

**IN ARBITRATION
BEFORE MARK E. BRENNAN, J.D.**

**WASHINGTON STATE DEPARTMENT
OF ECOLOGY,**

Employer ,

and

**WASHINGTON STATE FEDERATION
OF STATE EMPLOYEES,**

Union.

(Michael Franks Grievance)

ARBITRATOR'S DECISION AND AWARD

AAA #01-19-0002-6401

For the Employer:

Elizabeth D. Brown
Washington State Attorney General's Office
7141 Cleanwater Drive SW
Olympia, WA 98504

For the Union:

Gregory M. Rhodes
Younglove & Coker, P.L.L.C.
1800 Cooper Point Rd SW, Bldg 16
Olympia, WA 98507

I. INTRODUCTION

This dispute between the Washington State Department of Ecology ("Employer" or "Ecology") and the Washington Federation of State Employees ("Union" or "WFSE") concerns a grievance the Union filed under the parties' 2017-2019 collective bargaining agreement ("Agreement"). The parties agreed during the hearing that the matter was properly before the Arbitrator for decision.

The Union contends the Employer violated Article 23.1 by not paying Washington Conservation Corps (“WCC”) Supervisors meal per diem rates established by the Washington State Office of Financial Management (“OFM”) while travelling to perform certain of their duties. The Employer denies that it violated the Agreement.

At a hearing held through video conference on September 29, 2020, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other’s witnesses. The parties filed post-hearing briefs on November 23, 2020. A court reporter provided a transcript of the hearing. I reviewed the transcript, admitted exhibits and notes that I took during the hearing to analyze the evidence. Having carefully considered the evidence and the parties’ arguments in their entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties agreed to the following issue:

Has the Department of Ecology violated Article 23.1 of the 2017 through 2019 collective bargaining agreement between the parties, and if so, what is the remedy?

III. FACTS

The Employer employs about 50 WCC Supervisors. Those employees became represented by the Union on December 21, 2018. Thereafter, they became covered by the Agreement.

WCC Supervisors work in the Employer’s Washington Conservation Corp program. WCC is housed under the Department of Ecology’s Shoreland and Environmental Assistance program. It is funded by the State. It partners with the national AmeriCorps program and receives a grant from the federal Corporation for National and Community Services. The grant is called an AmeriCorps grant after the federal AmeriCorps program. WCC’s mission is to enhance and

conserve Washington State's natural resources while providing meaningful service opportunities for young adults and military veterans.

WCC Supervisors oversee crews of five volunteers from the federal AmeriCorps program, who are either between the ages of 18 and 25 or military veterans. The volunteers are paid a monthly stipend, roughly equivalent to minimum wage. They are not Employer employees.

WCC Supervisors work four ten-hour days each week. Their work includes working outdoors, away from their home office, supervising their crews. These trips are called "spikes." Each spike lasts either four or eight days.

WCC Supervisors go on spikes with varying frequency. One Supervisor testified that he has only gone on two spikes in four years of employment. Another goes out on a spike about once per month. Another is on a spike up to 60% of his workdays. On brief, the Employer writes "the crew spends a majority of their time 'in the field', which can include overnight travel for a lengthy amount of time in remote areas, to include out of state."¹

The crews are assigned to or sponsored by other State agencies, governmental agencies, or non-profit organizations. Crews assigned to the Washington State Department of Fish and Wildlife take water supply samples on beaches throughout the State. Crews assigned to the Washington State Department of Natural Resources do forest management work or work in State campgrounds. Other crews, called spike crews, work for several different sponsors throughout the year. The crews also provide disaster response as needed.

The crew sponsored by Fish and Wildlife overnights either at hotels or Airbnbs. Other crews most often camp out or stay in bunk houses.

¹ This is a direct quotation from the Employer's step three grievance response, dated June 11, 2019, written by Deputy Director Polly Zehm. Quotation marks were not used in the brief. Zehm did not testify. Accordingly, it is not clear whether Zehm, and in turn the Employer on brief, claim all or even most WCC Supervisors are traveling on "spikes" most of their work time.

At the beginning of each spike WCC Supervisors take their crews shopping for groceries to last the entire spike. Each crew member including the Supervisor is entitled to \$20 per day as a meal allowance. WCC Supervisors have Employer-provided credit cards they use to purchase the groceries for the entire crew.

Each crew member selects his own food and uses a calculator to ensure purchases are under the allotted \$20 per day. Crew members can, but often do not, coordinate food purchases beyond the purchase of common items like cooking oil.

WCC has a manual that addresses the roles, responsibilities, and expectations for WCC Supervisors. It contains procedures that according to the manual “do not substitute for or replace [Department of] Ecology policies.” U-9, p. 6 As to food purchases that manual provides (*Id.*, at p. 65 (emphasis in original)):

Crews that are on travel status may use the crew Visa card for food purchases. WCC supervisors must send ALL receipts to WCC Headquarters immediately. The approved rate is \$20 per person per service day or \$480 weekly (includes tip and tax on prepared foods).² When calculating this total, supervisors must factor in all food purchased for that spike (grocery store and restaurant purchases). In addition to meeting these set maximums for the WCC Program, individual meals must be less than the agency maximum (varies by county, limits available through OFM).

Note: When the WCC or sponsor provides food on spike or at events, *per diem* is unavailable. People with especially restricted diets will need to supplement food provided by conference facilities, at their own expense.

Providing WCC Supervisors the same \$20 per day food allowance as provided to the crew members has long been the Employer’ practice.

WCC Supervisor displeasure with the \$20 per day food allowance was a primary motivator for those employees to seek Union representation. Other State employees on travel status receive a food allowance at rates set by OFM. WCC Supervisors also receive the OFM rates when on

² The \$480 figure is for the entire crew (five volunteers and the supervisor) for a four-day week.

travel status other than spike travel.³ The OFM rates vary by county and effective January 1, 2020 range from \$55 to \$76 per day.

Other Ecology Department employees who travel out into the field receive the OFM meal per diem rates. For example, employees in the Department's water quality section who go out into the woods and riparian zones to ensure water quality and wildlife preservation and stay overnight receive OFM meal per diem. They receive the full reimbursement without having to show they actually spent the full allotment.

Soon after WCC Supervisors became represented their Union representatives discussed bringing the Employer's employment practices for WCC Supervisors into compliance with the Agreement. Although the parties were able to agree on issues not identified by the parties during the hearing, they were not able to agree on meal per diem rates while WCC Supervisors were travelling on spikes.

Beginning in February 2019, WCC Supervisors submitted request for reimbursement based upon the OFM meal per diem rates. The Employer refused to pay them based upon guidelines in the WCC Supervisor manual. The Employer argued, at least in part, that through the \$20 per day per person that it was supplying the food to the crews, including WCC Supervisors. The Employer also argued that meal planning and preparation training was a Supervisor responsibility. The Employer believes that it enhances team building and ensures equity to have WCC Supervisors and crew members receive the same food allowance.

³ Michael Franks whose crew usually works for Fish and Wildlife testified that his crew sometimes works side projects. When they do that, he and his crew members are reimbursed based on the OFM per diem rates. WCC Section Manager Bridget Talebi and Labor Relations Specialist Molly Clinton both testified that WCC was not aware of this. Talebi feared that this reimbursement could violate the WCC's contract with AmeriCorps.

OFM monitors the Employer's practices. Either OFM or the Employer's fiscal office annually audits the WCC. Neither has ever raised a concern about the Employer's food allowance policy for spike travel.

The Employer's travel policies provide its "employees are to conform to all OFM travel regulations." E-5 OFM has published a State Administrative & Accounting Manual ("SAMM"). One of SAMM's purposes set forth in Section 1.10.10 is "to provide control and accountability over financial and administrative affairs of Washington State Government." U-1. It further provides that the manual's policies and procedures "are the minimum requirements that state agencies must meet" and that agencies "may adopt additional policies and procedures in greater detail, or use additional or alternative supporting documentation, as long as the agency meets the required minimum standards." *Id.*

The SAMM contains travel regulations in Chapter 10. E-6 Pertinently, those provide (*Id.*):

- All state employees must comply with the travel policies (§10.10.05).
- Agency heads and their designees must (1) ensure that travel costs are directly work related, (2) establish an effective system for management over travel costs through written internal policies and procedures and (3) ensure travelers are not treated differently under like travel circumstances (§10.10.10.a).
- Agencies may adopt internal travel policies and reimbursement allowances that are more restrictive than those contained in the Chapter 10 on travel (§10.10.10.b).
- Travelers are eligible for reimbursement for lodging, meal and transportation expenses (§10.20.10).
- Reimbursement for meals and lodging shall not exceed the maximum allowable per diem rate (§10.20.30).
- Reimbursement for meal costs is on an allowance basis not to exceed the amounts in effect at the time of travel set periodically by OFM (§10.40.10).
- Normally, travelers will receive the per diem allowance, although an agency head or designee may require actual receipts (§10.40.20).
- Reimbursement for meal expenses is not authorized when a traveler does not incur

expenses for meals because they are furnished (§10.40.40).

The Employer's policy manual has a chapter on travel (Chapter 6.) E-5 Administrative Policy 6-01 establishes the Employer's Fiscal Office as responsible for interpreting OFM Travel Regulations and authorizes it to establish Employer specific travel policies. It particularly provides (*Id.*):

Where regulations permit agency discretion, the Fiscal Office will recommend policy that is appropriate to the needs of Ecology and conforms to existing statutes. All policy statements required by OFM or deemed necessary by agency management will be placed into the Ecology Policy and Procedure Manual.

The Employer's Fiscal Office has not recommended, and the Employer has not adopted and put into its Policy and Procedure Manual any provision about the WCC Supervisors' meal reimbursement rate.

On April 25, 2019, the Union filed a grievance. The parties were unable to resolve it, leading to this matter.

III. PERTINENT CONTRACT PROVISIONS

ARTICLE 23 --TRAVEL

23.1 Employees required to travel in order to perform their duties will be reimbursed for any authorized travel expenses (e.g., mileage and/or per diem), in accordance with the regulations established by the Office of Financial Management and agency policy.

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ARTICLE 29 -- GRIEVANCE PROCEDURE

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STEP 5 – Arbitration

If the grievance is not resolved at Step 4 . . . the Union may file a request for arbitration. .

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D. Authority of the Arbitrator

1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any provision of this Agreement;
 - b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance
 - c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement.

* * *

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

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

* * *

3. If either party desires a record of the arbitration, a court reporter may be used. If that party purchases a transcript, a copy will be provided to the arbitrator free of charge. If the other party desires a copy of the transcript, it will pay for half of the costs of the fee for the court reporter, the original transcript and a copy.

4. Each party is responsible for the costs of its staff representatives, attorneys and all other costs related to the development and presentation of their case

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ARTICLE 50 -- ENTIRE AGREEMENT

50.1 This Agreement constitutes the entire agreement and any past practice or past agreement between the parties prior to July 1, 2005—whether written or oral—is null and void, unless specifically preserved in this Agreement.

IV. PARTIES' POSITIONS

A. The Employer.

The Union cannot meet its burden that the Employer violated the Agreement. The Employer had not changed how it has reimbursed WCC supervisors for spike travel for many years. OFM has never found that those payments violated any OFM policy. Nor has it ever been determined that the payments violate any agency policy. The Union has not presented any evidence to the contrary.

Spike travel is unlike any other travel by Employer employees. While on spike travel WCC Supervisors are all treated the same and while on non-spike travel WCC Supervisors are treated the same as all other Employer travelers.

There is a reasonable, business related reason for the Employer to adopt an internal policy and reimbursement allowance that is more restrictive, during spike travel. Purchasing food together for the entire crew during the workday, using WCC cooking facilities or equipment to prepare meals is the most team oriented, healthy and efficient method to feed WCC Supervisors and their crew members while on spike travel.

The Union did not demonstrate that spike travel is like other travel circumstances. Even other field travel is not the same as spike travel. Other field travel, even that which is remote, does not include supervision of a team.

Article 23.1 requires that the Employer follow OFM regulations and agency policy regarding travel reimbursement. There is no evidence that the Employer has violated OFM regulations or agency policy by reimbursing WCC Supervisors \$20 per day while on spike travel. The Union simply asserts that WCC Supervisors should be treated like other state employees while in travel status because they are state employee in travel status while on spike travel. However,

the OFM rules allow for agencies to adopt internal travel policies and reimbursement allowances that are more restrictive, and it has not been shown that the Employer's food purchases for WCC Supervisors while on spike travel is inappropriate.

The Employer's food allowance for spike travel is a long-standing practice. Article 23.1's language does not conflict with this practice. The practice is (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time and accepted by both parties. Accordingly, it controls this matter.

The Union's grievance must be denied.

B. The Union.

The Employer violated Article 23.1. The Union's grievance should be granted.

As an initial matter, past practice predating the Union's certification as the WCC's exclusive bargaining representative is inapplicable. Under well-established arbitral principles for a past practice to be valid and binding on the parties it must not only be clear and consistent, long standing and repetitive and an acceptable pattern, the pattern must be mutually acknowledged by the parties over the long term. Where, as here, a practice has developed before the Union became a party to the Agreement or the employees' representative, there is no mutuality and thus past practice is not binding on the Union or its represented employees.⁴

Article 23.1 requires the Employer to reimburse employees for "authorized travel expenses (e.g., mileage and/or per diem), in accordance with regulations established by [OFM] and agency

⁴ During the Union's opening statement, it asserted that Article 50.1 precluded application of past practice to this matter. Subsequently, the language in that section reading "any past practice or past agreement between the parties prior to July 1, 2005—whether written or oral—is null and void," was discussed. With its post hearing brief, the Union submitted copies of portions of old collective bargaining agreements and portions of the Revised Code of Washington governing State Collective Bargaining, Chapter 41.80 RCW. Although the Employer did not object to submission of additional evidence, which the old collective bargaining agreement portions constituted, I have not reviewed those materials. I have taken notice of the statutory provisions.

policy.” The rates for reimbursement in the OFM manual are clear. The Employer is not paying those rates.

The Employer is wrong to argue that it need not pay those rates because (1) the OFM manual allows it to be more restrictive or (2) by providing a credit card the Employer furnishes meals.

The SAMM provision that provides “agencies may adopt internal travel policies and reimbursement allowances that are more restrictive than those contained in this chapter” is a stand-alone provision in the chapter on Agency responsibilities. It does not explicitly state that an agency may reimburse employees at rates less than the published rates. Moreover, any effort to pay less contradicts SAMM’s overriding directives in Section 1.10.10 that “policies and procedures in the manual are minimum requirements” and any additional policies or procedures an agency adopts “must[] meet the required minimum standards.” The “more restrictive” language likely refers to matters like requiring receipts set out in Chapter 10.

It is simply unreasonable to allow the more restrictive language to allow an agency to reduce reimbursement to any amount it wanted. Under such a reading an agency could reduce per diem meal reimbursement to \$1 per day or lodging to 5% of the actual cost. Such absurd results run afoul of the intended purposes of the guidelines.

It also would run afoul of the clear purpose of the Agreement. The Agreement requires the Employer to reimburse employees “in accordance with regulations established by the Office of Financial Management.” The expectation is employees will be reimbursed at the rates published by OFM in the SAAM. If regulations referred to in Article 23.1 allow the Employer unfettered discretion to deviate from the published rates, the Article would have no purpose or meaning. This would lead to the kind of harsh, absurd and non-sensical results arbitrators seek to avoid.

Finally, even if the Employer is correct to assert that SAMM allows deviation from the published rates, it has not properly done so here. The exercise of such discretion must be done through enactment of formal policy provisions. The Employer has not done that here.

Article 23.1 allows for per diem reimbursement per OFM “regulations . . . and agency policy.” The Employer has only one policy regarding travel. This policy requires the Employer’s Fiscal Office to “recommend policy that is appropriate to the needs of Ecology and conforms to other existing statutes.” E-5. Such policies must be placed in the Employer’s “Policy and Procedure Manual.” *Id.*

The Employer’s Fiscal Office has not drafted, nor has the Employer adopted or implemented or placed in its Manual any policies granting it discretion to pay per diem rates below OFM published rates. The WCC Supervisor’s manual by its explicit acknowledgment does not substitute for or replace agency policies.

The Employer does not furnish meals by providing a credit card to pay for the meals. Meals are furnished when the meals themselves are actually furnished. Indeed, this understanding is the understanding of the parties. When WCC Supervisors are provided meals while on spike travel, they do not receive the \$20 per diem.

The Employer treats WCC Supervisors differently from other employees. Other employees receive the published OFM reimbursement rate for meals when travelling. The Employer also pays WCC Supervisors that rate when as the Employer describes it, they are in “like travel circumstances as other Ecology employees (e.g. attending an overnight crew training without a crew).” E-4 The Employer uses “like travel circumstances” to defend against the mandate in SAMM Section 10.10.10.a(4) that requires agencies to “ensure travelers are not treated differently under like travel circumstances.”

It is not disputed that WCC Supervisors are unique in the sense that they are the Employer's only employees who travel with and supervise AmeriCorps members. In that sense, however, the Employer could find something unique about every employee's particular travel circumstances. Now that WCC Supervisors are covered by the Agreement, they should not be denied its protections based upon an artificial distinction arising out of their particular duties.

Any issues the Employer raises about the feasibility of paying AmeriCorp members \$20 per day for food and WCC Supervisors at the OFM rates are not well taken. WCC Supervisors could use the credit card to pay for AmeriCorp members' food and use their own funds to purchase their own food, and later receive reimbursement at the OPM per diem rate like other traveling Employer employees. Similarly, concerns about equality and team comradery if WCC Supervisors received a higher meal rate are not valid reasons to deny WCC Supervisors their rights under the Agreement.

V. DECISION

In contract interpretation cases, arbitrators must determine the parties' mutual intent. The contract's written words are the starting point to determine that intent. The contract as a whole must be reviewed to determine if a plain meaning can be ascertained – that is, are the words plain and clear, conveying a distinct meaning. Where parties differ on the meaning that they give to contractual language, arbitrators look to various indicators of intent. Those indicators of intent include extra-contractual evidence such as bargaining history and past practice.

Here, neither party presented any evidence on bargaining history. The Employer argues that its historical payment of less than OFM per diem meal rates to WCC Supervisors while on spike travel should be used to determine the Agreement's language. However, as the Union

persuasively argues past practice can only be used to aid in the interpretation of an agreement when the practice is long-standing and mutually apparent to or known by both parties.

A practice developed when the Union did not represent employees cannot be apparent to or known by the Union, one of the parties who must have such knowledge for the practice to be used as a guide. This is particularly appropriate where, as here, the Union immediately claimed the practice violated the Agreement. Accordingly, I must examine the language set forth in the Agreement.

Article 23.1 provides quite simply that employees the Employer requires to travel to perform their duties will be reimbursed for any authorized travel expense in accordance with regulations adopted by OFM and agency policy. Under OFM regulations, employees are eligible for reimbursement for meal expenses when engaged in travel that is directly work related. No one disputes that WCC Supervisors are engaged in travel that is directly work related when on spike trips. Thus, they are entitled to reimbursement for meal expenses under OFM regulations. Under those regulations, the reimbursement amount generally is the County per diem rate established by OFM unless an agency requires actual receipts. It was not contested that the Employer has not required actual receipts when its employees request meal reimbursement.

OFM does allow exceptions to the per diem rate other than the actual receipt requirement. First, if meals are furnished, then no per diem allowance is authorized. Second, more restrictive reimbursement allowances are allowed if certain conditions are met.

The Employer argues that it furnishes meals to WCC Supervisors by providing \$20 per day and having them make their own meals. From the example provided in SAAM on how to determine the reimbursement amount when meal costs are included in lodging or meetings, it is apparent the furnish exception is limited to when an actual meal is furnished, not when money is

provided to buy food products. Moreover, it appears that if an employee is on non-spike travel and is able to produce their own meals, like at an Airbnb or other lodging allowing meal preparation, that employee would receive the OFM per diem meal rate. Accordingly, WCC Supervisors are not furnished meals to exclude them from OFM's published per diem meal reimbursement.

The Employer also argues that it is allowed by SAAM to adopt more restrictive reimbursement allowances. SAAM §10.10.10.b OFM allows agencies to “adopt internal travel policies and reimbursement allowances that are more restrictive than those contained in [the travel] chapter,” provided that “travelers are not treated differently under like travel circumstances (§10.10.10.a).”

Under this language the Employer can be in compliance with OFM regulations if it adopts either more restrictive travel policies or more restrictive reimbursement allowances provided travelers in like travel are treated the same. In other words, the Employer can adopt more restrictive reimbursement allowances for WCC Supervisors while on spike travel provided spike travel is different from other travel for the Employer where employees receive the OFM per diem rates.

Spike travel may be different from travel undertaken otherwise by the Employer's employees. It is done as part of a group and meal preparations are to some extent done as a group. However, back country travel done by other of the Employer's employees receive the OFM meal per diem allowance. I need not decide, however, if the spike travel is sufficiently different from that done by the Employer's other employees because the Employer has not adopted a policy providing that WCC Supervisors receive a more restrictive meal allowance while on spike travel.

The Employer must be bound by its adopted policies. As set forth above, it has authorized its Fiscal Office to recommend changes to OFM's travel policies. Following any such recommendation, such a policy must be placed into the Employer's Policy and Procedure Manual memorializing that recommended change. That has not been done here.

The WCC Supervisor's Manual on spike travel meal allowance does not suffice. By its terms, the manual's provisions "do not substitute for or replace [Department of] Ecology policies." It is neither policy nor in the Employer's Policy and Procedure Manual. As a result, the Employer is bound to provide the WCC Supervisors meal reimbursement allowance set forth by OFM.

Any difficulties in reimbursing the WCC Supervisors differently from AmeriCorps members can be easily overcome and does not negate the Employer's obligation to pay the OFM rates. Similarly, the Employer's concerns about equity and comradery cannot negate that obligation.

In sum, the Employer must reimburse its WCC Supervisors at the per diem rates established by OFM.

VI. CONCLUSION

As set forth above, I have concluded that the Employer has violated Article 23.1 of the Agreement.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following Award:

1. The Washington State Department of Ecology violated Article 23.1 of the 2017-2019 collective bargaining agreement it had with the Washington Federation of State Employees (“Agreement”), by not reimbursing its WCC Supervisors for meals at the per diem rates established by the Washington State Office of Financial Management;
2. The Washington Federation of State Employees’ grievance is granted;
3. The Washington State Department of Ecology must make its WCC Supervisors whole for the differences in amounts under the Office of Financial Management published rates and amounts each received in meal reimbursement;
4. The Washington State Department of Ecology and the Washington Federation of State Employees shall each be responsible for one-half of the fees and expenses of the arbitrator in this proceeding; and
5. The arbitrator shall retain jurisdiction over this matter for a sixty-day period to resolve any dispute the parties may have over implementation of this award.

DATED this 30th day of November 2020



Mark E. Brennan, JD
Arbitrator