

**IN ARBITRATION
BEFORE
RICHARD L. AHEARN**

OPINION and AWARD

**AAA No. 01-20-0002-0457
(YOLANDA BANKS GRIEVANCE)**

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Employer,

and

WASHINGTON FEDERATION OF STATE EMPLOYEES

Union.

Appearances:

For the Employer:

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OPINION

I. INTRODUCTION

The Washington State Department of Social and Health Services (Employer or DSHS) and the Washington Federation of State Employees (Union) have been parties to a series of collective bargaining agreements (CBA). The CBA, effective July 1, 2017 through June 30, 2019, includes the provisions at issue and was in effect at all times material herein.

The subject of this Opinion and Award concerns a grievance filed on behalf of Yolanda Banks, (grievant), who is employed as a residential rehabilitation counselor 2 (RRC2) at the Employer's secure community transition facility located on McNeil Island. The grievance concerns a bid that grievant submitted on February 27, 2019, pursuant to Article 3 of the CBA, to apply for a position that provided a different schedule from the schedule she was then working. The essence of the grievance is that the Employer allegedly violated its obligations under Article 3 by failing to pull grievant's bid and failing to pull any bids for the position. With no mutual resolution of the grievance, I conducted a hearing by videoconference on December 14, 2020, at which the 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. Both Parties stipulated that the grievance was properly before me for a decision and that I should retain jurisdiction thereafter to aid in the implementation of any remedy, should that be necessary. In lieu of post-hearing briefs, the Parties presented closing arguments at the conclusion of the hearing. With the receipt of the transcript on January 4, 2021, the matter was closed.

II. THE ISSUE

At hearing the Parties agreed on the following statement of the issue before me:

Did the Employer violate the Article 3 bid system of the Parties' collective bargaining agreement for position WV24 as alleged in the grievance?

If so, what is the remedy?

III. RELEVANT CBA PROVISIONS

ARTICLE 3 BID SYSTEM

3.1 Applicability

- A.... For purposes of this article the Special Commitment Center (SCC) and the Secure Community Transition Facilities (SCTF) within the Department of Social and Health Services (DSHS) within the Department of Social and Health Services (DSHS) will be considered one (1) institution. ...
- B. This Article does not apply to the filling of non-permanent, on-call, project or, except at the WSSB and the CDHL, career seasonal positions.

3.2 Definitions

For purposes of this Article only, the following definitions apply:

A. Bid Positions

Positions filled as a result of a bid.

B. Bid System

A process allowing employees with permanent status to submit bids to other positions within their employing institution in the same job classification in which they currently hold permanent status or to a lower classification in which they have previously held status. A permanent part-time employee will be eligible to bid for full-time positions after completion of one thousand and forty (1,040) hours of employment within the job classification. A permanent full-time employee will be eligible to bid on part-time positions in the same job classification in which he/she currently holds permanent status or to a lower classification in which he/she has previously held status.

C. Position

A particular combination of shifts and days off, except for the DSHS, DVA and the DOC. In DSHS, DVA and DOC, a position is defined as a particular combination of shift, days off and location...

3.3 Components of a Bid

With the exception of DOC, bids will indicate the employee's choice of shift, days off (and, for DSHS and DVA, location) and job classification. DOC employees will bid by position number. Employees will be responsible for the accuracy of their bids. Each bid

will remain active for a period of six (6) months from the date submitted by the employee.

3.4 Submittal and Withdrawal of Bids

Any bids submitted after the date a vacancy is considered to have occurred will not be considered for that vacancy. Employees may withdraw their bids, in writing, at any time prior to the referral.

3.5 New Positions or Reallocated Positions

When a new position is established or a vacant position is reallocated, the Employer will post the position for seven (7) calendar days if the combination of shift and days off (and, for DSHS, DVA and DOC, location) does not currently exist. The agencies will use electronic and/or hard copy methods for notification.

3.6 Vacancy

For purposes of this Article, a vacancy occurs when:

- A. An employee notifies management, in writing, that he or she intends to vacate his or her position; or**
- B. Management notifies an employee, in writing, that the employee will be removed from his or her position.**

3.7 Awarding a Bid

When a permanent vacancy occurs, the Employer will determine if any employee has submitted a transfer or a voluntary demotion request for the shift and days off. Seniority will prevail provided the employee has the skills and abilities necessary to perform the duties of the position. An employee's bid request may be turned down if the employee has documented attendance or performance problems. The employee will begin working in the new position within forty-five (45) calendar days of being awarded the bid unless circumstances warrant otherwise.

3.8. Commitment Following an Award or Refusal of a Bid

- A. For all agencies except DSHS, when an employee has been awarded a bid, or refuses an awarded bid, the employee will be prohibited from requesting other bids for a minimum of six (6) months. The six (6) month period will begin on the first day the employee is assigned the new shift and/or days off. All other active bids the employee has on file will be removed from the bid system.**

B. For DSHS, when an employee has been awarded a bid, the employee will be prohibited from requesting other bids for a minimum of twelve (12) months. If an employee refuses an awarded bid, the employee will be prohibited from requesting other bids for a minimum of six (6) months. The time period will begin on the first day the employee is assigned the new shift, days off and/or location. All other active bids the employee has on file will be removed from the bid system.

3.9 Whenever there is need for a major change in residential settings such as elimination of positions or major changes to shifts or assignments, the Union and the Employer may agree to suspend the procedure described in [Sections 3.3](#) through [3.6](#) and [3.8](#) above and allow all employees to bid on positions, which will be filled in accordance with the procedures in [Section 3.7](#) of this Article.

3.10 Reassignment from a Bid Position

Nothing in this Article will preclude management from reassigning an employee from his or her bid position to another position on a different shift or to a position with different days off, provided the employee is notified, in writing, of the reason(s) for the reassignment. A copy of the notice will be sent to the Union.

...

ARTICLE 35 MANAGEMENT RIGHTS

Except as modified by this Agreement, the Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to, the right to:

...

H. Establish or modify the workweek, daily work shift, hours of work and days off;

...

.

IV. EVIDENCE

Background

Grievant is a long-term employee whose responsibilities generally involve supervision of residents at the Employer's Special Commitment Center (SCC). SCC is a highly secure 24/7 facility that houses sex offenders who, having completed their criminal sentences, received a

civil commitment to SCC. The facility is located on an island that is only accessible by ferry. In addition to general supervision, grievant frequently transports the residents of the facility to treatment and court appointments that are held off the island. With staffing ratios established by statute, scheduling needs necessarily fluctuate depending on the number and schedules of the various residents.

Evidence from Grievant and Union

In early 2019, grievant's work schedule included five (5) eight (8) hour day shifts, with her off days on Sunday and Monday.¹ On February 27, she submitted a bid (WV24E) for a position with a four (4) ten (10) schedule, that would include Sunday, Monday and Tuesdays off.² With no action by the Employer with respect to her bid, grievant began checking with the Human Resources Department of the Employer. Eventually grievant received the following responses from Bianca Reece, HR consultant:

- A June 10 email stating, "I don't know if you are the senior bidder for the position as this has not been requested by management. If you are the senior bidder, management will contact you period."**
- A July 18 email repeating the message in the June 10 email.**
- A subsequent July 18 email stating, "They have not pulled a bid for this position, so I do not know if you are the senior bidder. From what I can tell the position has been filled but I am not aware of the circumstances. I apologize for not being in the know on this one."**

In addition, Julie Lovlin (Lovlin), Residential Program Manager at the SCC, expressed to grievant:

- In a June 21 email that, "...due to changing business needs we no longer need 10 hour staff on Saturdays and we need more staff on Mondays ...I am waiting to find out what days are new pending residents will have treatment so that I can make sure the staffing needs are covered, then we'll pull bids for the new days off /hours for the open positions ...if the shift schedule does not match a current SCTF schedule it will be posted prior to**

¹ All dates herein 2019 unless otherwise specified.

² The Employer's positions are identified by letters and numbers, with each having a set schedule.

bids being pulled. Let me know if you have any other questions. Thanks for all that you do!"

- **Further, in response to an observation from grievant, on June 22, Lovlin explained that Monday was the "heaviest day of need."**

In essence grievant testified that she was confused by the various and conflicting messages from management and that her bid for WV24E was never pulled, despite her seniority. Angela Jeannee Simpson, council representative for WFSE, testified to her belief that based on her experience grievant's bid should have been pulled. Further, Bobbie Appleton, shop steward for WFSE at the facility, expressed her understanding that consistent with past practice grievant's bid should have been pulled. She also agreed however that after awarding a bid, the Employer could change the schedule.

In addition, on July 9, Lovlin wrote Keith Devos, Chief of Transition and Program Accountability, requesting approval to change the days off for a recently vacant swing shift, 4 PM to midnight position, from Friday /Saturday off to Monday /Tuesday off. The expressed justification for the requested change was "due to an increase in trips on Fridays and Saturdays ..."

Employer Testimony

According to the testimony of Andrea Detlefsen, (Detlefsen) Human Resources business partner with the Employer, a bid provides an opportunity for an employee such as grievant to request to move into a different position with a different schedule and different days off. Thus, the employee avoids going through an open and competitive recruitment process. For instance, if the employee is the senior bidder, once a vacancy occurs in that position and their bid is pulled, the employee can move into that different position. However, that opportunity is only available if the bid is submitted prior to a vacancy in the position.

Detlefsen further testified that her Department frequently becomes involved in changing schedules as the personnel needs fluctuate, depending on the number and needs of the

resident population. With respect to vacancies, management can make these changes immediately. With respect to a position with a permanent incumbent, management must provide seven (7) -days notice before implementing a change in the schedule. In this instance, management decided that an existing schedule, described as TG64, that included work hours of 8:00 AM to 4:00 PM, with Saturday and Sunday off, was needed, rather than the schedule of WV24E. Further, as TG64 constituted an existing schedule, there was no need to post. Consequently, according to Detlefsen, grievant's bid was for a different schedule than what was available and accordingly was not actionable.

Julie Lovlin, (Lovlin) Residential Program Director at SCC, was the manager of the secure transition facility during the events herein. As such Lovlin was responsible for developing and coordinating the scheduling of the RRC2s, frequently needing to arrange for off island trips. According to Lovlin, scheduling required constant juggling as she had a statutory requirement for 3 RRC2s in the facility at all times and also needed to have adequate staffing to chaperone the residents during their court appearances, treatments and other off-island appointments. As a result of these numerous and often evolving factors, the scheduling needs of the facility required constant evaluation. On the other hand, on cross examination Lovlin conceded that similar scheduling changes were not comon and had only occurred on approximately five (5) occasions during the three (3) years she was involved in scheduling.

In particular, when the WV24 position at issue here became vacant, the Employer concluded that the 10-hour Saturday staffing component of that position was no longer needed. The basis of that determination was that four (4) staff members who were previously needed for Saturdays were no longer required for that day.³ Consequently, the decision was made to place an employee on a Monday schedule, that had previously been short as a result of the four (4) staff that had been assigned to Saturdays. Finally, Lovlin testified that she did express the business need justification for the Employer's action to both grievant and the Union.

³ One resident who required two (2) staff on Saturdays returned to the total confinement center and the treatment provider for the other resident ceased the arrangement.

Additionally, Patricia Boettcher, Labor Relations manager for the Employer, testified about position WV24. According to Boettcher, in about January the permanent incumbent began a reasonable accommodation process. In addition, in February another employee moved into that position as a result of a local grievance settlement. Subsequently, in May the permanent incumbent vacated the position upon completion of his reasonable accommodation process. With no permanent incumbent occupying the position, the Employer's evaluation resulted in a determination that a permanent schedule change for position WV24 was needed as a result of changes to the scheduling patterns of the facility's residents. Thus, grievant's desired schedule of four (4) ten-hour days, with Sunday, Monday and Tuesday off was no longer available. Consequently, grievant's bid was for a schedule that was no longer needed.

V. PARTIES' POSITIONS SUMMARIZED

UNION

- Although grievant on February 27 submitted a bid for position WV24, she never received a satisfactory explanation of why she was not awarded the position.**
- The alleged business needs expressed by the Employer are self-contradictory.**
- Further, the hearing testimony about the business needs were not conveyed to the Union during the processing of the grievance.**
- By filling the vacancy without pulling bids the Employer violated Article 3.7 of the CBA.**
- The remedy should require the Employer to grant grievant the position for which she submitted a bid.**

EMPLOYER

- Article 35 of the CBA expresses the Parties' agreement that the Employer has the fundamental management right to determine and change schedules.**
- The five (5) days, eight (8) hour shift schedule did not need to be posted because it was already existing.**
- The position to which grievant bid was changed during a vacancy because that schedule was no longer needed.**

- **Any confusion or uncertainty on the part of grievant regarding the underpinnings of the Employer's decision do not establish a violation of the CBA.**

VI. ANALYSIS

General

As the moving party in this contract interpretation case, the Union bears the burden of proof to establish that its position is correct and consistent with their relevant terms of the CBA. It is also well established that an arbitrator's authority is derived from the applicable collective bargaining agreement. Here, the Parties acknowledged this principle with the following language at Article 29.3 (D) of the CBA:

29.3 Filing and Processing

...

D. Authority of the Arbitrator

1. The arbitrator will:

- Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;**
- Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;**
- Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;**
- Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.**

...

As in any contract interpretation decision, I am charged with determining the Parties' mutual intent and understanding. In that regard, it is well established that where the disputed

language is clear and unambiguous, arbitrators will give effect to the plain meaning, even if one party considers the result harsh or unexpected. Further, unless there is evidence that the parties intended some specialized meaning, words are to be given their ordinary and popularly accepted meaning. Further, meaning must be determined by an examination of the principal purpose of the parties. Accordingly, arbitrators frequently read the contract sections in dispute in light of other sections in order to discern the parties' intent.

Bargaining history and past practice are among the interpretive aids on which arbitrators frequently rely to assist in discerning the parties' mutual intent. Further, arbitrators prefer a "reasonable meaning" interpretation to one that produces unreasonable, harsh, absurd or nonsensical results. One important element of reasonableness is expressed as the doctrine of good faith and fair dealing, a set of principles that can prevent a party from evading the spirit of a bargain.⁴

Application of Principles

Initially, I observe that there is no dispute regarding grievant's qualifications for the position at issue. Thus, I must determine the meaning and intent and purpose of the Parties' bid system as set forth in the relevant articles of the CBA. In my analysis I recognize that the long-established interpretive principle of determining intent from the CBA as a whole will provide helpful guidance.

As a threshold matter, I recognize that Article 3.7 expresses the Parties' expectation that employees who have submitted bids for a position will be selected in order of seniority "when a permanent vacancy occurs." (emphasis added). Significantly, the term "will" is synonymous with an order or command. Accordingly, if a permanent vacancy arose in the position for which grievant had submitted a bid, the Union's position would be well founded.

⁴ *The Common Law of the Workplace*, 2.12, St. Antoine (2nd. Ed. 2005).

However, I further recognize that Article 35 (H) enshrines the fundamental right of management "To establish or modify the work week, daily work shift, hours of work and days off." Further, Article 3.10 acknowledges management's right to reassign employees "from his or her bid position to another position on a different shift or to a position with different days off..."⁵ In light of the foregoing, I am persuaded that an examination of the contract as a whole reveals that the Parties agreed that the Employer possesses the contractual privilege of unilaterally adjusting the schedules and positions of the RRC2s.

In that regard, among other evidence, I find the unrebutted testimony of the Employer's witnesses about the need to bolster staff on Monday and the diminished need for Saturday reliable and instructive. Thus, I am persuaded that the Employer exercised its broad contractual authority set forth in Article 35 in determining that the work schedule represented in WV24 would not serve the evolving needs of the facility. In light of the foregoing, it appears that subsequent to grievant's bid position WV24 never became a "permanent vacancy" within the meaning of Article 3.7.

Further, with regard to the Union's argument regarding the Employer's allegedly misleading and conflicting responses to grievant's inquiries, I recognize the well-established maxim that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." An inherent and implied covenant of reasonableness that applies to all collective bargaining agreements, the doctrine ... "prevents any party to a collective bargaining agreement from doing anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract..."⁶ Of particular relevance here, the duty mandates that managerial discretion permitted under the CBA must be exercised reasonably. As expressed by the respected arbitrator Carlton Snow:

"The emphasis of the reasonable expectations principle is on preventing a party from using discretionary authority in a contract to defeat essential objectives of the agreement formed by

⁵ The notice requirements that are expressed in Article 3.10 are not applicable here as they apply only in the event of reassignment from a position held at that time by the incumbent. However, Article 3.10 further reflects the Parties' agreement that the Employer possesses broad discretionary authority to change schedules to meet evolving needs.

⁶ *Elkouri & Elkouri, How Arbitration Works*, 9-50. (8th Ed., 2016).

the parties.”⁷

In the absence of any evidence that Article 35 of the CBA provides the Employer unrestricted discretionary authority, it is axiomatic that both Parties understood that their contractual obligations were enforceable.

Here I am persuaded that the Employer’s contractual obligation to grant an existing bid for a vacant position on the basis of seniority constitutes an “essential objective ” of Article 3 and a “fruit of the contract” for the Union and grievant. On the other hand, Article 35, without qualification, provides the Employer with the sole authority to change the schedule of positions. Further, Article 3.10 permits reassignment to a different position and schedule with notice to the incumbent and the Union.

Significantly, I find no evidence that the Employer’s underlying decision to change the schedule was based on anything but objective business considerations. Further, I am persuaded that the relative rarity of similar scheduling changes do not warrant a different result. Moreover, even assuming arguendo that certain of the Employer’s responses and explanations to grievant were incomplete or inaccurate, I am persuaded that such comments did not defeat any essential objectives or deny grievant or the Union any “fruits of the contract.” In light of the foregoing, and in particular in the absence of any evidence that the Employer acted unreasonably, capriciously or arbitrarily, I am compelled to conclude that the Employer’s actions were in harmony with the fairness and reasonableness standards described above.

CONCLUSION

Both Parties presented comprehensive, well-reasoned arguments. Although I appreciate the grievant’s disappointment in not receiving her preferred schedule, after careful review of all the evidence in the record and the positions of the Parties, I am compelled to conclude that both the plain meaning and the overall context of the relevant CBA Articles support dismissal of the grievance. In particular I am persuaded that Article 35 provides the Employer with broad discretionary authority to change schedules. I also find no basis to conclude that the Employer

⁷*City of Salem, 2003 WL 26556957.*

exercised that authority unreasonably or unfairly. Further, I am persuaded that the surrounding circumstances do not warrant deviation from the clear and unambiguous language of the CBA. Accordingly, as my authority is wholly dependent on the CBA, I will dismiss the grievance as the Union failed to meet its burden of demonstrating a permanent vacancy in the position grievant sought. In reaching my conclusions I considered all the evidence presented at the hearing, as well as the Parties' entire arguments, even if not specifically addressed in this Opinion.

AWARD

Based on careful consideration of the evidence and the arguments of the Parties in their entirety, I award the following:

- 1. The grievance is denied in its entirety.**
- 2. Pursuant to Article 29.3 of the CBA, the Parties will be responsible for my fees in equal amounts.**

Respectfully submitted,



Richard L. Ahearn

Arbitrator

January 30, 2021