AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF AN ARBITRATION BETWEEN

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

AND

WASHINGTON FEDERATIONS OF STATE EMPLOYEES

AAA Case No: 75 390 00471 12 TAFL
Subject: Tawnette F. Harris – Job assignment

ARBITRATOR

ELIZABETH C. WESMAN, Ph.D.

APPEARANCES

For the Employer: **Gilbert P. Hodgson**
Assistant Attorney General

For the Union: **Thomas P. Keehan**
Younglove and Coker

ALSO PRESENT

For the Employer: Jeanette Dixon – Labor Relations Consultant
Anmarie Aylward – Assistant Secretary Community Corrections
Lois Bergstrom – Regional Human Resources Manager, DOC
Tranquilina Cooley – Human Resources Classifications Unit, DOC
Merlin Miller – Statewide Community Corrections Programs Administrator
Lydia Zamora-White – Human Resources Manager, Stafford Creek Corrections Center
Jenny Tan – Human Resources Consultant Assistant, DOC

For the Union: Tawnette F. Harris – Grievant
Amy Murphy – WFSE Council Representative

Arbitrator Intern: Connor M. Parker

PROCEEDINGS

Washington State Department of Corrections ("Employer") and the Washington Federation of State Employees ("Union") selected me to act as hearing officer in this matter under the Voluntary Arbitration Rules of the American Arbitration Association. The hearing was held on November 20, 2013, in a conference room of the Office of the Attorney General, in Tumwater, Washington, at which time both Parties were afforded full opportunity to present testimonial and documentary evidence. The Parties elected to complete the record with closing statements at the hearing. Following the hearing, in light of the timing of the receipt of the transcript, the Parties kindly agreed to an extension for issuance of the Award until January 17, 2014.

ISSUES

At the hearing, the Parties stipulated to the following issues

1. **Is the entire grievance non-arbitrable?**
2. **Even if not, are there aspects of the grievance not subject to arbitration, which therefore must be excluded from arbitration?**
3. **As to any articles that are subject to arbitration, did the employer violate those articles as alleged by the union, and, if so, what is the appropriate remedy if any?**

PERTINENT CONTRACT PROVISIONS AND SCHOOL REGULATIONS

ARTICLE 29

GRIEVANCE PROCEDURE

29.3 D Authority of the Arbitrator

1. The arbitrator will:

a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;

b. Be 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;

c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;

d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

* * *

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

* * *

ARTICLE 33.1

SENIORITY

33.1 Definition

A. Seniority for full-time employees will be defined as the employee's length of unbroken state service. Seniority for part-time or on-call employees will be based on actual hours worked….

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ARTICLE 34

LAYOFF AND RECALL

* * *

34.7 Layoff Units

A. A layoff unit is defined as the geographical entity or administrative/ organizational unit in each agency used for determining available options for employees who are being laid off.

B. The layoff unit(s) for each agency covered by this Agreement are described in Appendix D, Layoff Units.

* * *

34.9 Formal Options

A. Employees will be laid off in accordance with seniority, as defined in Article 33, Seniority, among the group of employees with the required skills and abilities, as defined in Section 34.8, above. Employees being laid off will be provided the following options to comparable positions within the layoff unit, in descending order, as follows:

1. A funded vacant position for which the employee has the skills and abilities, within his or her current job classification.

2. A funded filled position held by the least senior employee for which the employee has the skills and abilities, within his or her current permanent job classification.

3. A funded vacant or filled position held by the least senior employee for which the employee has the skills and abilities, at the same or lower salary range as his or her current permanent position, within a job classification in which the employee has held permanent status or, at the employee's written request, to a lower classification within his or her current job classification series even if the employee has not held permanent status in the lower job classification.

Options will be provided in descending order of salary range and one (1) progressively lower level at a time. Vacant positions will be offered prior to filled positions. Full-time employees only have formal options to full-time positions.

B. For multi-employee layoffs, more than one (1) employee may be offered the same funded, vacant or filled position. In this case, the most senior employee with the skills and abilities who accepts the position will be appointed. Appointments will be made in descending order of seniority of employees with the skills and abilities of the position(s).

34.10 Informal Options

An employee being laid off may be offered a funded vacant position to job classifications he or she has not held permanent status within his or her layoff unit, provided the employee meets the skills and abilities required of the position and it is at the same or lower salary range as the position in which the employee currently holds permanent status. An employee may request an informal option to job classifications through the agency's Human Resources Office within five (5) calendar days of receipt of a written notice of a permanent layoff. Part-time employees may be provided informal options to both part-time and full-time positions. The award or denial of an informal option is not subject to the grievance procedure.

* * *

34.12 Notification to Employees With Permanent Status

A. Except for temporary reduction in work hours and temporary layoffs as provided in Section 34.6, employees with permanent status will receive written notice at least fifteen (15) calendar days before the effective layoff date. The notice will include the basis for the layoff and any options available to the employee. The Union will be provided with a copy of the notice.

* * *

C. Employees will be provided five (5) calendar days to accept or decline, in writing, any option provided to them. Except for cyclical or seasonal employees, if the fifth (5^{th}) calendar day does not fall on a regularly scheduled work day for the employee, the next regularly scheduled work day is considered the fifth (5^{th}) day for purposes of accepting or declining any option provided to them. This time period will run concurrent with the fifteen (15) calendar days' notice provided by the Employer to the employee.

D. The day that notification is given constitutes the first day of notice.

* * * *

BACKGROUND

In 2011, legislation passed by the Washington State Legislature (Engrossed Substitute Senate Bill 5891), provided that funding for the Washington State Department of Corrections (DOC) Community Corrections Division would be considerably reduced. The immediate result of that legislation was that the DOC would have to eliminate more than 65 positions by February 5, 2012. At the time Ms. Harris, the Grievant in this case, held a position as a Community Corrections Officer 2 (CCO2). It is undisputed that the DOC delivered layoff letters to its employees the required 15 days before the effective date of those layoffs. Employees with multiple formal options for bumping by seniority – or moving into an available vacant position – ranked their preferences and returned them to the DOC.

Following receipt of vulnerable employees' preferences, the DOC reviewed the choices and awarded affected employees their highest ranked available formal option in accordance with seniority. Accordingly, not all employees received their first choices as an option. Once the process was complete, the DOC notified the employees of the results. Some employees, because of their lack of qualifications or their seniority had no formal options and faced unemployment. Those employees who had no options or who were unhappy with their formal options (due to location, for example) could request informal options.

In the process, a Community Corrections Officer 2 employee whose position was scheduled to be eliminated (Ms. Mullinex), and who was more senior than Ms. Harris, elected to bump into the position Ms. Harris held. Ms. Mullinex was awarded the placement and DOC informed her of that fact on January 23, 2012. At approximately the same time, the Grievant, who had been offered 12 different potential formal options, would have been given her sixth choice among them, a position in Marysville in Snohomish County, approximately 35 miles north of Seattle. Until the announced layoffs, Grievant had been working a position in Pierce County.

In view of the distance of Marysville from her residence and former place of work, Grievant requested informal options (in accordance with Article 34.10 of the Collective Bargaining Agreement).

Since the Grievant had been working in Pierce County, she expressed a preference for that county, but suggested that she would consider surrounding counties as well. Her preferences among the surrounding counties were for Thurston County, South King County, and Mason County. In response to the Grievant's request, DOC offered Ms. Harris several potential informal options, which were also being offered to other similarly situated employees.

On January 27, 2012, another CCO2 (Ms. Saunders), working in Burien, Washington, notified the DOC that she would be retiring. The DOC then offered Ms. Harris the informal option of accepting that position on February 2, 2012, which it would then "double fill" (paying both Ms. Harris and Ms. Saunders until the latter actually left) and Ms. Harris accepted it.

On February 17, 2012, Ms. Harris filed a grievance. That document read in pertinent part as follows:

> **Article(s) and Section(s) of the CBA violated, misapplied, and/or misinterpreted:** 33.1, 34.7A, 34.7B, 34.9A, 1., 2., and 3., 34.9B, 34.10. 34.12A, 34.12 C
>
> **Nature of the grievance and facts upon which the grievance is based:**
>
> On February 3, 2012, grievant received confirmation of her informal layoff option effective February 6, 2012.
>
> We contend the above Articles and Sections were violated, misapplied and/or misinterpreted.
>
> Informal resolution conversation occurred on February 6, 2012, between Council representative and Lois Bergstrom but no resolution found.
>
> **Specify remedy requested:**
>
> That grievant be placed in her previous CCO2 position at RAP/Lincoln. The DOC pay for mileage reimbursement of grievant for commute to Burien for each day she traveled at the IRS rate per mile. That the grievant be in travel status for all hours traveling to and from Burien office and O.T. of all hours over 40 as a result of the travel.

The grievance was processed by the Parties in accordance with their Collective Bargaining Agreement, after which it remained unresolved. Accordingly, it is properly before me for resolution.

POSITIONS OF THE PARTIES

The following positions of the Parties are condensed and extrapolated from their respective closing statements.

Union.

The Union asserts that the Collective Bargaining Agreement was violated in several ways that adversely impacted the grievant, Ms. Harris. Specifically, the Union points to Article 34.9 Formal Options and 34.10 Informal Options. They allege that certain steps were not followed in descending order when determining the formal options layoff for employees. In particular, they note, a funded vacant position needs to be offered to a laid off employee of the same job classification before a funded filled position in the employee's permanent job classification.

The Union then contends that informal options were misapplied with the grievant, Ms. Harris, when the DOC offered her another CCO2 position. They assert that the DOC action was inconsistent with the contract definition and insists that any informal option can never be a job offer to the same position that one is currently holding. The Union also insists that the contract provides for formal options and informal options only. They maintain that there is not a third option available such as suggested by the DOC. It emphasizes that the contract does not provide for processes outside of the Collective Bargaining Agreement or other gratuitous acts.

The Union then argues that contrary to the Collective Bargaining Agreement, the DOC decided not to recalculate the layoff options when Ms. Saunders' vacancy was announced. Although it was an informal option presented to Ms. Harris, Ms. Saunders' position needed to be offered as an option for all CCO2s affected by the layoff. They note that other state agencies, such as DSHS, recalculate layoff options for all affected employees, even if a vacancy occurs after the layoff notices have been issued. Although the DOC stated they do not recalculate formal options beyond a certain point, the Union argues that there is no definition of when that point is, since it is not specifically addressed in the Contract. The Union maintains that recalculating layoff options on an ongoing basis be adopted as reasonable practice.

Finally, the Union contends that if the DOC had recalculated layoff options then Ms. Mullenix would have moved into the position about to be vacated by Ms. Saunders' and Ms. Harris would not have been bumped. They propose that the bumping of Ms. Harris caused many harms and damages to her health as a result from the stress of the commute and working conditions. As remedy for the DOC's violation, the Union suggests that relief should be granted to Ms. Harris.

Employer.

The Employer maintains that there is no basis for the Union's allegation that it violated the Collective Bargaining Agreement during a large-scale agency-wide layoff in the Community Corrections Division in February 2012. It also contends that Ms. Harris was not adversely affected by its actions, as alleged in the grievance. The Employer contends at the outset that the grievance is not subject to arbitration for several reasons. First, the contractual language does not allow for it, and they cite Article 34.10 Informal Options, which states: "the award or denial of an informal option is not subject to the grievance procedure." The Employer argues as

well that the grievance is not about Ms. Harris' layoff, but rather the Union is attempting to attack another layoff, which was not grieved by the impacted employee, Ms. Mullinex.

The Employer insists that even if the arbitrator concludes that the grievance presented is arbitrable, they did not violate the contract. The Employer emphasizes that the Union failed to meet its acknowledged burden of showing that there was a contract violation in this case. The vacancy at the heart of the Union's argument – created by Ms. Saunders' announced resignation – does not come into play in the determination of formal and informal options, since that announcement came well after the initial calculations of vacancies, and would not occur for many days after the layoffs were to take effect. Further, the Employer insists that the charge of a violation of seniority dates under Article 33.1 should be dismissed since there was no evidence that the DOC misidentified a seniority date or that any action of that nature by the Employer played a part in the grievance.

The Employer points out that the Grievant, Ms. Harris was provided with 12 different potential formal options during the layoff evaluation; in view of the formal options she was awarded, she then requested informal options to avoid the long drive (or a household move) to Marysville. The Employer notes that the language in the informal options article provides that such options may be offered at a job class lower than the employee's current position. The Employer maintains that its historical understanding of the informal options article during a layoff period is entirely permissive.

With respect to this Grievant in particular, the Employer insists that there is no contractual requirement to "double fill" a non-vacant position as it did in the case of Ms. Saunders' position. They assert that the "double fill" action was an attempt to minimize the impacts of a wide scale layoff for this employee. The Employer maintains that it should not be punished for thinking creatively and going beyond the contract in this instance.

Accordingly, the Employer asks that the grievance be denied in its entirety. It suggests as well that if it is found that there is any sort of remedy to be reached in this process, the grievant is not entitled to the requests of overtime compensation for commuting to work.

OPINION OF ARBITRATOR

As noted above in the "Issues" section of this award, the Parties' first issue is whether the grievance is actually arbitrable. Since this is a threshold procedural issue, it must be determined before considering the merits. Only if the subject matter of a grievance is found to be arbitrable, may an arbitrator legitimately proceed to decide the merits of the case before him or her.

At the heart of the arbitrability determination, is Article 34.10 – Informal Options, of the Parties' Collective Bargaining Agreement. The language of that Article is clear:

> An employee being laid off may be offered a funded vacant position to job classifications he or she has not held permanent status within his or her layoff unit, provided the employee meets the skills and abilities required of the position and it is at the same or lower salary range as the position in which the employee currently holds permanent status. An employee may request an informal option to job classifications through the agency's Human Resources Office within five (5) calendar days of receipt of a written notice of a permanent layoff. Part-time employees may be provided informal options to both part-time and full-time positions. The award or denial of an informal option is not subject to the grievance procedure. (*Emphasis mine*).

The language of Article 34.10 unambiguously provides that the offering of informal options is at the discretion of the employer, and, more important, the ultimate award or denial of an informal option is not subject to the grievance procedure; i.e., not arbitrable. Accordingly, the key to determination of whether the grievance before me is arbitrable is whether the position ultimately awarded Ms. Harris was in the nature of an informal option.

There can be no question that the initial formal option offered to Ms. Harris – in Marysville, Washington – was a formal option, based upon her preference rankings and her seniority. Nor is there dispute on this record that she was the rightful recipient of that position. The Union's attempt to suggest that other employees – not included in this grievance – should have been considered to bump Ms. Harris in the first place, or for placement into Ms. Saunders' position when it became available, cannot be considered as a live argument, since those affected employees did not file a grievance at the time of the alleged Employer oversight. It is also not in question that the position in Marysville involved considerable inconvenience to Ms. Harris. Marysville is some 40 miles north of Seattle and would have required Ms. Harris to make what would undoubtedly be an onerous daily commute, or to move her family's place of residence north of her present location. Understandably, she was reluctant to do either.

The Union contends that when Ms. Saunders announced her retirement, the DOC should have re-calculated the formal and informal options. There is no contract language in the Collective Bargaining Agreement to support such a contention. Accordingly, I do not find that the Employer was required to adjust its formal and informal positions during the layoff process to accommodate the unanticipated appearance of Ms. Saunders' future vacancy. Moreover, there is evidence on the record that, had the DOC done so, Ms. Harris would have been even worse off than she would have been with the formal option of the Marysville position.

The Employer offered Ms. Harris the position at Burien as what was, essentially, an informal option. No other employees grieved their offer of that position, and their decision to "double pay" Ms. Harris until Ms. Saunders left, as an informal option for Ms. Harris, is neither required nor prohibited by the Collective Bargaining Agreement. In short, there is no language in the agreement to prevent the Employer from accommodating an employee's preference for a closer work site, so long as it does not demonstrably disadvantage another employee. There is no evidence on this record to suggest that any other employee was disadvantaged by the

Employer's somewhat creative informal option offer to Ms. Harris, nor is there evidence of any pending or past grievance to that effect.

Based upon the foregoing, I find that the Employer's offer to "double pay" Ms. Saunders' position so that Ms. Harris did not have to travel to Marysville, is solidly in the category of an "Informal Option" under the provisions of Article 34.10. It was an option that "may" (might) be offered at the discretion of the Employer under the clear wording of that Article. As such, and in accordance with the equally clear final sentence of Article 34.10, "The award…of an informal option is not subject to the grievance procedure." Thus, I find that the present grievance is fatally procedurally flawed and is not arbitrable. It is therefore inappropriate and contrary to well-established arbitral law for me to proceed to the merits of this dispute, and I make no comment thereon.

AWARD

1. **The entire grievance is non-arbitrable.**

Elizabeth C. Wesman, Ph.D.

Signed: 16 January 2014