

IN THE MATTER OF ARBITRATION
BETWEEN
TEAMSTERS LOCAL UNION NO 117,
Union,
and
WASHINGTON STATE DEPARTMENT
OF CORRECTIONS,
Employer.

ARBITRATOR'S OPINION
AND AWARD
GRIEVANCE OF
THOMAS LOWRY

RECEIVED

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OFFICE OF THE ATTORNEY GENERAL
LABOR & PERSONNEL DIVISION

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Attorney General's Offices
Tumwater, Washington

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REPRESENTING THE UNION:

Katelyn M. Sypher
Schwerin Campbell Barnard
Iglitzin & Lavitt
18 West Mercer Street, Suite 400
Seattle, WA 98119

REPRESENTING THE EMPLOYER:

Catherine S. Blinn
Kari J. Hanson
Assistant Attorney Generals
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504-0145

ARBITRATOR:

Gary L. Axon
P.O. Box 190
Ashland, OR 97520

I. INTRODUCTION

Teamsters Local Union No. 117 (Union) filed a grievance against the State of Washington, Department of Corrections (Employer) alleging the Employer violated the parties' Collective Bargaining Agreement (CBA) by reverting Thomas Lowry (Grievant) from his trial service appointment as a Correctional Sergeant at Cedar Creek Corrections Center.

The Employer contested arbitrability, arguing reversion of an employee who is unsuccessful during a trial service period is not subject to the grievance procedure. The Arbitrator advised counsel the arbitrability issue would be treated as a threshold question before any decision on the merits would be made.

II. STATEMENT OF THE ISSUES

The parties were unable to agree on a statement of the issues. Each side offered their respective views on how the issues should be framed.

The Union proposed the Statement of Issues to be decided as:

Did the Employer violate the Collective Bargaining Agreement by reverting Thomas Lowry? If so, what is the appropriate remedy?

The Employer proposed the Statement of Issues to be decided as:

- A. Is Mr. Lowry's trial service reversion subject to arbitration when the CBA specifically states that trial service reversions are "not subject to the grievance procedure?"
- B. When Mr. Lowry did not successfully complete his trial service period, did DOC violate the trial service provisions of the CBA when it reverted him to his last permanent position, which is consistent with Article 15.7.B.5?
- C. When Mr. Lowry did not successfully complete his trial service period, did DOC violate the anti-discrimination

provisions of the CBA when it reverted him to his last permanent position?

Based on the submissions of the parties and the evidence presented during the arbitration hearing, the Arbitrator formulates the questions to be decided as follows:

- (1) Is the October 10, 2014 trial service reversion of Grievant Thomas Lowry subject to the grievance procedure in Article 9 of the parties' CBA?
- (2) If yes, did the Employer violate Article 15 of the parties' CBA when it reverted Grievant Thomas Lowry from his trial service appointment as a Correctional Sergeant at Cedar Creek Corrections Center?

If yes, what is the appropriate remedy?

If the grievance is denied, the issue of remedy becomes moot. If the Union prevails in this matter, the Arbitrator will retain jurisdiction for a period of sixty (60) days after the issuance of the Award to assist with the implementation of remedy, if any.

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 15 HIRING AND APPOINTMENTS

...

15.7 Review Periods

...

B. Trial Service Period

1. Length of Trial Service Period

Except for those employees in an in-training appointment, all employees with a permanent status who are promoted, or who voluntarily accepts a transfer or demotion into a job classification for which they have not previously obtained permanent status, will serve a trial service period of six (6) consecutive months. The Employer may extend the trial service period to no more than twelve (12) consecutive months due to specific documented training requirements.

...

5. Reversion Rights

An employee serving a trial service period may voluntarily revert at any time or the Employer, with one (1) working day's written notice, may revert an employee who does not successfully complete his/her trial service period. ...

...

6. Reversion Review

The reversion of employees who are unsuccessful during their trial service period is not subject to the grievance procedure in Article 9. However, any trial service employee notified of an involuntary reversion may request and will receive a review of the reversion by the Secretary or designee. ...

...

Er. Ex. 16.

IV. STATEMENT OF FACTS

In March 2004 Thomas Lowry was hired by the Washington State Department of Corrections, stationed at the Cedar Creek Corrections Center (CCCC) in Littlerock, Washington. In 2012 Grievant filed a lawsuit against the Employer alleging race-based harassment in the workplace. Tr., pp. 68, 70. In July 2013 Grievant received a temporary supervisory Correctional Sergeant's position. The temporary position was later changed to temporary Shift Sergeant. Tr., pp. 58-60, 72; Er. Ex. 1. Grievant served in this position until April 16, 2014, when he was awarded a promotional appointment to Permanent Correctional Sergeant in trial service. Tr., pp. 76-77; Er. Ex. 2.

While Grievant was on vacation, his immediate supervisor, Lieutenant Vaaia Gaines, received a request from a group of Grievant's subordinates seeking her attendance at a July 8, 2014 meeting. Tr., pp. 140-141; Er. Ex. 18. During the meeting, staff complained about Grievant's management style and informed Gaines that Grievant

had engaged in inappropriate sexually motivated conversations. Gaines immediately requested incident reports describing the allegations. A formal investigation was initiated. Tr., pp. 142-147. Gaines telephoned Lowery to convey he was under investigation for allegations of sexual harassment. On July 11, 2014, pending the investigation, Grievant was temporarily reassigned to work on special projects without supervisory duties. Tr., pp. 82-83, 156-157; Er. Ex. 3.

The sexual harassment investigation was concluded on June 26, 2015, with a letter finding "the allegations were unfounded." In addition, a Letter of Concern dated June 24, 2015 was placed in Grievant's personnel file. Un. Ex. 11; Er. Ex. 19.

On October 9, 2014, Grievant was summoned to a meeting with Human Resources Consultant Brad Conly and Superintendent Douglas Cole. Superintendent Cole informed Grievant he was receiving a trial service reversion from his appointment as a Correctional Sergeant effective October 10, 2014. Grievant requested the presence of a Union representative at the meeting. His request was granted and the meeting suspended until Grievant returned with Shop Steward Jessica Anderson. Grievant asked why he was being reverted. Cole replied that it was "in the best interest of the agency and the facility that Grievant not attain permanent status as a Correctional Sergeant." Because there were no vacant funded permanent positions at the Cedar Creek Correctional Center, Grievant was reverted to Correctional Officer 2 at the Washington Corrections Center in Shelton, Washington. Tr., pp. 86-88, 196; Er. Ex. 8.

On October 10, 2014 the Union requested a review of Grievant Lowry's involuntary trial service reversion. Er. Ex. 9. On October 17, 2014, the Employer issued a memorandum appointing a designee to schedule a hearing, initiating the

review process. Er. Ex. 10. In a letter dated December 29, 2014, Scott Frakes, Deputy Director, upheld the decision to revert Lowry. Er. Ex. 14.

Prior to the trial service reversion review meeting, the Union filed a grievance dated October 28, 2014, alleging the reversion was "... improper and unwarranted discipline imposed on Officer Thomas Lowry under the pretext of a trial service reversion." The grievance further alleged the Employer engaged in "ongoing acts of discrimination, retaliation, and harassment against Mr. Lowry." Er. Ex. 11. In a letter dated November 5, 2014, the Employer denied the grievance. The denial letter reads, in relevant part, "... it is apparent the Trial Service Reversion of Mr. Lowry is the issue giving rise to the grievance. ... As you are aware, the trial service reversion of an employee is neither disciplinary action nor subject to the grievance procedure." Er. Ex. 12. The trial service reversion review meeting was held on November 21, 2014. Er. Ex. 14.

During December 2014, Grievant received a favorable jury verdict on his 2012 race-based harassment lawsuit against the Employer. Tr., p. 72.

In a letter dated December 29, 2014 the Employer upheld the decision to revert Grievant's trial service appointment. The letter reads, in part:

... During the meeting Ms. Woodrow stated that employees are typically reverted from their trial service because they do not meet performance standards. She indicated that because you had worked as a non-permanent sergeant prior to your trial service appointment, you were able to meet the necessary performance standards. I do not agree with Ms. Woodrow. Temporary appointments do not afford the same level of assessment as a trial service appointment.

Er. Ex. 14.

On January 22, 2015 the Union requested an arbitration review of the grievance alleging "improper discipline" of Grievant Thomas Lowry. Un. Ex. 7.

The Union's grievance was moved to arbitration. All evidence received on the merits of the case was taken subject to the Arbitrator's ruling on the Employer's arbitrability objection. A hearing was held at which time both parties were accorded the full and complete opportunity to offer evidence and argument in support of their respective positions. Post-hearing briefs were timely filed. The grievance is now properly before this Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Employer

1. Arbitrability

The Employer argues the parties' CBA provides an employee may attain permanent status in a job classification only upon the successful completion of a probationary, trial service, or transition review period. Grievant did not successfully complete his trial service period because he was under investigation for sexual harassment, so was reverted on October 10, 2014.

The parties' CBA provides that the reversion of an employee who is unsuccessful during the trial service period is not subject to the grievance procedure. The parties specifically agreed that trial service reversions should not be submitted to arbitration. Because trial service reversions are not grievable, this case is not substantively arbitrable and this grievance should be dismissed.

The parties' CBA establishes a remedy for an employee wishing to challenge an involuntary trial service reversion. The employee may request a review of

the reversion. Grievant Lowry availed himself of this remedy. Resolving this case on the merits would require the Arbitrator to ignore the agreed upon remedy provided in the CBA. The Arbitrator must honor the contract language and give effect to the parties' intention.

The limits of the Arbitrator's authority are established in the CBA. The Arbitrator has no authority to modify the parties' Agreement. Concluding that a trial service reversion is subject to the grievance process would require the Arbitrator to modify provisions of the CBA, therefore violating the parties' Agreement.

2. Merits

The Union failed to meet its burden of proving a contract violation, therefore the grievance should be denied.

The parties' contract includes three requirements for reverting a trial service appointment: (1) The Employer must determine the employee did not successfully complete his/her trial service period, (2) The Employer must give the employee one working day's written notice, and (3) the employee must be reverted to an available funded permanent position that is either in the employee's previous permanent job class or at or below the employee's previous salary range. The Employer satisfied all three requirements.

The Union is improperly requesting that the Arbitrator impose new requirements for reverting an employee's trial service appointment. Nowhere in Article 15.7(B)(5) is there a requirement the Employer provide "performance-based" reasons for reverting the employee. Nor is there a requirement the Employer explain its decision

for reversion. Adding these prerequisites to the trial service reversion provisions of the CBA would require the Arbitrator to add new provisions, which is clearly prohibited.

The Employer contends a trial service reversion is not discipline, therefore not subject to just cause review. First, trial service reversions are not among the actions or events that qualify as discipline under Article 8.2 of the parties' CBA. Second, to conclude the trial service reversion is a form a discipline would require the conclusion the Grievant was demoted. Third, just cause is not required in order to revert a trial service appointment. Grievant had not yet attained permanent status. There is no requirement that trial service periods be reverted only for just cause. The Union is improperly attempting to superimpose the just cause standard in a situation where it is not warranted. The Arbitrator must reject the Union's argument.

The Employer contends there is no evidence presented to support the argument that Grievant's trial service revision was retaliation for filing a civil lawsuit. The sexual harassment investigation had not yet concluded when Grievant's trial service period was scheduled to end. The Employer did not have a basis to extend the trial service period due to contractual limitations. The Employer had two options, to either revert Grievant or allow him to attain permanent status as a sergeant while under investigation for sexual harassment. Additionally, during the pendency of the civil lawsuit, Grievant was promoted to both a non-permanent sergeant position and to a permanent sergeant position. No evidence was presented to support the argument Grievant's trial service reversion was retaliation.

The Employer requests the grievance be dismissed because it is not substantively arbitrable. Even if the Arbitrator concludes the case is arbitrable there is

no evidence the trial service reversion violated the anti-discrimination provisions of the Collective Bargaining Agreement.

B. The Union

1. Arbitrability

The Union argues this case is subject to the grievance and arbitration process because there is no evidence Grievant Lowry was "unsuccessful" in his trial service period as sergeant. The plain language of the parties' CBA allows for reversion only when an employee is unsuccessful during their trial service period. The Employer is improperly asking the Arbitrator to ignore the predicate phrase, "who are unsuccessful," and rewrite the contract to give the Employer complete discretion to revert trial service employees for no reason at all. This would require the Arbitrator to exceed his express authority under the CBA. The Arbitrator should reject the Employer's interpretation.

Elsewhere in the Agreement the parties have expressly adopted language that gives the Employer complete discretion when it comes to the separation of employees during their probationary periods. Article 15.7(A)(6) reads, "The separation of a probationary employee will not be subject to the grievance procedure in Article 9." This demonstrates the parties knew how to draft language that would give the Employer full discretion over a personnel decision. Instead, when agreeing on Article 15.7(B)(6) Reversion Review, the parties inserted the phrase, "who are unsuccessful," which is probative of the intent to include this condition precedent for reversion.

The Union asserts that where one interpretation of an ambiguous provision would lead to harsh, absurd, or nonsensical results and an equally plausible

interpretation would lead to just and reasonable results, the interpretation that leads to just and reasonable results must prevail. The Employer improperly urges the Arbitrator to construe the Agreement in a way that would effectively eliminate the agreed upon standards for reversion, namely unsuccessful performance in the promotional classification. In contrast, if the Arbitrator gives effect to the words "unsuccessful performance" the Employer would continue to have significant discretion.

The Employer failed to provide evidence of any performance deficiency supporting the decision to revert Grievant Lowry. Accordingly, the Employer failed to follow the clear language of the CBA and the Arbitrator should find the grievance subject to the arbitration procedure.

2. Merits

The Union contends the Employer failed to meet its obligations under Article 15.7(B)(5) to provide performance reasons for Grievant's reversion. Because Grievant was not "unsuccessful" during his trial service period, there is no evidence of a performance deficiency.

Both expressly, and as a matter of past practice, successful completion of the trial service period is a condition precedent to reversion. The Employer overstepped the bounds of its discretion by reverting an employee who had received only positive performance evaluations during his trial service period and by failing to point to any performance deficiencies as the basis for management's decision.

The Employer improperly argues that the allegation of sexual harassment against Grievant at the time of his reversion reflected poor performance and justified the decision. First, the sexual harassment allegations were not sustained and were closed

as unfounded. Second, the parties have a progressive discipline system in place for suspected misconduct. Finally, the Employer admits its investigation into the alleged misconduct was incomplete when the decision to revert was made.

The Employer should be held to the limitations written into Article 15.7(B)(5)--that management only revert employees who perform deficiently and do not successfully complete their new classification's job duties. The purpose of the trial service system is to allow the Employer to assess whether an employee is a good fit for the position and to see if the person has the skills, knowledge, and ability to perform successfully. The Employer totally failed to notify Grievant he was performing deficiently before deciding to revert him. The Employer robs the trial service system of its purpose.

Allowing the Employer to revert an employee without citing a performance reason would render the reversion review process functionally meaningless. The Arbitrator should reject the Employer's position.

By relying on an incomplete misconduct investigation and punitively reverting Grievant, the Employer violated Article 8 of the CBA and fundamental notions of industrial due process. The Employer did not conclude its sexual harassment investigation against Grievant until June 2015. Yet it rendered a decision to take action against him on the basis of these allegations. Grievant was not given the opportunity to respond to the allegations prior to the reversion. By acting prematurely, the Employer deprived Grievant of his fundamental rights to be heard on the allegations against him. The reversion could be viewed as punitive and an attempt to sidestep the just cause discipline process. The Union opines the Employer is asking the Arbitrator to turn its

discretion under Article 15.7(B) into a loophole to procedural due process that could be used against any employee facing investigations during a trial service period.

The facts also suggest that the Employer's actions may have been retaliatory, motivated in part or in whole by Grievant's claims of race discrimination and harassment. Grievant's lawsuit against the Employer was pending at the time he was reverted and there was a close nexus in time between the initiation of the sexual harassment investigation and the denial of a motion to dismiss the discrimination suit. If the Arbitrator finds the Employer's decision was motivated, in part or in whole, by retaliatory animus, he should rule that the reversion also violates the non-discrimination provision of the CBA.

The Union asks the Arbitrator find the Employer has violated the CBA by improperly reverting Grievant. It is further requested the Arbitrator order reinstatement to the Sergeant position at CCCC, back pay for the difference in pay during the period, and interest at the rate set by state law for prejudgment interest on unpaid financial obligations.

VI. DISCUSSION

Your Arbitrator must first decide whether the parties' Collective Bargaining Agreement precludes arbitration of the Union's grievance. I hold the October 10, 2014 trial service reversion of Grievant Thomas Lowry is not subject to the Article 9 grievance procedure in the parties' CBA. This conclusion is supported by an examination of the contract language and the evidence presented at the arbitration hearing. Accordingly, the grievance will be denied and dismissed in its entirety. The parties' detailed arguments set forth in post-hearing briefs are summarized in Section V, Positions of the

Parties of this Award and will not be repeated. The reasoning of the Arbitrator is set forth in the discussion that follows.

1. Arbitrability

The function of an arbitrator is to determine and give effect to the intent of the parties as expressed in the collective bargaining agreement. This begins with an examination of the text of the agreement in the context of the agreement as a whole. If the language is clear and unambiguous, the arbitrator should enforce the clear agreement of the parties without further analysis. Where a contract provision is ambiguous, extrinsic evidence, such as bargaining history and past practice, may be considered to define what the parties intended when they adopted ambiguous language.

With clear, unambiguous, and unequivocal contract language, Article 15(B) of the CBA provides:

5. Reversion Rights

An employee serving a trial service period may voluntarily revert at any time or the Employer, with one (1) working day's written notice, may revert an employee who does not successfully complete his/her trial service period. ...

Er. Ex. 16; emphasis added.

The undisputed evidence proves that on October 9, 2014 the Employer provided Grievant with one (1) working day's written notice he was receiving a trial service reversion from his appointment as a Correctional Sergeant effective October 10, 2014. I find the Employer complied with the Article 15(B)(5) contractually mandated reversion rights process.

The language in the parties' CBA regarding reversion review is also clear and unambiguous, providing:

6. Reversion Review

The reversion of employees who are unsuccessful during their trial service period is not subject to the grievance procedure in Article 9. However, any trial service employee notified of an involuntary reversion may request and will receive a review of the reversion by the Secretary or designee. ...

Er. Ex. 16; emphasis added.

Arbitral authority instructs that doubts as to arbitrability should be resolved against forfeiture. *Elkouri and Elkouri*, How Arbitration Works, Sixth Edition, 182 (6th ed. 2003); *Belknap, Inc.*, 69 LA 599, 601 (1977); *Quality Beer Distributors*, 73 LA 669, 671 (1970); *Mahoney Plastics Corp.*, 69 LA 1017, 1021 (1977). I concur with the line of cases that favors disposition of grievances on the merits. If the party seeking to have the grievance arbitrated advances a tenable ground for permitting the case to be heard on the merits without doing a disservice to the contract, an arbitrator should give that argument every favorable consideration.

I find the Union failed to advance a tenable ground for permitting this case to be heard on the merits without doing a disservice to the contract. The parties bargained for and agreed upon the language: "The reversion of employees who are unsuccessful during their trial service period is not subject to the grievance procedure in Article 9." Emphasis added. The plain language of the contract unequivocally establishes reversion is not subject to the grievance procedure.

An arbitrator's first obligation is to observe the limits of his powers articulated by the agreement of the parties. Article 9.5 of the parties' CBA reads, "... The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement" Er. Ex. 16. Your Arbitrator is duty bound to follow this restriction. The Union asks the Arbitrator to interpret the phrase "employees who are

unsuccessful," to mean the Employer must prove a performance-based deficiency as a condition precedent to reversion. Your Arbitrator cannot adopt the Union's expanded contract construction without running afoul of the clear agreed on language in the parties' CBA. In a plain language reading of the CBA, the parties unquestionably bargained for and agreed upon language granting the Employer broad discretion to make judgments on an employee's successful or unsuccessful performance during the trial service period. Proof of performance-based deficiency is not part of the contract.

The Arbitrator's conclusion the parties intended to remove the reversion review process from the grievance system is reinforced by the language in Article 15(B)(6) providing "... any trial service employee notified of an involuntary reversion may request and will receive a review of the reversion by the Secretary or designee." Er. Ex. 16. Not only did the parties clearly agree reversion is not grievable, they also agreed on an alternative to a grievance as a system of relief for employees who are involuntarily reverted. Grievant Lowry availed himself of this process.

I find the Union's contentions of past practices are without merit. Past practice has no purpose other than to fill in the gaps in a silent or ambiguous labor agreement. The Agreement before me is neither silent nor ambiguous on the issues at hand. Your Arbitrator has no authority to alter the clearly bargained for language contained in the parties' Agreement.

Your Arbitrator holds the Employer met its burden of proving the Union's grievance is precluded from arbitration by the language in Article 15 of the parties' CBA. I hold the October 10, 2014 trial service reversion of Grievant Thomas Lowry is not

subject to the Article 9 grievance procedure in the parties' Collective Bargaining Agreement and that this case is not substantively arbitrable.

2. Merits

Having found the grievance before me is not substantively arbitrable, I hold the issues on the merits of the case are moot. I will enter an Award in accordance with these findings.

AWARD

Having reviewed all of the evidence and argument, the Arbitrator finds the October 10, 2014 trial service reversion of Grievant Thomas Lowry is not subject to the grievance procedure in Article 9 of the parties' Collective Bargaining Agreement. Therefore, the Arbitrator is compelled to hold the grievance is not arbitrable. Accordingly, the grievance is denied and dismissed in its entirety. The fees and expenses of the Arbitrator are payable equally by the parties.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gary L. Axon".

Gary L. Axon
Arbitrator

Dated: June 7, 2016