

Opinion and Award
AAA No. 75 - 390 - 00060 - 14
(James Kadrmas)
Richard L. Ahearn, Arbitrator

Washington Federation of State Employees)
)
Union,)
)
and)
)
Washington State Military Department)
)
Employer.)

Appearances:

Union

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OPINION

Introduction

The Washington Federation of State Employees (WFSE) is a labor organization that represents employees of the Washington State Military Department (Employer). James Kadrmas (grievant) is employed as an Emergency Program Coordinator 2 (EMPS2) with the Employer. On August 21, 2013, the Union filed a grievance alleging that the Employer violated the current collective bargaining agreement (CBA) between the parties by refusing to compensate grievant at the Step M rate within his salary range.

With no mutual resolution of the grievance, the Parties selected me from a panel of arbitrators supplied by the American Arbitration Association. At the hearing on October 7, 2014, in Olympia, WA, the Parties stipulated that the grievance was properly before me for a decision on the merits and to aid in the implementation of any remedy, should that be necessary. Both Parties had full opportunity to call witnesses, to make arguments and enter documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. Following the close of the testimony, I received timely filed and well written, comprehensive briefs from both Parties, and the record closed effective November, 25, 2014.

Statement of the Issue

At the hearing the Parties stipulated that the issue before me is as follows:

Did the Employer violate Article 42.1 (C), or any other related article of the collective bargaining agreement, when on July 1, 2013, it refused to qualify grievant to Step M of his salary range?

If the collective bargaining agreement was violated, what is the appropriate remedy?

Relevant Collective Bargaining Agreement Provisions

ARTICLE 42

COMPENSATION

42.1 Pay Range Assignments

C. All employees will progress to Step M six (6) years after being assigned to Step L in their permanent salary range.

42.6 Periodic Increases

An employee's periodic increment date will be set and remain the same for any period of continuous service in accordance with the following:

A. Employees will receive a two (2) step increase to base salary annually on their periodic increment date, until they reach the top step of the pay range.

B. Employees who are hired at the minimum step of their pay range will receive a two (2) step increase to base salary following completion of six (6) months of continuous service and the date they will receive that increase will be the employee's periodic increment update. Thereafter, employees will receive a two (2) step increase annually, on their periodic increment date, until they reach the top of the pay range.

C. Employees who are hired above the minimum step of the pay range will receive a two (2) step increase to base salary following completion of twelve (12) months continuous service and the date they receive that increase will be the employee's periodic increment date. Thereafter, employees will receive a two (2) step increase annually, on their periodic increment date, until they reach the top of the pay range.

E. Employees who are appointed to another position with a different salary range maximum will retain their periodic increment date and will receive step increases in accordance with Subsections 42.6 A through C.

Prior Collective Bargaining Agreement

The prior collective bargaining agreement, effective July 1, 2011 through June 30, 2013, included the following language relating to Step M:

ARTICLE 42

COMPENSATION

42.1 Pay Range Assignments

E. All employees who have been at step L for six (6) consecutive years or more will progress to Step M.

Background

Grievant is a senior employee with the Employer, having begun his service in 1994 as an Emergency Management Communication Coordinator, Range 46, Step J. His relevant promotions include:

- On November 1, 2004, he was promoted to an Emergency Management Senior Program coordinator (now called Emergency Management Program Specialist 3) Range 58, Step K.
- On July 1, 2007, grievant was appointed at Range 58, Step L.
- Pursuant to his request, on March 4, 2012, grievant voluntarily demoted to the EMPS2 position, with his salary set at Range 52, Step L.¹

On August 13, 2013, having spent more than six (6) years at Step L, grievant sought clarification from the Employer about whether he was then receiving compensation at the longevity Step M. The Employer informed grievant that he was not eligible for Step M because on March 4, 2012, he had accepted voluntary demotion and that he would therefore not be eligible for Step M until he spent six (6) years in his new salary range. The Employer based its determination on Article 42.1 (C) above and on related interpretive documents it developed as guidance for individuals responsible for implementation of payroll and for affected employees.

Positions of The Parties

Union

In summary the Union argues:

¹¹ The record reflects that grievant is an exceptionally valuable employee whose request resulted from purely personal considerations and in no way reflects any shortcomings with his ability or productivity.

1. Well-established principles of interpretation mandate that any ambiguity should be construed against the Employer, as the drafter of the language in question.
2. The language of Articles 42.1 (C) and 42.6 (E) demonstrates grievant's eligibility for Step M as of July 1, 2013.
3. Even under the Employer's interpretations, an employee may have more than one permanent salary range yet retain their periodic increment date (PID) for purposes of Step M qualification.
4. The Employer's Question and Answer (Q & A) is a unilateral document not entitled to weight.
5. No explanation supports denying grievant eligibility for Step M progression in contrast to the other circumstances in which the PID is retained at step L of Range 52.
6. The Employer's action is contrary to the intent of the Parties, which was to include as many employees as possible in the opportunity to reach Step M.

Employer

In summary the Employer asserts:

1. The clear and unambiguous language of Article 42.1 (C) requires individuals to remain in their permanent salary range at step L for 6 years to be eligible for Step M. In 2012, grievant changed his permanent salary range and thus does not qualify for Step M under the express terms of the CBA.
2. In developing Article 42.1 (C), both Parties were concerned about employees who took a temporary position and then subsequently returned to their same permanent salary range.
3. In order to avoid the unintended consequences that employees who were laid off, accepted a voluntary demotion to avoid a layoff, or accepted a temporary position outside their personal salary range would not be disadvantaged, the Employer prepared a Q & A to provide guidance on the interpretation of Article 42.1 (C).

4. The Q & A was the product of joint back and forth and represents effective agreement between the Parties, as demonstrated by publication of the Q & A on the Union's website.
5. The Q & A specifically explained that employees at Step L who accept a layoff option to a position with a lower salary range will receive credit for time spent at Step L of the higher salary range. However, this rule is limited to demotions resulting from a layoff and does not apply to other employer/employee-initiated actions that result in movement to a lower or higher salary range.
6. As the demotion of grievant did not result from a layoff, he must remain six (6) years in his new permanent salary range to be eligible for Step M.

Analysis

Here, as in any contract interpretation case, my obligation as the arbitrator is to determine the mutual intent of the Parties. Various well accepted standards of interpretation aid arbitrators in reaching a conclusion consistent with the intent of the parties and their written agreement. Initially I must assess whether the language in dispute, primarily Article 42.1 (C), is either clear and distinct or whether it is ambiguous. If I conclude that the language is clear and unambiguous, I need not consider other evidence. As expressed in a leading treatise:

If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used. Elkouri and Elkouri, *How Arbitration Works*, 9-8 (7th Ed., 2012),

On the other hand, if I find that the language is ambiguous, I must consider bargaining history, past practice and other material circumstances that can provide meaning and context to the Parties' mutual intent. *Id.* at 9-5 to 9-13. One arbitrator has described the analytical process of determining whether language is ambiguous or clear and distinct by stating:

Perhaps a better way of putting it would be to ask if a single, obvious and reasonable meaning appears from a reading of the language in the context of the rest of the

contract. If so, that meaning is to be applied. *United Grocers*, 92 LA 566, 569 (Gangle, 1989).

Plain Meaning

As a preliminary matter I note that the dispute over the meaning of Article 42.1 (C) focuses on the term "in their permanent salary range." That term, however, is not defined in the collective bargaining agreement. Nor is it a term that has a common meaning generally. Concededly, "salary range" itself seems unambiguous as it refers to the matrix in the state salary structure that includes various numbers representing ranges, with the higher numbers representing ranges of the highest monetary amount. However, was the term "permanent salary range" intended to mean one's same or current salary range or, instead, whatever "permanent" salary range one is subsequently in as long as the employee is not in a temporary position?

In this regard, the Employer contends that the "plain meaning" of "in their permanent salary range" means an employee who is in step L in the same or current permanent salary range for six years. According to this interpretation, as grievant's permanent salary range changed from salary range 58 to salary range 52 when he voluntarily demoted on March 4, 2012, he will not be eligible for the Step M longevity increase until March 4, 2018, assuming he remains in his current permanent salary range.

In considering the Parties' mutual intent regarding the phrase "in their permanent salary range," I note, however, that the terms "same" or "current" do not appear in the contract language. Rather, the phrase is susceptible to the alternative interpretation that eligibility for step M requires six (6) years in "a" permanent salary range, not necessarily the same permanent salary range during the entire six year period. Accordingly, as there is no single, obvious meaning to the language on its face, I find that the Article 42.1 (C) is ambiguous and that bargaining history and other parole evidence are relevant to aid in my determination.

Bargaining History

Article 42.1 (C)

The history of Step M began in 2008 when the Parties agreed to establish a new longevity increase to be incorporated in the 2009–2011 CBA. Although an unfortunate budgetary shortfall precluded immediate implementation of the longevity increase, in order to preserve the concept, the Parties agreed that the Step M increase would occur after the employee had spent five years at Step L.² With financial limitations continuing during negotiations for the 2011–2013 Agreement, the Parties agreed to further extend the required time to qualify for the longevity increase by adding a 6th year to the requirement. The Step M language in the 2011–2013 Agreement thus stated:

All employees who have been at step L for six (6) consecutive years or more will progress to Step M.

During the bargaining for the 2013–2015 Agreement, the fiscal outlook had improved sufficiently that Step M could go into effect. Through traditional bargaining the Parties reached tentative agreement (TA) for the 2013–2015 contract. The TA provided no change from the prior language of the 2011–2103 agreement regarding Step M eligibility.

However, at some point after the Parties had agreed on the TA, Shane Esquibel, (Esquibel), negotiator for the Employer, contacted Amy Achilles (Achilles), coordinator of negotiations for the Union, and raised concerns about whether those responsible for payroll could easily and accurately identify employees who had been at Step L for six (6) consecutive years and also whether individuals who took a temporary promotion out of Step L would be required to begin a new six year period upon their return to their permanent appointment. As expressed by Achilles in describing Esquibel's having reached out to her:

² The shortfall was so severe that, through the legislative process, employees did not receive raises that had been negotiated.

"[w]e had a shared concern about the word "consecutive" and the negative impact that that might have on members who took a temporary position that took them outside of their range for a short period of time.

So one example might be an employee who took a temporary promotion. The State and the Union didn't want them to have to start over on their six years just because they came back from their temporary promotion."

Following various telephonic discussions and email exchanges between the Parties, including consideration of at least one earlier proposal for new language regarding Step M, on December 11, 2012, Achilles sent Esquibel an email stating:

I've spoken with Greg. It would be great if you could draft what we talked about and send it over for the M step. There are a couple of folks we need to have review.

Later that same morning Esquibel sent an email to Achilles, containing the Employer's draft of language that was eventually incorporated in the 2013-2015 CBA as Article 42.1 (C) above.

The new Step M language addressed the Union's concerns of adverse impact on individuals who accepted temporary appointments outside their permanent salary range. According to Achilles, the new language addressed concerns that someone in payroll may interpret the language literally and require employees who might be temporarily out of Step L for a short period of time to begin their six year eligibility over again. In her words:

"[b]ut the whole intent of changing the language was to include more folks. It was not to exclude people who, you know, went outside the range for a period of time for whatever reason."

The Step M Q & A

Following agreement on the new contractual language, in order to provide guidance to payroll staff who would be responsible for administering the new Step M longevity increase and for employees who might be eligible, Esquibel initiated a draft of a Q & A sheet that he shared with the Union. For instance, in a May 6, 2013 email to Achilles, Esquibel stated:

Attached is our updated Q & A. We made some minor changes to the answers to questions five, six, nine, and 10. Let me know if you have any questions.

Following receipt of the first draft of the Q & A, Bob Keller, the Union's Director of Field Operations, called Esquibel and asked how the Step M rules will be applied to employees who accepted a demotion as a result of a layoff the employee had done nothing to cause. According to Esquibel, he agreed that such a demotion raised valid concerns and also explained to Keller that he wanted to be clear that such an exception will not apply in any other circumstance where an employee was demoted. In response to Keller's concerns, the Employer then submitted to the Union an additional question and answer to address the issue of the effect of demotions on Step M eligibility.

Specifically, the new number 12 contained the following question and answer:

If an employee who is at step L accepts the layoff option to a position with a lower salary range, would time at Step L of the higher salary range count towards the six-year requirement to move to step M in the lower salary range?

Yes. Although the two positions are at different salary ranges, employees demoted as a result of a layoff will be given credit for time spent at Step L of the higher salary range. **This rule only applies to demotions that are the result of a layoff and does not apply to other employer/employee initiated actions that result in movement to a lower or higher salary range.** (emphasis supplied).

The record reflects that the Employer shared three different drafts of the Q & A with the Union. There is no evidence that the Union raised any objections to the content of the Q & A.

On July 3, 2013, the Union posted on its website the Q & A that included number 12, stating in the introduction:

The Step M language for all general government agreements and the higher education community college coalition agreements is as follows:

The remainder of the posting included the text of Article 42.1 (C) and 12 questions and answers, including number 12 above.

In reliance in part on the above interpretation of the eligibility requirements for Step M, the Employer denied grievant's request to be compensated at the Step M level in salary range 52.

Discussion

One well-established principle of arbitral interpretation is that past practice of the parties often provides compelling evidence of the parties' intent. Indeed, subsequent agreements may even amend the collective bargaining agreement. *How Arbitration Works*, supra at 12-10. For example Arbitrator Marshall, in discussing an "Interpretation of Seniority Clause" agreement between the parties, concluded:

[I]t must be remembered that it was the parties themselves who "interpreted" the contract. If the parties change the contract in the process of interpreting it, it must be held that the language of the "Interpretation" is controlling and supersedes the original agreement." *Borg-Warner Corp.*, 29 LA 629,634 (1957).

For the reasons that follow I likewise find that the interpretation set forth in the Q & A, at least tacitly agreed to by the Union, reflects the Parties' intent in implementing Article 42.1 (C).

Although the Union contends that the Q & A interpretation was unilaterally developed by the Employer and therefore cannot be accorded significant weight, the underlying circumstances suggest otherwise. For instance, the entire development of the Q & A involved initial draft by the Employer, followed with a copy of the draft to the Union. Although face-to-face meetings did not take place, their absence does not establish lack of opportunity for give and take. Rather, the May 6, 2013 email to the Union reflects the Employer's interest in the Union's reaction to the draft Q & A. Moreover, the Union through Keller initiated the suggestion of incorporating the exception for individuals who were no longer in their original permanent salary range through no responsibility or fault of the employee. Acting upon that request, Esquibel prepared question and answer number 12 that was forwarded to the Union. With no objection or request for further clarification, the Union

subsequently published the entire Q & A on its website, with introductory language that would reasonably suggest to employees (and to the Employer) acceptance of the interpretations set forth.

Based on a careful review of all these circumstances I am compelled to conclude that the entire course of conduct in the development of the Q & A supports the conclusion that the Union at least constructively adopted the interpretation prepared by the Employer. In that regard I find it most significant that the Employer developed question and answer 12 in response to Keller's request, that the Union had the opportunity but did not complain about the Employer's interpretation and indeed effectively endorsed the Q & A by publication on its website. These events demonstrate a course of dealing that gives meaning to the Parties' intent and compels me to conclude that Q & A 12 expressed the Parties' mutual intent.

In my analysis I did consider the Union's reliance on Article 42.6 and the argument that any ambiguity should be construed against the Employer, as it drafted Article 42.1 (C) and the Q & A. However, that principle of contract interpretation is not controlling here as any ambiguity was resolved by the subsequent bilateral interpretation reflected in the Q & A. In addition, although the general intent of the Parties was to provide opportunity for Step M to as many employees as possible, and although employees in different circumstances than grievant are allowed to retain their PID, Article 42.6 applies to step increases other than Step M. Thus the principle that specific terms are given greater weight than general ones supports implementation of the specific interpretation from the Q & A. rather than the broad thrust of Article 42.6, any statement of general overall intent or a comparison to other agreed-upon exceptions.

In reaching my conclusion I recognize that equitable concerns may favor granting Step M to grievant, in part because he is a dedicated employee who has provided many years of exceptional service to the State of Washington, and because others in different circumstances are allowed to retain their PID. However, my role is limited

to interpreting the Parties' mutual intent, rather than legislating or reforming the Parties' agreement. Under all the circumstances I am compelled to deny the grievance.

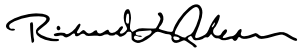
In my findings and conclusions, I have been cognizant of the limitations on the Arbitrator set forth in Article 29.3 of the collective bargaining agreement and have carefully reviewed all the evidence, arguments and authorities submitted by the Parties, even if not specifically mentioned in this Opinion. Rather, I focused my analysis only on the matters that were crucial to my decision and that I believed needed to be addressed.

AWARD

Based on my review of the evidence, the Parties' briefs and for the rationale expressed above, I conclude that:

1. The Employer did not violate the collective bargaining agreement when it refused to qualify grievant to Step M of his salary range.
2. The grievance is denied.

Respectfully submitted,



Richard L. Ahearn

Arbitrator

December 12, 2014