

**IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

WASHINGTON FEDERATION OF STATE EMPLOYEES,

and

STATE OF WASHINGTON, EMPLOYMENT SECURITY DE-
PARTMENT.

RE: Grievance of Carol Schley, Layoff and Seniority
Issues; AAA Case No. 75 300 00122 12 ANRO

OPINION AND AWARD

of

**LUELLA E. NELSON,
Arbitrator**

December 19, 2012

This Arbitration arises pursuant to Agreement between WASHINGTON FEDERATION OF STATE EMPLOYEES ("Union" or "WFSE"), and STATE OF WASHINGTON, ("Employer") EMPLOYMENT SECURITY DEPARTMENT ("ESD"), under which LUELLE E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on October 1, 2012, in Tumwater, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. A certified shorthand reporter attended the hearing and subsequently prepared a verbatim transcript. Both parties filed post-hearing briefs on or about November 19, 2012.

APPEARANCES

On behalf of the Union:

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On behalf of the Employer:

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STIPULATED ISSUE

The parties were unable to agree on a statement of the issue or issues to be decided. The Union would formulate the issue as follows:

Did the Employer violate Article 34.9 of the collective bargaining agreement when it failed to offer Carol Schley available positions in Thurston County for which she was eligible? If so, what is the appropriate remedy?

The Employer would formulate the issue as follows:

1. Did the Employer violate the terms of Article 34.9 of the collective bargaining agreement when it offered Carol Schley a single “formal option” to another position as an alternative to being laid off?
2. If the Employer violated the collective bargaining agreement, what is the appropriate remedy?

The parties stipulated that the Arbitrator would formulate the issue or issues to be decided. Having reviewed the record, the Agreement, and the parties' statements of the issues, the Arbitrator formulates the issues as follows:

1. Did the Employer violate Article 34.9 of the collective bargaining agreement when it offered a formal option to Carol Schley consisting of one of three available positions in Thurston County, and did not offer the other two available positions, as an alternative to being laid off?
2. If the Employer violated the collective bargaining agreement, what is the appropriate remedy?

RELEVANT SECTIONS OF THE AGREEMENT

ARTICLE 34 LAYOFF AND RECALL

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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.

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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. Part-time employees only have formal options to part-time 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).

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APPENDIX D LAYOFF UNITS

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Employment Security Department

- 1. For all locations except Thurston County:
 - A. Office
 - B. If no option is available within the office layoff unit, the county in which the employee's permanent workstation is located will be considered the layoff unit.
 - C. If no option is available within the county layoff unit, the unit expands to the bordering counties layoff unit.
 - D. If no option is available within the bordering counties layoff unit, the department statewide will be considered the layoff unit.

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FACTS

This case involves the question of whether the Employer was required to offer Grievant multiple vacancies in lieu of layoff. The Union argues that, as the most senior laid-off employee in her layoff unit, Grievant should have been offered first choice among three existing vacancies; the Employer argues that it properly offered her one of the three vacancies, and offered the other two vacancies individually to two other employees in her layoff unit. The parties stipulated at the outset of the hearing to the following facts:

- 1. The [Union] stipulates that the sole issue in this grievance concerns an alleged violation of Article 34.9, and all other references made in the original grievance form are hereby withdrawn.
- 2. As of November 15, 2011, Carol Schley was employed as an Office Assistant 3 with the [Employer] and was working at ESD's WorkSource Pierce office in Pierce County.
- 3. As defined in Article 34.7 and Appendix D of the CBA, Ms. Schley's layoff unit was as follows:
 - a. The WorkSource Pierce office.
 - b. If no option was available within the WorkSource Pierce office, Pierce County would be considered the layoff unit.
 - c. If no option was available within Pierce County, the layoff unit would expand to bordering counties (King, Thurston, Yakima, Lewis, Mason, Kitsap).
 - d. If no option was available within a bordering county, then ESD statewide would be considered the layoff unit.
- 4. Ms. Schley's seniority date, as defined in Article 33 of the CBA, was March 5, 1986.

5. On December 2, 2011, Ms. Schley received a letter from ESD informing her that she would be laid off from her position at the end of her work shift on January 15, 2012.
6. In this layoff notice letter, Ms. Schley was informed that the basis for the layoff was lack of funds, and she was offered the formal option of accepting an Office Assistant 3 position in Unemployment Insurance Employer Accounts in Thurston County. The position number for that position was 0862, and it would be a funded, vacant position as of the effective date of the layoff. The letter stated that there was no contingency option or informal option available.
7. On December 2, 2011, two employees who were less senior than Ms. Schley each received a layoff notice from ESD offering the formal option of accepting a position as an Office Assistant 3 in the WorkSource Standards and Integration Division (WSID) in Thurston County.
8. The two WSID positions did not yet exist as of December 2, 2011, but they had been approved to be created and filled. They were scheduled to come into existence in January 2012.
9. The position offered to Ms. Schley and the two WSID positions were equivalent in terms of job class and salary. They were all physically located in downtown Olympia, within approximately a half-mile of each other.
10. Ms. Schley had the necessary skills and abilities to perform the job she was offered, and she also had the necessary skills and abilities to perform either of the two WSID jobs described above.
11. Ms. Schley chose to accept her formal option, and on December 14, 2011, ESD gave her a letter instructing her to report to her new position on January 17, 2012. (The letter said January 17, 2011, but it is understood by all to have meant 2012.)
12. On December 20, 2011, WFSE filed a timely grievance on behalf of Ms. Schley.
13. On January 17, 2012, Ms. Schley reported to her new position and began working in it.

The parties further stipulated that, if Grievant had been offered the two WSID positions referenced in the stipulated facts, she would have preferred those positions and would have accepted them in favor of the position she was offered. The parties also stipulated that she resided in Thurston County.

Grievant was among 254 employees laid off state-wide in late 2011, three of whom were within her layoff unit. At the time of her layoff, there were no funded vacant positions or positions held by less senior employees in her office and within Pierce County. The Employer did not identify the disputed positions as available before it stopped looking for available positions for her, which was when it found the position she was offered. It did, however, identify those positions as available on the same day it identified the position that was offered to Grievant. It considered those positions equal to the one she was offered. Human Resources Manager Teresa Eckstein testified that, if more than one position was available within a layoff unit, ESD selected the position whose work was most similar to that the employee was doing. Only one position was offered to each employee. In her view, it would not have been possible to complete the process in the 12 weeks available had ESD offered multiple options to employees and awaited their responses.

Eckstein testified that in past layoffs ESD offered every potential position to every laid-off employee, and allowed them to rank them, then assigned preferred vacancies in seniority order. She testified ESD's Deputy Assistant Commissioner, Michelle Castanedo, wanted to discontinue that practice because, in her view, it was inconsistent with the Agreement. In addition, some employees expressed frustration over ranking numerous options that were not realistic options. To remedy that situation, she decided to offer one formal option and provide a chance to request informal options. She and Castanedo discussed this idea informally in a union-management subcommittee that included the Union's Labor Advocate, Debbie Lippincott, and a shop steward named Ginger. She also prepared a PowerPoint presentation comparing the existing and proposed processes, which included the following comparison:

Before	Now
Employee received all options at once, including formal, informal, and contingency (up to 25 pages)	Employee receives one formal option + contingency options + access to one informal option

Her recollection was that the Union representatives supported this change and did not argue that ESD was required to offer multiple formal options where more than one equivalent position existed. In a May 10, 2011, e-mail, Lippincott informed Castanedo, in relevant part, as follows:

Just a heads up - I am going to file a demand to bargain over the revised layoff process and ask that we continue to engage in informal discussions. I want to do this to protect any timelines and in case there are impacts that we identify that we will need to bargain over.

...

On the same day, Lippincott filed a demand to bargain with the Employer's Labor Relations Office, Office of Financial Management. Her letter cited Article 38.1 of the Agreement (requiring bargaining before making changes to mandatory subjects) and commented, in part:

WFSE and ESD have formed an Economic Transition Issues Committee. One of the tasks of this committee is to work together in the planning and implementation of the revised layoff process in anticipation of future budget cuts that may result in layoffs. At this time it is unclear what the impact will be on WFSE Bargaining Unit Members so we are initiating a Demand to Bargain at this time to safeguard timelines and to protect our rights.

I would respectfully request that we suspend formal negotiations in favor of continued meetings between WFSE and ESD. If WFSE determines that it is necessary to bargain over the impacts to our members I will contact you to schedule a meeting.

Thereafter, the Employer twice asked when Lippincott would be available to bargain. Lippincott asked to hold off scheduling formal bargaining while informal talks progressed. No formal bargaining occurred. Lippincott has since left the Union's employ, and the Employer has closed its file on her demand to bargain.

BARGAINING HISTORY

2004 NEGOTIATIONS

The parties bargained their first collective bargaining agreement starting in early 2004. The Union's opening proposal regarding layoffs included the following pertinent proposal:

xx.16 - RIF options will be ranked by offices first in local areas, then by county, then regionally, and lastly, statewide with the following order through each area:

- a. Employees will be offered layoff options by seniority to a vacancy in the same classification/class level/occupational category at or above the current salary range/position salary spread, or comparable classification/class level/occupational category, then to a comparable position held by a less senior employee.
 - i. If there are no options to a similar or comparable classification/class level/occupational category, the employee will have options to positions within a classification/class level/occupational category in which he/she previously held status. If any of these positions were later reclassified upward, the employee will have the option to those positions regardless of the present title and salary range/position salary spread, provided the employee meets the job qualifications or equivalents.

If there are no options to previously held or upwardly reclassified positions, the employee will be offered a position outside of the employee's current classification/class level/occupational category, provided he/she meets the job qualifications or equivalents.

If there are no options to a similar, comparable or upwardly reclassified position, the employee will be offered an option to a lower-salaried classification/class level/occupational category.

The Employer countered with the following language, in pertinent part:

X.8 Formal Options

- A. Employees will be laid off in accordance with seniority, as defined in Article X, Seniority, and the skills and abilities of the employee. Management shall determine if the employee possesses the required skills and abilities for the position. Employees being laid off shall be provided the following options to comparable positions in descending order within the layoff unit:
 1. A funded vacant position for which the employee has the skills and abilities, within their 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 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 their current permanent position, within a job classification in which the employee has held permanent status.

Options will be provided in descending order of salary range and one progressively lower level at a time. Vacant positions will be offered prior to filled positions.

On July 2, 2004, the Union proposed the following pertinent layoff language specific to ESD:

- X. **Employment Security Department Layoff.** In all U.I. Telecenters, WorkSource, and Regional Offices, employees will have the right to bump the least senior person in their class in their local area office. If there are no options in the local area office, bumping options will be provided to the employee in the following order:
- A. Options within the county in the employee's current class
 - B. Options within the region in the employee's current class
 - C. Options state-wide in the employee's current class
 - D. Options within the county at or below the employee's current salary range in a class in which they previously held permanent status
 - E. Options within the region at or below the employee's current salary range in a class in which they previously held permanent status
 - F. Options statewide at or below the employee's current salary range in a class in which they previously held permanent status.

In September 2004, toward the end of negotiations, the Union offered language which tracked the Employer's earlier proposal, but with modifications, as follows:

X.8 **Formal Options**

- A. Employees will be laid off in accordance with seniority, as defined in Article X, Seniority, and the skills and abilities of the employee. Management shall determine if the employee possesses the required skills and abilities for the position. Employees being laid off shall will be provided the following options to comparable positions in descending order within the layoff unit:
 1. A funded vacant position for which the employee has the skills and abilities, within ~~their~~ 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 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 ~~their~~ his or her current permanent position, within a job classification in which the employee has held permanent status.

Options will be provided in descending order of salary range and one progressively lower level at a time. Vacant positions will be offered prior to filled positions.

The Employer countered with its own modification of its earlier proposal, as follows:

X.8 **Formal Options**

- A. Employees will be laid off in accordance with seniority, as defined in Article X, Seniority, and the required skills and abilities as defined in X 8 of this Article, of the employee. Management shall determine if the employee possesses the required ~~skills and abilities for the position.~~ Employees being laid off shall will be provided the following options to comparable positions in descending order within the layoff unit:
 1. A funded vacant position for which the employee has the skills and abilities, within their 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 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 their current permanent position, within a job classification in which the employee has held permanent status.

Options will be provided in descending order of salary range and one progressively lower level at a time. Vacant positions will be offered prior to filled positions.

The Union countered with the following modifications to the Employer's most recent proposal:

X.8 Formal Options

- A. Employees will be laid off in accordance with seniority, as defined in Article X, Seniority, among the group of employees with the required skills and abilities as defined in X.8 of this Article. Employees being laid off will be provided the following options to comparable positions in descending order within the layoff unit:
 1. A funded vacant position for which the employee has the skills and abilities, within their 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 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 their current permanent position, within a job classification in which the employee has held permanent status.

Options will be provided in descending order of salary range and one progressively lower level at a time. Vacant positions will be offered prior to filled positions.

The Employer countered with the same proposal it had just offered, with redline/strike-out marks removed.

The parties reached tentative agreement reading, in pertinent part:

X.8 Formal Options

- A. Employees will be laid off in accordance with seniority, as defined in Article X, Seniority, among the group of employees with the required skills and abilities as defined in X.8 of this Article. Employees being laid off will be provided the following options to comparable positions in descending order within the layoff unit:
 1. A funded vacant position for which the employee has the skills and abilities, within their 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 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 their current permanent position, within a job classification in which the employee has held permanent status.

Options will be provided in descending order of salary range and one progressively lower level at a time. Vacant positions will be offered prior to filled positions.

The tentative agreement became the final language, except that “his or her” replaced “their” in paragraphs 1 and 3.

Council Representative Amy Murphy, who was part of the Union’s 2004 negotiating team, testified she did not recall whether the parties discussed how vacancies would be allocated among multiple employees who were subject to layoff, or whether the Employer would be allowed to choose a position for each such employee, in those negotiations.

Labor Negotiator Christina Peterson testified the Employer’s concern in negotiating this portion of the initial Agreement was to be able to match skills and abilities. For example, it wanted to avoid placing a laid-off employee with limited typing skills in a position that required good typing skills. She did not recall any discussions regarding offering multiple positions, and her notes do not reflect any questions about whether the Employer was to offer more than “a vacant position” to an individual laid-off employee.

2010 NEGOTIATIONS

The pertinent language carried over unchanged until negotiations for the 2011-2013 Agreement, which occurred in 2010. In those negotiations, the Union initially proposed to add the phrase “or job series” to the end of paragraph A.2. The Employer’s initial proposal did not accept that modification, but proposed to modify paragraph A.2. to end “within his or her current permanent job classification.” It also proposed to add the following sentences to paragraph A.3:

Part-time employees only have formal options to part-time positions. Full-time employees only have formal options to full-time positions.

It also proposed to add the following paragraph as a new paragraph B:

- 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).

The Union’s counter rejected the first of these proposed changes and accepted the second one; it continued to proffer the Union’s proposed minor change to add “or job series” to paragraph A.2. Neither party made change in their proposals regarding the pertinent language in the next exchange of counters. In its next counter, the Employer adhered to its former proposed modifications, but modified the end of paragraph A.3 so that the paragraph would read:

- 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 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.

Its next proposal adhered to this proposed change. With the series of changes made, the Employer's proposals were nearly identical to the current language; the exception is the phrase "at the employee's written request" that is now part of paragraph A.3.

Senior Negotiator/Staff Attorney Shane Esquibel testified that, at the time of extensive layoffs in 2010, the Union approached management at the Western State Hospital ("WSH") with the idea of offering multiple formal options to employees who were being laid off. Because the Employer believed that was not permissible under the then-current language, it negotiated a side agreement allowing employees to rank their preferences among all the vacancies and have vacancies awarded based on seniority. In later bargaining in 2010, both parties were interested in allowing that in other agencies. Article 34.9.B was the result. Esquibel, who drafted the language, testified he used permissive language ("may") because in some instances it might not make sense for an agency to offer options in that manner. The Union quickly agreed at the table; it did not suggest multiple options would or should be required or that the language was unnecessary because the Agreement already allowed this method of offering formal options.

LAYOFFS CONDUCTED PRIOR TO 2011

In September 2005, then -WorkSource Specialist 3 May Johnson was among employees laid off by ESD. She received a letter informing her of her formal and informal layoff options. Among those were a list of positions potentially available for "Bump, Transfer and Voluntary Demotion," all of which were also offered to the other employees in her layoff unit. The letter presenting the options instructed Johnson to prioritize the available positions in which she was interested; any she did not prioritize would not be considered as possible placements for her. Her eligibility for any particular position was to be determined by which were left after selection of placements by more senior employees in her layoff unit.

Murphy testified that multiple other agencies conducted layoffs in the same way as Johnson's between 2005 and 2011. She specifically recalled that the Department of Corrections and the Department of Parks and Recreation were among agencies that conducted them in that manner. She was unaware of any agency that did not conduct them in that manner in that timeframe; however, she does not become aware of every layoff, and she acknowledged it is possible that some conducted them as the Employer did here.

Eckstein testified that, in developing ESD's new layoff process, she asked other agencies about their layoff processes. She learned the Department of Corrections had pooled the options and allowed employees slated for layoff to rank them when it closed a facility. DSHS had pooled options in a specific closure. None of the other agencies told her they had pooled options.

Peterson testified that, at some point between 2005 and 2011, the Department of Transportation asked for her advice on a possible offer of multiple formal options to laid-off employees. Based on her interpretation of the Agreement, she told them that was not allowed. Other agencies have conducted multi-employee layoffs without offering multiple formal options to the affected employees, without garnering any grievances. In higher education, a single informal option has been offered to multiple laid-off employees where it was uncertain whether any of them would want the position; for example, instructional aides or program coordinators might be offered a vacant custodial position.

Peterson testified she has trained agency personnel that Article 34.9.A's reference to "a funded position" means that only one formal option is to be offered to an individual laid-off employee. She was unaware whether anyone from ESD attended those sessions. In her view, the Employer has the authority to choose which vacancy to offer to any laid-off employee, without regard to relative commute distances..

Esquibel testified he advised agencies prior to 2011 that they did not have the discretion under the Agreement to offer multiple formal options to a laid-off employee; he also trained agency personnel on this interpretation of the Agreement. He believed the 2010 WSH layoff was the first time multiple formal options were offered.

POSITION OF THE UNION

No specific discussion took place in bargaining that would have illuminated the parties' difference of opinion regarding the meaning of the governing language. The parties left negotiations for their first full-scope Agreement with different understandings of the processes mandated by the layoff language. That Agreement went into effect in 2005; three more were negotiated later with no further discussions that were germane to the issue at hand.

There is reason to doubt that the Employer's understanding of the language was as clear in negotiations as its testimony suggests retroactively. The Employer immediately put into effect processes that were consistent with the Union's understanding of the language. In late 2011, ESD admittedly changed its existing processes concerning layoffs; the Union took issue and found cause to object.

The Employer proposed the language at issue; the Union accepted it with a specific understanding of the rights and obligations the language conferred. ESD acted in conformity with the Union's understanding of the language between 2005 and 2011, until it changed its layoff process and asserted it had been in violation of the Agreement for the previous years. ESD's revised process violates the Agreement.

The Employer has always been obligated to offer the most senior employee their choice of available positions which match the criteria in the Agreement. This was the assumption everyone operated under since 2005. This was the first time the Union was aware of a deviation from the intended process.

Bargaining history supports the Union's interpretation. The parties bargained their first full-scope Agreement beginning in 2004. The Union's opening proposal on layoffs referred repeatedly to "options" in the plural, and to "employee" in the singular. The proposal secured the concept that "[e]mployees will be offered layoff options by seniority." The Union understood that, if multiple equal options existed, the most senior employee would have first choice. The Employer's counterproposal was similar, and equally ambiguous. It, too, provides that "[e]mployees being laid off shall be provided the following options to comparable positions," but references the descending order of options in the singular, "[a] funded vacant position." This language became the language of the Agreement.

The Union believed it had secured the right of senior employees to choose and be offered available positions before less senior employees. The Union would have balked had the Employer articulated that it reserved the right to dole out positions it deemed equal to employees regardless of seniority. At no time in bargaining or otherwise did the parties discuss this scenario and process. The majority of the discussion involved the right to determine whether an employee had the necessary skills and abilities.

The Arbitrator should apply the reasonable interpretation that is less favorable to the party that drafted the language. The Employer proposed the final language. It did not dramatically change the Union's proposal, but did create its own format. It had the ability to discuss and constrain any interpretation the parties took from the proposed language. If it did not intend to obligate itself to offer "options to comparable positions" "in accordance with seniority," it was its obligation to clarify that this was not its intent. The Union accepted the proposal as confirming that the Employer would offer positions in light of seniority.

Past practice also supports the Union's position. If the Employer had left bargaining and immediately applied the newly-negotiated language as it did here, it would have been apparent that there was no meeting of the minds. However, the Employer conducted layoffs in the manner the Union believed it had

secured in negotiations. This calls into question the Employer's assertion that it believed the language allowed and obligated it to dole out singular, available positions.

In 2005, ESD offered all available positions to all employees being laid off, and allowed their rankings to determine which positions were offered to whom. This was more efficient than approaching the most senior employee with the list and waiting for that employee's choice before moving on to the next person on the layoff list. It does not matter which of these approaches is followed, as long as the senior employee gets the first choice of layoff options.

The Employer's testimony is contradictory. A representative of OFM/LRD testified they always interpreted the Agreement to allow agencies to choose and allot one formal option out of the available options, so long as they went in order of seniority. An ESD representative said ESD adopted the Union's preferred method until 2011, when ESD radically redeveloped its process of administering layoffs.

Custom or past practice is the most widely used standard to interpret ambiguous or unclear contract language. The practice ESD followed in implementing the first Agreement suggests there was a mutual understanding on the terms. The Employer cannot unilaterally alter that practice and understanding.

The Employer admits it changed the practice because ESD's Deputy Assistant Commissioner decided the contract terms should be given a different meaning. It also contends the new approach was less confusing for employees. The Employer has unilaterally removed a specifically negotiated obligation.

The Employer also argues the change was approved by a Union member who is no longer employed by the Union. It presents nothing in writing to suggest the change was overtly or tacitly approved. It has not shown that the Union is estopped from challenging the radical departure from past practice. The Union was unaware that ESD or any other agency implemented layoffs in this manner until Grievant's situation arose, and the Union promptly filed a grievance.

Article 34.9.B, added in 2011, does not undermine the Union's position. This language simply reinforced the method already in place. The Union received the proposal and simply said, "OK." The alternative was to go one employee at a time and wait for that employee to choose from the list of available positions. It has never been the Union's intent to make the process more cumbersome than necessary.

In negotiating Article 34.9.B, the Employer did not reserve the right to allot one option apiece among employees regardless of seniority. That is not in the language, nor was it communicated or discussed in bargaining.

The Employer's position creates absurd results. It could offer a position 50 miles from the senior employee's home, even though an equally available position existed 5 miles away. This would lead to absurd results and would not reward seniority as specifically negotiated. Here, the Employer asserts the three positions are equal. There will always be unique factors inherent to a position that make it more or less desirable, even if those do not involve proximity to an employee's home. It is not for the Employer to make those determinations unilaterally. This undermines the right of seniority. Grievant would have chosen one of the other available positions

The Arbitrator should find that the Employer violated the Agreement, and require the Employer to offer the options to Grievant that are required under the Agreement.

POSITION OF THE EMPLOYER

ESD complied with the Agreement. It offered Grievant a funded vacant position within her current job classification and in the correct layoff unit, in accordance with Article 34.9.A. The plain language allowed ESD to offer a single formal option. Bargaining history and other past events confirm a mutual understanding that there was no requirement to provide a "menu" of formal options. No past practice required ESD to offer multiple formal options. The grievance must be denied. No remedy is appropriate.

The Union bears the burden of proof by a preponderance of the evidence. It has not carried this burden.

Where the contract language is clear, the plain language controls. Only if the language is ambiguous is it proper for an arbitrator to consider extrinsic evidence to help make the meaning clear. Arbitrators must view the agreement as a whole, since a single phrase, sentence, or paragraph taken out of context may logically abort the parties' intent. In this case, the plain language governs and defeats the Union's argument. The Union asks the Arbitrator to insert a requirement that does not exist.

Article 34.9 prescribes the procedures for offering formal options in a layoff. Sections A and B describe the two alternatives when multiple employees will be laid off. The first option is to follow seniority and, moving down through the layoff unit, offer either "[a] funded vacant position" or "[a] funded filled position" to each employee until there are no more positions to offer. The second option is to choose, at the Employer's discretion, to offer the same position to multiple employees and award it to the most senior employee who accepts it. The second option is not required under the plain contract language. "May" is permissive language. No evidence exists that the parties intended a mandatory meaning. ESD was under

no obligation to proceed under that option. When a department does not choose to use Article 34.9.B, Article 34.9.A governs as the default process.

Although Article 34.9.A uses plural nouns “options” and “positions” in its opening paragraph, it only requires an offer of a single position to each employee for whom a position is available as a formal option. “Options” and “positions” are plural because each sentence in the opening paragraph uses the plural noun “employees.” It would be grammatically incorrect to say “Employees being laid off will be provided the following option to a comparable position within the layoff unit....” Therefore the language and structure of the opening paragraph rule out the inference that multiple formal options must be given to any individual laid-off employee.

The plain language of the descriptions of the available positions shows the Employer is not required to offer multiple formal options to a single employee under Article 34.9.A. The Agreement lists three levels of positions. The Employer must look at them in progressive order. At each level, the Agreement directs the Employer to offer “[a] funded ... position” that is either vacant or filled, depending on the level. It does not direct the Employer to offer “positions” or “options” or any other plural noun at any level. The descriptions at each level could easily have been written using “funded vacant positions...,” “funded filled positions ...,” “all funded vacant positions...,” or similar phrases. The fact that they were not shows the parties did not intend to require the Employer to offer multiple positions at each level.

The Union’s argument ignores the plain language of Article 34.9.A, which only required ESD to offer “a funded vacant position” to Grievant.

ESD complied with the plain language of Article 34.9.A. It followed the seniority principles in the Agreement. It correctly followed the process by going through the descending levels of positions and expanding stages of the layoff unit until it identified a vacant funded position in Grievant’s current job class in an adjoining county. Once it found a position for her, it stopped its search. It offered that position, and she accepted it. Under the plain contract language, nothing more was required. Nothing in the Agreement required ESD to allow Grievant a choice from among the three vacant funded positions that ended up being available in her job class in Thurston County. ESD had chosen not to use Article 34.9.B.

Even if it was appropriate to look to extrinsic evidence, it shows mutual understanding that ESD was not required to offer multiple formal options.

No written proposal in the bargaining history for Article 34.9 contained language requiring multiple formal options to be offered. There is no evidence the Union asserted in 2004 negotiations, or any later negotiations, that multiple formal options were required. On the contrary, the Union understood that the Agreement did not require formal options.

The WSH layoff and adoption of Article 34.9.B show that the Agreement does not require ESD to offer a menu of formal options. In the WSH layoff, the parties informally agreed it would be best to offer multiple formal options to employees. To ensure that this process would not violate the Agreement, DSHS approached the LRD, and the parties entered into an agreement under which DSHS could offer multiple options. In later negotiations for the 2011-2013 Agreement, the Employer proposed, and the Union agreed to, language that became Article 34.9.B, allowing (not requiring) the offer of positions to multiple employees. The intent was to give departments discretion to offer the same list of positions to multiple employees, making layoffs more efficient in some cases. The Employer cited the WSH layoff as an example showing the desirability of permitting flexibility in administering layoffs. The Union never expressed the position that the amendment was unnecessary because the Agreement already allowed departments to offer multiple formal options under Article 34.9.A.

The Employer trained its human resources personnel with the understanding that multiple options were not required. Some agencies later offered only one formal option to each person; others at times offered multiple positions to individual employees, allowed them to rank their preferences, then granted preferences according to seniority. The Union never filed grievances disputing any agency's practice of offering only one formal option to individual employees, nor did it formally or informally assert that agencies were required to offer multiple formal options.

Until 2011, ESD offered multiple formal options. It revised its layoff procedures in 2011 and decided to offer only one formal option to each employee. The Union not only was notified of ESD's intent and was involved in the change from the beginning, but supported the change. At no point in those discussions did the Union assert that ESD must continue to offer multiple formal options to each employee. The Union did file a demand to bargain generally about changes to the layoff process, but only "to safeguard timelines and to protect [its] rights," since at that time it was unclear how changes might affect members. In spite of repeated efforts by the Employer to meet to bargain, the Union never wanted to do so, repeatedly

stating its preference for continued meetings and informal discussions. After the layoff letters were sent, the Employer closed its file on the demand to bargain.

The bargaining history and parties' actions support the plain language of the Agreement, that ESD is not required to provide multiple formal options to employees.

No past practice requires ESD to offer multiple formal options. The Union acquiesced in other agencies' practices of offering only one formal option. Other agencies' practices cannot bind ESD. Adoption of Article 34.9.B erased any past practices contrary to that section. The Union supported ESD's change in practice and declined to pursue its demand to bargain.

The Union acquiesced in other agencies' offers of only single formal options. This defeats any argument that other agencies' offers of multiple formal options created a binding past practice. The Union's failure to grieve or otherwise contest offers of single formal options arguably created a past practice of allowing just a single formal option. The most that can be said is that past practices have conflicted. In such cases, the "predominant pattern of practice" is controlling. The Union has failed to establish that offering multiple formal options was the "predominant pattern of practice" among state agencies.

Even if the Union could establish a past practice among other agencies, that practice would not bind ESD. Another party's actions cannot show mutual understanding. Other agencies' practices therefore do not bind ESD. Even if there was a past practice, the binding effect of that practice was erased by Article 34.9.B. A past practice is ended by the parties' mutual assent in bargaining to contract terms at odds with the past practice. Past practice cannot grant a demand that a party was unable to obtain in bargaining.

ESD's acknowledged practice of offering multiple formal options does not bind it because of the adoption of Article 34.9.B and the Union's failure to pursue its demand to bargain after it was notified of ESD's intent to change its layoff process. The Union cannot gain through arbitration a benefit it had the opportunity to pursue in bargaining but chose not to pursue.

Even if ESD violated the Agreement, the only available remedy for Grievant would be to allow her to choose to transfer to one of the other positions that were available at the time of her layoff. The three positions were equivalent in job title, job class, and salary, and comparable in duties and location. Grievant suffered no harm when ESD offered one specific position to her. The positions were located within a few blocks of each other, so there was no evidence of a longer or more expensive commute. Apart from her unexplained preference for the positions she was not offered, there is no evidence of disadvantage or harm,

subjective or objective. The only proper remedy would be to permit Grievant to choose one of the other positions.

The Arbitrator should deny the grievance.

OPINION

PRELIMINARY MATTERS

The Union bears the burden of persuasion as the moving party in this contract interpretation case. The applicable standards for contract interpretation are well established. Where the language is clear and unambiguous, arbitrators must give effect to the parties' intent. That is so even where one party finds the result unexpected or harsh. Language may be deemed clear even though the parties disagree concerning its meaning. Arbitrators cannot interpret disputed contract provisions in a vacuum, but must read them in conjunction with the rest of the Agreement. In determining whether the language is clear, words are given their ordinary and popularly accepted meaning, absent evidence they were used in a different sense.

Where the contract language is unclear or ambiguous, or if it does not specifically address the situation at hand, arbitrators will attempt to ascertain the parties' most likely intent, often through reliance on past practice or other extrinsic evidence of the parties' intent. Arbitrators seek to balance the legitimate rights and obligations of the parties and provide both sides with the benefit of their bargain.

A split of opinion exists among arbitrators regarding the proper application of evidence of past practice. My view is that past practice can aid in interpreting the contract where the contract language is ambiguous or where it is clear. However, the quantum of proof necessary for a past practice to be persuasive in deciding a grievance is considerably greater where the contract language is clear. The reason for this difference is evident when one considers the logical underpinnings of the concept of past practice.

Past practice is persuasive in interpreting ambiguous language where the practice is clear, consistent, and known to both parties. In this setting, past practice serves as an aid in illuminating the parties' intent. However, no illumination is required where the contract language is clear. Instead, a practice can override clear language only if it demonstrates an equally clear and unambiguous agreement by the parties to modify the written contract—i.e., if it is the functional equivalent of an amendment to the contract. The conduct necessary to modify clear language must be unequivocal, and the terms of the modification must be clear, mutual, intentional, and readily ascertainable through a fixed practice over a reasonable period of time.

Awareness of a practice may be presumed from its long-established and widespread nature. A course of conduct which arose out of convenience or personal preference, or was unilaterally implemented without discussion or acquiescence, is insufficient to modify clear contract language. Where a course of conduct is not controversial, or when it benefits both parties, no agreement to be bound by it rather than by clear contract language can be implied. This is so even when employees have come to expect it.

Bargaining history is helpful in interpreting ambiguous contract provisions where either the evolution of language or the parties' statements at the bargaining table demonstrate the intent behind particular provisions. Where a party did not express in bargaining the meaning it claims to have attached to its proposal, that meaning is less persuasive. A change in language may infer a change in intent, but should also be examined to determine whether it constituted no more than an attempt to spell out already existing rights. A party may not obtain through arbitration what it did not seek or achieve in bargaining.

Arbitrators must avoid interpreting ambiguous language to nullify or render meaningless any part of the parties' negotiated agreement if another reasonable interpretation gives effect to all provisions. If two plausible interpretations exist, arbitrators must prefer that interpretation which avoids harsh, absurd, or nonsensical results. Any ambiguity not removed by other rules of interpretation may be removed by construing the ambiguous language against its proponent.

THE MERITS

Article 34.9 is ambiguous. Although individual sentences appear clear in isolation, that clarity vanishes when they are read together. That is particularly so within Article 34.9.A.

Article 34.9.A initially requires the offer of "options" "in descending order", then lists three levels of options, each described as "a funded ... position" within that particular level. If Article 34.9.A ended there, the reference to "options" in the initial paragraph would be susceptible to two reasonable interpretations: either that an agency conducting a layoff would multiple options, as the Union urges, or that an agency would shift its gaze from one level to the next if it did not find "a funded ... position" within higher levels, but would offer only one funded position to any particular laid-off employee, as the Employer did here. However, there are two weaknesses in the latter interpretation.

First, the Employer's "one formal option per employee" interpretation does not address how the particular option to be offered would be selected where, as here, more than one "funded ... position" exists within a single option level. It is undisputed that the parties did not specifically discuss this scenario in

bargaining; it is therefore necessary to attempt to discern the parties' likely intent (i.e., perform "gap filling"). It is not hard to envision a situation under the Employer's interpretation in which a senior employee would be offered a position that was so undesirable that s/he would opt for layoff, although that senior employee would have been willing to accept a different equivalent funded position had it been offered.¹ It is unlikely that the parties would have intended this result in a provision that otherwise accords preference by seniority.

The second weakness in the Employer's interpretation of Article 34.9.A is in the sentence that immediately follows the list of option levels. That sentence specifies, "Options will be provided in descending order of salary range and one (1) progressively lower level at a time." Offering only one formal option to a laid-off employee, as the Employer urges, would render this sentence inoperative. The more likely meaning of this provision is that agencies will provide multiple options, in descending order, as ESD did prior to 2011.

The later addition of Article 34.9.B does not alter this interpretation. It permits an agency to offer multiple formal options simultaneously to multiple employees. This not only codifies the practice followed by ESD before 2011, but clarifies the question that gave Eckstein pause in 2011 – i.e., whether an agency was required to wait for the most senior employee to respond to multiple formal options before offering the remaining multiple formal options to the next most senior employee. As Eckstein persuasively testified, following that cumbersome process for 254 layoffs would have induced considerable delays in completing the layoff. The new language avoids that delay by specifically permitting an agency to do what ESD had only inferred it could do before – choose whether to offer multiple formal options to one employee at a time, then work its way down the seniority list as each employee responds to the formal options, or instead offer multiple formal options to multiple employees simultaneously.

Neither bargaining history nor past practice requires a different finding regarding parties' intent. The parties did not specifically address the situation that arose here in bargaining, nor did a single unified practice develop among all agencies. While the Employer alleges that it provided training to agency labor relations representatives consistent with its interpretation, on this record, not all agencies complied with this interpretation. That is particularly true of ESD, which admittedly applied this language in the manner the

¹ This result would not require any ill will by the agency in choosing among positions to offer as formal options. The labor relations representative(s) selecting among funded positions might well be unaware of individual reasons for finding a particular placement distasteful. The reason could be geography; it could be the subject matter of the work; it could be the condition or neighborhood or amenities of the building; it could be any number of unique factors.

Union seeks here. The record does not reflect that the Union was aware of the interpretation provided in the Employer's training.


Finally, the informal discussions with Lippincott do not establish that the Union acceded to the Employer's interpretation of the disputed language. While Lippincott confirmed in writing the desire to continue informal discussions, no resulting agreement modifying the negotiated language is in evidence. The Union promptly grieved the implementation of the impact of the modified layoff process on Grievant.

For all the above reasons, I conclude that the Employer violated Article 34.9 of the Agreement when it offered Grievant only one formal option from among the three available funded positions in her layoff unit. The sole harm suffered was that she was forced to choose between layoff and a less desirable formal option. The remedy for this harm is to offer her all three formal options and, if she selects a different formal option from the one she accepted at the time of the layoff, transfer her to her selected position. In that event, another laid-off employee would be displaced. In order to provide a complete remedy, the Employer must permit the more senior of those two employees to select between the remaining two positions and, if necessary, transfer that employee to the preferred position.

As agreed by the parties, I will retain jurisdiction over the remedy and any disputes arising therefrom.

AWARD

1. The Employer violated Article 34.9 of the collective bargaining agreement when it offered a formal option to Carol Schley consisting of one of three available positions in Thurston County, and did not offer the other two available positions, as an alternative to being laid off.
2. As a remedy, the Employer shall offer Ms. Schley formal options consisting of the three available positions in Thurston County and, if she selects an option other than her current position, shall transfer her to the selected position. It shall also offer the more senior of the other two employees in her layoff unit a choice between the remaining two formal options and, if necessary, transfer that employee to the preferred position.
3. The Arbitrator retains jurisdiction over the Remedy portion of this Award and any disputes arising therefrom.



LUELLA E. NELSON - Arbitrator