until September 30, 2011 was reallocated back to HG4 with the same duties and responsibilities I performed as an ES3."

**14.** On Ms. Dahmen's grievance form she described the specific remedy requested as: "I am requesting back pay for the years I was worked out of class and making me whole."

**15.** Section 41.3F of the Agreement provides: "Decisions regarding appropriate classification...will not be subject to the grievance procedure specified in Article 29 of this Agreement." (Agreement, p. 111)

**16.** The Union alleges that Ms. Dahmen's grievance involves a violation of Section 42.4 of the Agreement, which provides for higher pay for temporary assignment of higher level duties without an accompanying change in job classification.

**17.** Section 42.4B of the Agreement reads as follows:

> B. Employees who are temporarily assigned the full scope of duties and responsibilities for more than thirty (30) calendar days to a higher-level classification whose range is six (6) or more ranges higher than the range of the former class will be notified in writing and will be advanced to a step of the range for the new class that is nearest to ten percent (10%) higher than the amount of the pre-promotional step. The increase will become effective on the first day the employee was performing the higher-level duties. (Agreement, p. 114)

**18.** The Union clarified that Ms. Dahmen is not alleging that a request for reallocation has been requested or denied. The Union asserts, therefore, that Ms. Dahmen is not requesting a classification review under Section 41.3 of the Agreement.

**Management Rights**

**19.** The Agreement contains a Management Rights clause, and that clause includes the right to: "Establish, allocate, reallocate or abolish positions and determine the skills and abilities necessary to perform the duties of the position." (Agreement, Article 36, p. 94)

## Discussion

Ms. Dahmen alleges that the Department violated Article 42 of the Agreement and she seeks relief in the form of a back pay/make whole remedy. Essentially, Ms. Dahmen contends that because Position 3786 was reallocated to a higher pay range as an HG4 effective February 27, 2013, she should be compensated at the higher pay rate for the work she performed from 2004 or 2005 to September 30, 2011, during which time the position was allocated to a lower pay range as an ES3. She contends she performed the same duties as the reallocated positon.

The facts raise questions of both substantive and procedural arbitrability (timeliness).

Concerning timeliness, the Union argues that Ms. Dahmen did not know or could not reasonably have known of the occurrence of the event that gave rise to her grievance before she saw the March 21, 2013 job posting. Therefore, in the Union's view of the facts, Ms. Dahmen complied with the twenty-one day grievance filing time limit when she filed the grievance on April 5, 2013. Assuming, without deciding, that the grievance is timely, the substantive arbitrability questions remains.

Essentially, this grievance questions either Ms. Dahmen's classification when she held Position 3786 or the legitimacy of the reallocation decision, but tries to avoid a direct approach to those issues by stating that the grievance only concerns work in a higher classification under Article 42.4B while Ms. Dahmen occupied Position 3786. Article 42.4B deals with temporary assignments to the full scope of duties and responsibilities of a higher level position. In my judgment, six or seven years does not seem to be a reasonable time to remain in a temporary assignment, and so I question whether Article 42.4B applies at all in this case.

In my judgment, under the circumstances present in this case, the issue of allegedly performing the full scope of duties and responsibilities of a higher level position and the issue of the classification cannot be separated from one another. The grievance only arose because Ms. Dahmen believes either the reallocation of Position 3786 is not legitimate or her classification when she held Position 3786 was not proper. Ms. Dahmen asserts that she has been told by colleagues that the duties of Position 3786 as an HG4 are the same as the duties she performed in the position as an ES3. Although couched in terms of Article 42.4B, the real claim here is a claim that the reallocation shows that Position 3786 was improperly classified when Ms. Dahmen held the position. Article 41.3F of the Agreement clearly states that decisions regarding

appropriate classification are not subject to the grievance procedure of Article 29 of the Agreement. (Agreement, p. 111)

Ordinarily, substantive arbitrability is a matter for courts to decide. (see *Steelworkers v. Warrior and Gulf Co.* 363 US 574, 583, f.n. 7 (1960) and see *Peninsula School District No. 401*, 130 Wn.2d 401 413-14; 924 P2d 13 (1996)) If, however, the parties submit an issue of substantive arbitrability to an arbitrator, then the arbitrator is expected to apply an analysis for resolving the question consistent with the analysis that a court would apply. A leading labor arbitration textbook describes the arbitrator's role in these circumstances as follows:

> ...The Supreme Court created a strong presumption of substantive arbitrability, and doubts are to be resolved in favor of coverage.
>
> In applying the rebuttable presumption of arbitrability courts routinely ask (1) whether the subject matter of a dispute specifically has been excluded from the arbitration agreement, and (2) if there was no express exclusion of the subject matter in dispute, whether there is other forceful evidence that the parties intended the issue not to be covered by the arbitration provision. While not required to do so, most arbitrators use a similar approach to analyzing questions of substantive arbitrability. The focus of arbitrators is not on what the parties specifically included, but rather on what was specifically excluded from coverage. (St. Antoine, *The Common Law of the Workplace, 2nd Ed.*, (BNA Books; 2005) p. 94)

Unmistakably, Article 41.3F of the Agreement expressly excludes decisions regarding appropriate classification from the grievance procedure of Article 29 of the Agreement. (Agreement, p. 111) Accordingly, I find that the grievance lacks substantive arbitrability because the subject matter of the grievance is specifically excluded from the grievance procedure.

## Ruling

In ruling on this matter, I have considered the Parties' July 1, 2011 through June 30, 2013 Agreement, the grievance filed on April 5, 2013, the April 18, 2014 Declaration of Corrina McElfish, the February 8, 2013 memorandum from the Office of the Columbia River describing the business reasons for the reallocation of Position 3786, the Position Description for the reallocated Position 3786 and the briefs of the Parties.

After full consideration of the record submitted by the parties, I find that the grievance is essentially a request for classification review and Article 41.3F of the Agreement provides that decisions regarding appropriate classification are not subject to the

grievance procedure of Article 29 of the Agreement. Therefore, the grievance lacks substantive arbitrability. Accordingly, the grievance must be and it is dismissed.

Consistent with Section 29.3.E.1 of the Agreement, the parties shall each pay one-half of the arbitrator's total fee.

SO ORDERED

Dated this 19th Day of May 2014

Joseph W. Duffy
Arbitrator