

AMERICAN ARBITRATION ASSOCIATION

WASHINGTON FEDERATION)
STATE EMPLOYEES)
(LLOYD DESHAVER, ET AL)
Union)
)
v.)
)
WASHINGTON STATE DEPARTMENT)
CORRECTIONS)
Employer)
)
)
)

AAA Case No. 01-23-0001-8062 (Contract Interpretation)

ARBITRATOR'S OPINION AND AWARD

I. INTRODUCTION

This matter was heard on March 18, 2024 via Zoom. Sarah Smith, Labor Advocate represented the Washington Federation of State Employees (WSFE or Union). Kelly Oshiro, Assistant Attorney General, represented the Washington State Department of Corrections. (Employer).

II. PROCEDURAL HISTORY

- a. Union and Employer signed a collective bargaining agreement, (Union Exhibit U-3 and Employer Exhibit E-1).
- b. The Grievant and 8 other Correction Specialist Four Officers were denied assignment pay. The Union filed a grievance (Employer's Exhibit 2.)
- c. The matter was referred to arbitration.
- d. Written closing briefs were presented within two (2) weeks from the close of the arbitration hearing on March 18, 2024.

III. POSTION OF THE PARTIES

Union

There are nine Washington Federation of State Employee Union members classified as Correction Specialist Four (CS4's) in the bargaining unit within the Washington State Department of Corrections (DOC) at the center of this disagreement. On November 2, 2021, the WFSE members in the bargaining unit who were previously in the division work unit section named the "Emergency Operations Unit," received an email notification that they were being moved from that unit to new units. The new units the WFSE members were moved to were either the Firearms Unit or the Use of Force Unit. The WFSE members who were moved into new units all teach various defensive tactics courses for the Washington Department of Corrections. Teaching defensive tactics classes involves exposure to danger from both physical safety and chemical aspects. Ordinarily, instructors who teach defensive tactics classes are given assignment pay at the rate of fifteen dollars per hour while teaching added to their base pay, unless they are in the "Emergency Operations Unit or Training Development Unit," which are proscribed by the CBA as being ineligible for the pay.

In the 2021-2023 CBA, Article 42.28, "Assignment Pay/Special Provisions, A". says, "Assignment pay is a premium added to the base salary and is intended to be used only as long as the skills, duties, or circumstances it is based on are in effect. The Employer may grant assignment pay to a position to recognize specialized skills, assigned duties, and/or unique circumstances that exceed the ordinary. The Employer determines which positions qualify for the premium. Classes approved for assignment pay are identified in Appendix O." In Appendix O, Reference #50, of the CBA, the following instruction is given, "REFERENCE #50: Within the Department of Corrections (excluding those assigned to the Training and Development Unit and Emergency Operations Unit), certified instructors of defensive tactics, firearms, taser, verbal tactics, and pistol maintenance, will be compensated at basic salary plus fifteen dollars (\$15.00) per hour for every hour engaged in giving instruction to or in receiving re-certification training."

The WFSE members who were moved from the Emergency Operations Unit (EOC) to the Firearms and Use of Force units received assignment pay for teaching defensive tactics classes during the months of approximately July through September, 2022. The assignment pay was discontinued and the discontinuance was grieved according to the grievance procedure in the CBA.

In the Department of Correction grievance Step 2 and Step 3 responses issued respectively by Charles Anderson and Thomas Fithian, they cited several reasons that they considered the WFSE members ineligible for the assignment pay: that their duties and job responsibilities had not changed, that the Assignment Pay was not meant to apply to the Grievants. Denial of the grievance and inability to reach a mutual understanding regarding assignment pay at the pre-arbitration meeting resulted in this arbitration hearing.

Employer

Within the Office of Correctional Operations is the Security and Emergency Management Division led by Charles Anderson, the Director of Security and Emergency Management. The divisional name of Security and Emergency Management evolved a few times – from Emergency Operations Unit to Crisis Intervention to its current name – during Mr. Fithian’s tenure over Correctional Operations, which he described as semantics. Since April 2022, the five programs under the Security and Emergency Management Division include Security Management, Emergency Operations, Use of Force, Firearms, Correctional Industries (CI) and Community Security. The Security and Emergency Management Division is responsible for the security and emergency management of DOC. The Security and Emergency Management Division’s purpose is to ensure staff have the necessary training to respond to emergency events at DOC and various operational sites within the community.

From January to April 2022, only three programs fell under the Security and Emergency Management Division, Use of Force, Firearms, and Emergency Operations. The job title

of the position that oversaw the Security and Emergency Management Division was an Administrator as opposed to the current title of Director.

The precursor divisional name of Security and Emergency Management was the short-lived Crisis Intervention Division that DOC used from November 2021 to January 2022. The Use of Force, Firearms, and Emergency Operations programs fell within the Crisis Intervention Division. During this three-month period, the Crisis Intervention Administrator position remained vacant. DOC was in the process of recruiting and establishing the Security and Emergency Management Administrator position.

Prior to November 2021, the division's name was Emergency Operations Unit led by the Chief of Emergency Operations. The Chief of Emergency Operations oversaw the Use of Force and Firearms programs and individual emergency operations specialists. The Firearms and Use of Force programs fell under the Emergency Operations Unit dating back to approximately 2006.

During COVID, the division's name was Emergency Operations Unit. At the time, only two people managed DOC's emergency operations and emergency management functions and led the statewide response for facilities that operate 24 hours a day seven days a week. After COVID, DOC wanted to have a division name that highlighted the emergency management or emergency operations function of the agency, which is why the current name of the division is Security and Emergency Management. COVID taught DOC that the agency needed individual programs that focused solely on emergency management, incident response, and emergency operations.

This need allowed DOC to acquire three additional positions that led to the formation of Emergency Operations as its own stand-alone program within the Security and Emergency Management Division.

Grievants argue that they should be entitled to the \$15.00 per hour assignment pay because they are no longer part of the Emergency Operations Unit. Department of Corrections

excluded the Grievants from receiving the assignment pay for hours taught instructing or receiving recertification training because those functions are part of the incumbent job duties.

IV. ISSUE

Did the Employer violate Article 42.28(A) and Appendix O, Reference #50 of the parties' Collective Bargaining Agreement when it moved the Union members out of Emergency Operations Unit and refused to issue or continue issuing assignment pay? If so, what is the remedy and what is the effective date of the remedy?

Relevant Provision of the CBA

Article 42.28(A) of the 2021-23 Collective Bargaining Agreement between Washington State, Department of Corrections and the Washington Federation of State Employees states:

Assignment pay is a premium added to the base salary and is intended to be used only as long as the skills, duties, or circumstances it is based on are in effect. The Employer may grant assignment pay to a position to recognize specialized skills, assigned duties, and/or unique circumstances that exceed the ordinary. The Employer determines which positions qualify for the premium. Classes approved for assignment pay are identified in Appendix O.

Employer's Exhibit 1, at p.156.

Appendix O, Reference #50 of the Collective Bargaining Agreement is the provision at issue, which states:

Within the Department of Corrections (excluding those assigned to the Training and Development Unit and Emergency Operations Unit), certified instructors of defensive tactics, firearms, taser, verbal tactics, and pistol maintenance, will be compensated at basic salary plus fifteen dollars (\$15.00) per hour for every hour engaged in giving instruction to or in receiving re-certification training.

Union Exhibit 3-A.

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:

- A. Determine the Employer's functions, programs, organizational structure and use of technology;
- B. Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;
- C. Direct and supervise employees;
- D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies;
- E. Determine the Employer's mission and strategic plans;
- F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;
- G. Determine or consolidate the location of operations, offices, work sites, including permanently or temporarily moving operations in whole or part to other locations;
- H. Establish or modify the workweek, daily work shift, hours of work and days off;
- I. Establish work performance standards, which include, but are not limited to, the priority, quality and quantity of work;
- J. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions;
- K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer, and temporarily or permanently lay off employees;
- L. Determine, prioritize and assign work to be performed;
- M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;
- N. Determine training needs, methods of training and employees to be trained;
- O. Determine the reasons for and methods by which employees will be laid-off; and
- P. Suspend, demote, reduce pay, discharge, and/or take other disciplinary actions.

Employer Exhibit E-1, Pages 119-120.

V. DISCUSSION

The Employer had the right, pursuant to Subsection A, Article 35, Management Rights, to "determine the Employer's functions, programs, organizational structure and use of

technology.” From October 2020 to November 2023 to the present¹, the Employer, used this right several times in the organizational structure of the Department of Corrections, including changing the names of divisions, and programs for the Office of Corrections Operations, Security and Management Unit. *See* Employer Exhibit 11-18. Specifically, the Employer in October 2020,² had a division Emergency Operations, under which, the Grievants were located, this continued until November 2021.³ In November, 2021, the Grievants were placed under the division called Crisis Intervention,⁴this continued until January 2022.⁵ In January, 2022, the Grievants were placed under the Division called Security & Emergency Management.⁶ The Grievants have stayed under that unit from January 2022 to present.^{7 8}

Contract Interpretation Principles

In contract interpretation, the objective theory of contract interpretation is generally used. This objective theory “is that which a reasonable person in similar circumstances would believe the disputed contract language to mean.”⁹ Put in another way, the “plain meaning rule,” which states that “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.”¹⁰ Further, “.....the principle that ‘when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even though they are similar to those listed....’¹¹ will be used to further help determine the interpretation of Article 42.28(A) and Appendix O, Reference #50.

¹ See Transcript at pg.107, ln 19.

² See Employer Exhibits 14 and 17.

³ See Employer Exhibit 11.

⁴ *Id.*

⁵ See Employer Exhibit 18.

⁶ *Id.*

⁷ See Employer Exhibits 15,12,16, and 13.

⁸ The Union filed its Grievance on November 4, 2022.

⁹ The Common Law of the Workplace: The Views of Arbitrators, 2nd Edition, Theodore J. St. Antione, editor, 2005, pg.71.

¹⁰ Elkouri & Elkouri, *How Arbitration Works*, 6th Edition, at pg.434.

¹¹ *Id.* at pg. 467

I. OPINION

Using these principles of contract interpretation, I find that the Employer's argument that the changes to the Unit names from Emergency Operations, to Crisis Intervention, then to finally Security & Emergency Management, were merely "semantic ...It really serves no purpose."^{12,13} and states that nothing changed as far as supervisors of the Grievants and the Grievants' job duties to not be compelling. Through the testimony of Thomas Fithian – Senior Director Correctional Operations- Office of Correctional Operations — and Charles Anderson, Director Security & Emergency Management – Office of Correctional Operations, both who testified that the Grievants' job descriptions require the Grievants to have "specialized skills, assigned duties, and/or unique circumstances that exceed the ordinary".¹⁴ This is further supported when reviewing the job descriptions for each of the Grievants.¹⁵ It is clear that each of the Grievants fall within the purview of Article 42.28(A) in that each Grievant is required to have "specialized skills, assigned duties, and/or unique circumstances that exceed the ordinary"; which would make them eligible for Assignment Pay; if each of the Grievants, were not placed in the division Emergency Operations and thus excluded from Assignment Pay by the operation of Appendix O, Reference #50.¹⁶

Appendix O, Reference #50, only requires that they be "certified instructors of defensive tactics, firearms, taser, verbal tactics, and pistol maintenance" to receive the assignment

¹² See Transcript, pg. 102,ln 13-14.

¹³ "Semantic" means according to Webster New World Dictionary, Second College Edition, 1972, "of or pertaining to the meaning"

¹⁴ See Transcript--(Fithian testimony)-- pg. 111, ln 8-13; and --(Anderson testimony)--pg. 124, ln 22-25, pg. 125, ln 1-2, ln 7-23, pg. 127, ln 5-10, ln 17-25, pg.128, ln 1, pg. 137, ln 4-7, ln 21-25, pg. 138, ln 1-11, ln 23-25, pg.139, ln 1-6; See also Article 42.28 (A).

¹⁵ See Union Exhibits U-1, pg. 1; U-7, pg. 1; U-8, pgs.1-2; U-11, pgs. 1-2; U-12, pgs.1-2; U-13, pg.1

¹⁶ The Union argues that the Teamster Collective Bargaining Agreement, Armory Sergeants, has similar language regarding assignment pay to the language found in Article 42.28(A) and Appendix O, Reference #50. This Teamster Collective Bargaining Agreement is not relevant to issues surrounding Article 42.28(A) and Appendix O, Reference #50.

pay. In reviewing the job descriptions for each Grievant, it is noted that between 45-60% of the duties required the Grievant to be involved in training. In Charles Anderson testimony, he stated that “the percentages on the PDs are little bit arbitrary. And I’ve written many of them, and you throw some numbers up there that equal 100 percent at the end of the day, and a lot of time they don’t completely correlate.” Transcript, pg. 152, ln 17-21.

When the Grievants were moved from “Emergency Operations” to Security & Emergency Management, in January 2022, the Grievants then were no longer excluded from receiving the Assignment Pay set out in Article 42.28(A), as the Grievants were no longer excluded by Appendix O, Reference #50, because they were no longer in the Emergency Operations division, spelled out in Appendix O, Reference #50.¹⁷ ¹⁸ Moving the Grievants from Emergency Operations to Security and Emergency Management, the Employer failed to anticipate and recognize the implications as related to the language of Article 42.28(A) and Appendix O, Reference #50, of the Collective Bargaining Agreement, was/is a consequence of the Employer’s decision by moving the Grievants from an excluded unit to one that was not excluded under these provisions of the Collective Bargaining Agreement.

The Union met its Standard of Proof, by showing the Employer purposely moved the Grievants from Emergency Operations Division to the Security & Emergency Management Division taking them out of the Emergency Operations Division. And, by showing that the Grievants met the standards for Assignment Pay as laid out in Article 42.28(A) and Appendix O, Reference #50.

¹⁷ Emergency Operations was still an existing division within the Office of Correctional Operations of the Department of Corrections during the term of the 2021-2023 Collective Bargaining Agreement.

¹⁸ Where one or more specific items are mentioned in a list without any general description following, this will generally be regarded as excluding other items. Therefore, the Grievants were moved from Emergency Operations, an excluded category of employees, to a non-excluded category of being placed in Security and Emergency Management, despite this category was “similar to those listed.” Elkouri & Elkouri, *How Arbitration Works*, 6th Edition, at pg. 467.

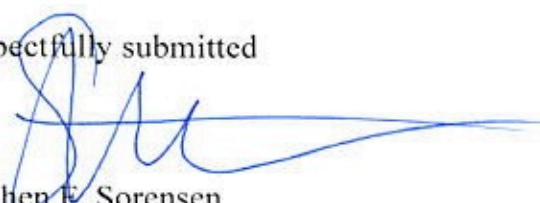
The Employer could have sought to modify Appendix O, Reference #50, to include the “Security & Management Division” to be one of the excluded divisions for Assignment Pay, but that would require notifying the Union, which it did not do.

VII. AWARD

It was the Employer’s decision to move the Grievants from the Emergency Operations division to the Security & Emergency Operations in its organizational chart. This change did not include a change to the Appendix O, Reference #50, where it, as of the end date of the Collective Bargaining Agreement, still existed. Employer has the right to organize its Department of Corrections, as it sees fit. However, when such a move affected specific employees and their wages, then it needed to notify the Union and bargain. The Employer did not do this. The affected employees recognized that they were now eligible for assignment pay based on plain language of Appendix O, Reference #50, and started in July, 2022, to submit time sheets for the trainings they conducted, which they were eligible to receive the assignment pay.

The Employer shall pay according Appendix O, Reference #50 for all hours of “of giving instruction to or in receiving re-certification training” conducted by the Grievants from January 1, 2022¹⁹ to June 30, 2023.

Respectfully submitted



Stephen F. Sorensen
Arbitrator

¹⁹ This is date that the Grievants were moved from Emergency Operations to Security and Emergency Management on a permanent basis. See Employer’s Exhibit E-18, organizational chart effective January 1, 2022. See also Transcript pg. 101, ln 14-25, pg. 102, ln 1-7.