In the Matter of the Arbitration	)	
	)	
between	)	
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	
	)	
(Union)	)	OPINION AND RULINGS
	)	ON ARBITRABILITY
And	)	FURLOUGH GRIEVANCE
	)	AAA 75-390-00102-11 CEPO
	)	
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY	)	
	)	
(Employer)	)	

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES:

For the Union

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For the Employer

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HEARING: September 27, 2011

RECORD CLOSED: November 9, 2011

AWARD ISSUED: December 30, 2011

I. INTRODUCTION

As a result of 2010 state legislation, the State of Washington Department of Ecology (Employer or Ecology) closed for ten days of business causing temporary layoffs, or furloughs, of employees. The Washington Federation of State Employees (Union or WFSE) filed grievances on behalf of overtime-exempt employees in Ecology claiming that the Employer did not properly reduce the workload of employees despite the reduction in their salary, and as a result, implemented the layoffs in a manner that violated the Collective Bargaining Agreement.

This case is administered by the American Arbitration Association (AAA) and the Arbitrator was chosen pursuant to AAA procedures. The Case Manager is Cecilia Pompa.

The parties agreed to bifurcate the issues in this case in order to first address arbitrability questions regarding the Union's grievance. A hearing on these limited issues was held on September 27, 2011 at the offices of the Washington Attorney General in Olympia, Washington. Both parties were accorded a full opportunity to present evidence and argument in support of their respective positions. The hearing was transcribed by certified court reporter Dixie Cattell of Dixie Cattell & Associates.

At the end of the hearing, the parties elected to file written closing briefs. The Arbitrator officially closed the record upon receipt of those briefs. The parties agreed the Arbitrator could have until December 30, 2011 to issue her decision.

II. ISSUES

The parties agreed to the following statement of the issues. I have listed the issues in the order that I discuss them.

Due to the nature of these cases:

> Do the Union's grievances fail to state a claim for relief under the Collective Bargaining Agreement?
>
> Should the Union be required to prove a breach of the Collective Bargaining Agreement with respect to each grievance?[1]
>
> Transcript (Tr.) 4-5.

At the onset of hearing, a third issue was identified as: Do the grievances only apply to those employees that are specifically named in the grievances? Later in the hearing, for purposes of this case, the Union agreed to withdraw the grievances insofar as they list unnamed grievants; that is, the grievances are limited to those employees who are specifically named and overtime-exempt. Tr. 78-79.

III. CONTRACT LANGUAGE

> **29.2 Terms and Requirements.**
>
> A. Grievance Definition
>
> A grievance is an allegation by an employee or group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants."
>
> **29.3 Filing and Processing** * * *
>
> B Processing
>
> **Step 5—Arbitration:**
>
> If the grievance is not resolved * * * the Union may file a request for arbitration. * * *

[1] In its Post-Hearing Brief, the Employer prefaces the second issue with "[If this case proceeds to a hearing on the merits,] should the Union be required to prove a breach of the collective bargaining agreement with respect to each grievant named? Employer's Post-Hearing Brief at p. 8.

6.9 Overtime-Exempt Employees

Overtime-exempt employees are not covered by federal or state overtime laws. Compensation is based on the premise that overtime-exempt employees are expected to work as many hours as necessary to provide the public services for which they were hired. These employees are accountable for their work product, and for meeting the objectives of the agency for which they work. The Employer's policy for all overtime-exempt employees is as follows:

A. The Employer determines the products, services, and standards that must be met by overtime-exempt employees.

B. Overtime-exempt employees are expected to work as many hours as necessary to accomplish their assignments or fulfill their responsibilities and must respond to directions from management to complete work assignments by specific deadlines. Overtime-exempt employees may be required to work specific hours to provide services, when deemed necessary by the Employer.

C. The salary paid to overtime-exempt employees is full compensation for all hours worked.

D. Overtime-exempt employees' salary includes straighttime for holidays. An overtime-exempt who's Employer requires him or her to work on a holiday will be paid for at an additional rate of one and one-half (1-1/2) times the employee's salary for the time worked.

E. Employees will consult with their supervisors to adjust their work hours to accommodate the appropriate balance between extended work time and offsetting time off. Where such flexibility does not occur or does not achieve the appropriate balance, and with the approval of their Appointing authority or designee, overtime-exempt employees' will accrue exchange time for extraordinary or excessive hours worked. Such approval will not be arbitrarily withheld. Exchange time may be accrued at straight time to a maximum of eighty (80) hours. Exchange time has no cash value and cannot be transferred between agencies.

F. If they give notification and receive the Employer's concurrence, overtime-exempt employees may alter their work hours. Employees are responsible for keeping

management apprised of their schedules and their whereabouts.

G. Prior approval from the Employer for the use of paid or unpaid leave for absences of two (2) or more hours is required, except for unanticipated sick leave.

Joint Ex. 1.

IV. STATEMENT OF THE CASE

The Department of Ecology is the State of Washington's primary environmental agency. Polly Zehm is Ecology's Deputy Director. Ecology does everything from pick up of roadside litter to oversight of clean up at Hanford. Ecology has ten environmental programs that include functions such as: regulation, permits, technical assistance, youth or young person's programs, standard air/water quality hazardous waste management and clean up of toxic sites.

Ecology has approximately 1,560 full-time employees. The Union represents a wall-to-wall unit of non-supervisory employees Tr. 47-48. WFSE represents both overtime-exempt and overtime-eligible employees. Tr. 53. This dispute involves overtime-exempt employees.

Overtime-exempt employees are paid compensation (a salary) on the premise that they are expected to work as many hours as necessary to complete their job duties. Joint Ex. 1, Article 6.9; Tr. 26. Yet, due to the nature of providing public service, the Employer may require overtime-exempt employees to work specific hours. Joint Ex. 1, Article 6.9 B; Tr. 26. Ecology has work schedules so that the public knows when offices are available for business. Employer Ex. 8; Tr. 53.

Because of a drop in revenue, in 2010 the Washington legislature passed Engrossed Substitute Senate Bill (ESSB) 6503. To comply with that law, Ecology implemented furloughs, or temporary layoffs, for ten days between July 2010 and June 2011. Joint Ex. 2; Tr. 28-29.

The Employer and the Union bargained the impact of these temporary layoffs. They met on July 6, 7, 15 and 22, 2010. Lead negotiator on behalf of the State of Washington was Staff Attorney Shane Esquibel of the Office of Financial Management, Labor Relations Office. Zehm also was on management's negotiating team for Ecology. Lead spokesperson for the Union was Cecil Tibbetts. Scott Mallery is an Environmental Engineer 3 for Ecology in the Spokane, Eastern Region Office. He is a Union shop steward and was a part of the Union's negotiation team. He attended all impact bargaining sessions. Tr. 98-99.

As a result of impact bargaining, the parties reached agreement after about a month of bargaining. They signed a Memorandum of Understanding (MOU) dated August 9, 2010. Joint Ex. 3. The MOU applies to all state employees under the Union's contract that were subject to temporary layoffs pursuant to ESSB 6503. Tr.33.

The parties spent most of their time in bargaining discussing impacts on employees with alternative work schedules (for example, four/ten hour days). Tr. 33-34. The parties also discussed: employee discipline; overtime-exempt employees; and employee workloads.

Concerning discipline, the Employer proposed language that an employee would not receive discipline or a negative performance evaluation solely because of a temporary layoff. The Union did not want the word "solely"; and the parties ultimately did not agree to any language. The Employer said at the table that there was just cause and the parties could rely on that provision if a disciplinary matter arose. Tr. 35.

In the MOU, the parties agreed to a specific provision regarding overtime-exempt employees that provides:

> Pursuant to 29 CFR §541.710(3)(b), the parties understand that during the weeks of temporary layoff, employees designated as overtime exempt will become overtime eligible. Therefore, during the weeks of a temporary layoff, the overtime eligible provisions in the parties' 2009-2011 collective bargaining agreement will apply to overtime exempt employees.
>
> Joint Ex. 3, Paragraph 9.

As a result of this language, during a furlough (or temporary layoff) week the overtime-exempt employee was overtime eligible; that is they could receive overtime pay for work in excess of 40 hours. The Employer's expectation was that these employees would work 32 hours so that the eight hours of lost pay would go toward meeting the reduction in budget. Tr. 36-37.

The Union proposed that the hours forfeited on the temporary layoff day be counted as hours worked; for example, if 33 hours were worked the employee would receive overtime for the 33rd hour. The Employer did not agree to the proposal because it was trying to save money. Tr. 37-38.

There was discussion in bargaining about work performed during weeks before and after the furlough week, but the MOU language does not address

other time periods. The Employer's intent was that employees work less; not to work the same amount and receive less pay. Tr. 39.

On the subject of workload, the parties agreed to the following MOU language:

> An employee who anticipates he/she will not be able to meet a work deadline and/or workload demand as a result of a temporary layoff will raise the issue with her/his supervisor sufficiently in advance of the deadline to allow for appropriate adjustments. If the supervisor determines that it is necessary, he/she will outline prioritization of work and methods to accomplish work in the employee's workload. Employees shall not be denied the ability to schedule leave solely because of work left undone due to the imposed temporary layoffs.
>
> Joint Ex. 3; Paragraph 12.

Concerning who should initiate the discussion on workload, Esquibel reported that the Union's initial proposal was similar to the Employer's proposal. The language was just "tweaked" a bit.

There are a myriad of jobs covered by the Agreement. Esquibel remembered a discussion during negotiations about a "one-size fits all" approach to workload; but there was no realistic way to do it. Tr. 44-45. Management felt it was important that communication occurred at the supervisor-employee level. According to Esquibel, employees knew what their abilities and time frames were; and as a result they needed to bring matters to their supervisor. Tr. 45.

Mallery also remembered that at the table the parties could not agree on how to reduce workload for everyone involved; including overtime-exempt employees who had 5% fewer work days because of the furloughs. Mallery agreed that the parties came up with employees talking to their supervisors; but it

was implied that this concerned the week of the furlough—not the overall period of time worked in that year. Tr.99-100.

September 7, 2010 was a furlough day. On September 27, 2010 the Union filed the first of many grievances on behalf of overtime-exempt Ecology employees.[2] Joint Ex. 4a. The Union filed more grievances for furlough days that followed September 7, 2010. The Union's grievances were filed from 9/27/2010 through 3/7/2011—12 in total here.[3] Joint Ex 4 e-k; Joint Ex. 4 m. All but two of the grievances describe their nature basically in the same way and seek the same remedy:

> Ecology harmed Union overtime exempt employees by having them take temporary layoff days on September 7, 2010 [or another later furlough day]. This harm was not notifying the overtime-exempt employee on what reduction to their workload would occur because of the approximate 20% reduction in time available to work that happened on each of the temporary layoff days and weeks. Without this notification, Ecology is still considering workload based on the premise that overtime-exempt employees are expected to work as many hours as necessary to provide the public service for which they were hired. Therefore, Ecology is not assigning workload to overtime-exempt employees accordingly.
>
> Specific Remedy Requested:
> 1) Notify in writing each overtime-exempt employee on what reduction to their workload will occur for each temporary layoff day.
> 2) Pay each overtime-exempt employee for each layoff day Ecology didn't notify each overtime-exempt employee on what reduction to their workload would occur.
> 3) Make each overtime-exempt employee whole.
>
> Joint Ex. 4 a.

[2] Four grievances identified furloughs on July 12 and August 6, 2010. Joint Ex. 4a-d. At hearing, the parties agreed that these furloughs are not included in the Union's grievances. Tr. 77-78.
[3] The Union withdrew Grievance DOE-05-11 (Joint Ex. 4 l) as it involved an overtime-eligible employee who was inadvertently included as a grievant. Tr. 76.

Two of the 2011 grievances also state that grievants asked for reduction in their workload prior to the temporary layoff day but did not receive guidance or reduction of workload from their managers/supervisors. Joint Ex. 4 g and 4 h.

Nine of the 12 grievances list contract articles violated as: Article 6.9 [Overtime-Exempt Employees], 34 [Layoff and Recall Article], 42.1[Pay Range Assignments], and Appendix F [Salary Schedule]. Three of the grievances, in addition to the contract articles identified above, list as violated the MOU of August 9, 2010. Joint Ex. 4h; 4i; 4m.

On October 28, 2010 a grievance hearing was held between the parties. Because people from multiple Ecology programs were involved and due to the remedy sought by the Union, the hearing was held with Zehm and considered to be Step 3 of the grievance process.

According to Zehm, neither before nor at the grievance hearing was she informed that an employee had been disciplined or requested exchange time as available under Article 6.9 of the Agreement; she was not told of any concrete harm to employees. At the grievance hearing, Zehm asked if any of the grievants had spoken to their supervisors about workload but the Union gave her no examples and no information was provided to her. Tr. 58-60. Zehn described the discussion as more prospective; not about individual grievants.

Union Council Representative Dale Roberts attended the grievance hearing. At that hearing, the Union told the Employer that exempt employees' workloads should be reduced by 5%. According to Roberts, it was important for

management to understand that the workers felt there was a workload problem and what a proposed solution would be—the 5% reduction. Tr. 113-114.

After the hearing, on November 2, 2010, Roberts provided Zehm and Labor Relations Manager Amy Heller with Union proposals regarding the 5% reduction. Union Ex. 14. Roberts said the 5% was presented to management to give ideas about what members saw as reasonable things that could be eliminated, modified or addressed in order for the 5% reduction in workload to become real to them.

Based upon the information provided by the Union and upon her review of the alleged contract violations, Zehm found no contract violation and denied the grievances. Employer Ex. 5. The Union received no further request for information from management.

Article 29.2 of the parties' Agreement provides that the Employer may consolidate grievances arising out of the same set of facts. The Union filed several grievances after the October 28 hearing and the Employer consolidated all of the grievances. Tr. 116.

V. DISCUSSION

A Positions of the Parties: Failure to State a Claim

1. Employer

The Employer contends that the Union's grievances must be dismissed because the grievances themselves do not articulate a breach of the Collective Bargaining Agreement. There was no contractual duty to notify overtime-exempt employees specifically how their workload would be reduced in the week of a

temporary layoff. The Union cannot identify a provision of the Agreement that imposes the duty WFSE wishes to hold Ecology accountable to. Further, for nearly all grievances, there is no alleged violation of paragraph 12 of the MOU—which is the only provision that comes close to addressing the issue of workload. According to the Employer, the Union cannot now get in arbitration what it tried and failed to get in negotiation.

2. Union

The Union argues that the facts will show that there is a contract violation of Article 6.9 as the Employer's interpretation of Article 6.9 would render it meaningless. According to the Union, the grievants are overtime-exempt employees covered by Article 6.9 which defines the basis for their compensation; and their compensation was reduced through the use of temporary layoffs. This is so, argues the Union, despite the fact that the employees are still expected to get the same amount of work done.

The Union contends that in the context of furloughs, in order for the provisions of Article 6.9 to remain meaningful, it must create an obligation on the Employer—the Employer is the one that determines work to be done; not the worker.

The Union claims the MOU only addresses how the employee can bring up issues; it does not negate the existing obligation on the Employer to proactively reduce overall workload when reducing the pay of overtime-exempt employees. In negotiations, argues the Union, workload only addressed the impact of being gone one day during the week in which the furlough occurred.

Here, the grievants are asking the Employer to determine and reduce the public services they provide, overall, during the six months pay was reduced. The MOU does not address this matter, but Article 6.9 does in its provisions.

The Union claims that the definition of "harm" and the appropriateness of remedy should be construed broadly. Taking too narrow an approach limits grievants' ability to utilize the grievance procedure to resolve legitimate, deeply felt, workplace disputes.

B. Ruling: Failure to State Claim

In its Post-Hearing Brief, the Employer stated that its procedural objections to arbitrability had been largely alleviated by the Union's concessions at the hearing. As a result, the Employer focused in its brief on substantive objections to arbitrability—that the grievances fail to state a claim for relief as breach of the Collective Bargaining Agreement. Employer's Post-Hearing Brief at p. 8; note 4.

Although the Employer's argument is presented as failure to state a claim for breach of the Agreement, it is apparent—as the Employer recognizes—that the heart of its claim is one of substantive arbitrability

The principles utilized to address arbitrability issues were developed many years ago in the *Steelworkers Trilogy*.[4] If a particular contract contains an arbitration clause, a presumption of arbitrability exists. See Elkouri & Elkouri, *How Arbitration Works*, 1335-1336 (6th Ed. 2003).

[4] *Steelworkers v. American Mfg. Co*., 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960).

That is, an order to arbitrate the particular grievance(s) should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Steelworkers v. Warrior & Gulf Navigation Co*. 363 U.S. at 582. Also, in deciding substantive arbitrability, an arbitrator (or court) must not rule on the merits of the underlying claim. Elkouri & Elkouri at 1336.

The parties' Agreement defines a grievance as:

> * * * an allegation by an employee or a group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Article includes the term "grievants." Joint Ex. 1, Article 29.2 A.

On the face of the Union's grievances, the Union identified specific articles allegedly violated, misapplied, and/or misinterpreted: Article 6.9, 34, 42.1 and Appendix F (and several include the MOU). The written grievances are based (in part) from the language of Article 6.9 in that they allege Ecology still considered workload "based on the premise that overtime-exempt employees are expected to work as many hours as necessary to provide the public service for which they were hired". *See* Joint Ex. 4.

The problem with the Employer's request to dismiss the Union's grievances is that its arguments are intertwined with the merits of the dispute between parties.

Ecology's arguments are in large part: (1) there was no contractual notice duty to overtime-exempt employees concerning workload; (2) there is no alleged

violation of paragraph 12 of the MOU and (3) the Union cannot now get in arbitration what it tried and failed to get in negotiation. All of these claims go to the heart of whether or not there was a contract violation and concern interpretation of provisions of the Collective Bargaining Agreement and the MOU as applied to the facts of this case.

I cannot resolve these arguments without addressing the merits of the Union's grievances. As a result, I apply the presumption of arbitrability in favor of the Union and will deny the Employer's request to dismiss the grievances for failure to state claim under the parties' Agreement. In doing so, I express no opinion on the merits of the Employer's arguments; only that these arguments are inappropriate for me to consider in determining arbitrability.

C. Parties' Positions: Failure to Cooperate and Proof of Contract Violation

1. Employer

Additionally, or in the alternative, Ecology argues the grievances should be dismissed because the Union failed to cooperate in the grievance process and failed to share critical information with Ecology. The Employer argues the Union never provided information, if any, about grievants that had a challenge in prioritizing their workload, spoke to their supervisor, and still felt aggrieved.

Ecology argues that if any part of this case goes forward, it should be limited to one grievance that both claims (1) breach of the MOU, and (2) that the grievant spoke to his supervisor about concerns with workload and did not receive any guidance.

Regardless of how many grievances go forward on the merits, the Employer asserts that the Union should be required to prove a violation of the contract with respect to each grievant that remains a part of this case.

2. Union

The Union points out that at the October 28th hearing, the Employer requested information which the Union provided on November 2, 2010. The Employer consolidated the grievances, some of which were filed after the October 28th hearing; and the Union received no further requests for information.

The Union contends that all of the grievances arose out of the same set of facts and the Employer's consolidation was appropriate on that basis. As a result, the Union should not be required to prove breach of contract and harm for each individual because the same evidence then must be presented a multitude of times.

The Union requests that with respect to arbitrability, it be acknowledged that the grievants were all aggrieved in the same manner and that if one of them was aggrieved they all were. According to the Union, each group of grievants associated with the timely grievances should be allowed to argue for an appropriate remedy. The Union acknowledges that not every grievant was aggrieved with each furlough; and in at least one instance the Employer made an effort to reduce employee workload. See, e.g. Union Ex 16-18.

D. Ruling: Failure to Cooperate and Proof of Contract Violation

First, the Employer's arguments regarding failure to cooperate largely concern paragraph 12 of the MOU. Once again, in order to resolve these claims,

the Arbitrator must interpret and apply relevant portions of the parties' Agreement and the MOU. At their core, these claims do not concern arbitrability but rather whether or not there was a contract breach. I will deny the Employer's request that the remaining grievances be dismissed.

The parties' question concerning proof largely involves the Union's burden of proof and case management. The Union has stipulated that for purposes of this case it will proceed only with grievances of specifically named grievants for furlough days of September 7, 2010 and thereafter.

As the party alleging a contract breach, the Union ultimately is responsible for proving a contract breach for each grievance and/or grievant as the case may be. I will include this conclusion in my ruling because the parties' have requested that I answer it.

That being said, due to the nature of this dispute and because it is a group grievance, I direct the parties to meet sufficiently in advance of the hearing on the merits to determine possible stipulated facts and to reduce repetitive testimony. I also direct the parties to exchange their exhibits in advance of hearing and stipulate to the admissibility of as many documents as possible. If necessary, I will set a time by which the parties shall meet to address these matters after we have set a hearing date(s) for the merits.

I also would like to have a pre-hearing telephone conference with the parties to discuss case management issues that remain between them. I want to avoid unnecessary duplication of evidence that is part of the record from the first

hearing. I also want to address any procedural questions or concerns the parties may have with respect to the hearing on the merits.

VI. CONCLUSION

For all the foregoing reasons, I conclude the Union's grievances state a claim for relief under the Collective Bargaining Agreement. I also conclude the Union is required to prove a breach of the Collective Bargaining Agreement with respect to each grievance and/or each grievant.

In arriving at these conclusions, I have considered all of the evidence, authorities and arguments submitted by the parties even if not specifically mentioned in this decision. My decision is based upon the grounds set forth above.

I will enter rulings consistent with my findings and conclusions. Pursuant to Article 29.3 the fees and expenses of the Arbitrator will be split equally between the parties.

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	)	CEPO
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY	)	
(Employer)	)	

Having carefully considered all evidence and argument submitted by the parties concerning this matter, the Arbitrator concludes that:

1. The Union's grievances state a claim for relief under the Collective Bargaining Agreement.

2. The Union is required to prove a breach of the Collective Bargaining Agreement with respect to each grievance and/or grievant.

3. Pursuant to Article 29.3 of the Agreement, the fees and expenses of the Arbitrator shall be borne equally by the parties.

Respectfully submitted,

Kathryn T. Whalen
Arbitrator
Date: December 30, 2011