

In the Matter of Arbitration Between)

WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
(Union),)

and)

WASHINGTON DEPARTMENT OF)
ECOLOGY,)
(Department or Employer).)

OPINION AND AWARD

AAA Case No. 75 390 410 07
Alisa Huckaby Grievance¹

BEFORE:

David W. Stiteler, Arbitrator

HEARING LOCATION:

Tumwater, Washington

HEARING DATE:

September 30, 2008

APPEARANCES:

For the Union:
Gregory Rhodes
Attorney at Law
Younglove & Coker
P.O. Box 7846
Olympia, WA 98507-7846

For the Department
Ronald Marshall
Assistant Attorney General
Office of the Attorney General
P.O. Box 40145
Olympia, WA 98504-0145

RECORD CLOSED:

October 31, 2008

OPINION & AWARD ISSUED:

December 3, 2008

¹ Though Ms. Huckaby's name was attached to the case for identification purposes, the grievance lists over 20 Department employees as grievants.

OPINION

I. INTRODUCTION

The Union filed this grievance in May 2007. The grievance charged the Department with violating the parties' collective bargaining agreement by allocating unlicensed employees into the Hydrogeologist (HG) 4 job classification. The Department denied the grievance, and the Union filed for arbitration. Through the procedures of the American Arbitration Association, David W. Stiteler was appointed Arbitrator.

Before the hearing date, the Department filed a motion to dismiss, asserting that the matter was not arbitrable. The Arbitrator denied the motion. The ruling is discussed later in this decision.

A hearing was held before the Arbitrator on September 30, 2008, in Tumwater, Washington. The parties had the full opportunity to examine and cross-examine witnesses, present documents, and make arguments. They agreed the Arbitrator could retain jurisdiction for 60 days following the decision to resolve any disputes about the remedy, if a remedy was awarded. The parties waived closing arguments in favor of post-hearing briefs. The Arbitrator received the briefs on November 3, and the hearing record was closed.

II. ISSUE

The parties agreed to the following statement of the issue:

Did the Department violate the collective bargaining agreement by allocating individuals who did not possess a hydrogeologist license into the Hydrogeologist 4 classification?

Although the parties agreed that the issue concerned the allocation of unlicensed individuals into the HG 4 classification, the grievance makes reference to the HG 3 classification and evidence relating to that classification was presented. Some of that evidence is set out below. However, for purposes of the decision, my focus was on the issue agreed to by the parties.

III. RELEVANT CONTRACT LANGUAGE

Article 9
Licensure and Certification

- 9.1 The Employer and the Union recognize the necessity for bargaining unit employees to maintain appropriate licensure and/or certification to perform the duties of their position.
- 9.2 Agencies will continue their current practices related to licensure and certification.

IV. FACT SUMMARY

There is little dispute about the salient facts. The Department has employed people as hydrogeologists at all times relevant to this dispute. A broad definition of hydrogeology is that it is a geologic specialty that deals with the distribution and movement of groundwater; that is, it concerns the flow of water through the soil and rocks as opposed to over the surface.

Licensing history. In 2000, the Washington Legislature passed a law requiring individuals practicing geology or certain geologic specialties to obtain and maintain a license. In relevant part, the law states:

RCW 18.220.020
License required.

(1) It is unlawful for any person to practice, or offer to practice, geology for others in this state, or to use in connection with his or her name or otherwise assume or advertise any title or description tending to convey the impression that he or she is a licensed geologist, or other licensed specialty geologist title, unless the person has been licensed under the provisions of this chapter.

(2) A person shall be construed to practice or offer to practice geology, within the meaning and intent of this chapter, if the person:

(a) Practices any branch of the profession of geology;

(b) By verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself or herself to be a geologist;

(c) Through the use of some other title implies that he or she is a geologist or that he or she is licensed under this chapter; or

(d) Holds himself or herself out as able to perform or does perform any geological services or work recognized by the board as the practice of geology for others.

RCW 18.220.190

Permitted activities – Certificate of licensing not required.

The following activities do not require a certificate of licensing under this chapter:

* * * * *

(4) Geological research conducted through academic institutions, agencies of the federal or state governments, nonprofit research institutions, or for-profit organizations, including submission of reports of research to public agencies.

* * * * *

(7) General scientific work customarily performed by such physical or natural scientists as * * * hydrologists * * * providing such work does not include the design and execution of geological investigations, being in responsible charge of geological or specialty geological work, or the drawing of geological conclusions and recommendations in a way that affects the public health, safety, or welfare; or

(8) The giving of testimony, or preparation and presentation of exhibits or documents for the sole purpose of being placed in evidence before any administrative or judicial tribunal or hearing, providing such testimony, exhibits, or documents do not imply that the person is registered under the provisions of this chapter.

The effective date of the statute was July 1, 2001. However, individuals who did not have a license but were performing duties that would require one were given a one year grace period to obtain the license. The Department initially determined that the licensing requirement would apply to at least some of the hydrogeologists it employed.

The Washington Department of Personnel (DOP) is now responsible for writing and updating the class specifications for State jobs. There are five levels of HG class specification. The HG 1 is an entry level position; the HG 5 is a senior level position with program responsibility. The HG 4 class at issue is a senior level position with lead worker and/or project responsibilities.

In November 2001, a group of Department hydrogeologists requested Department Employee Services Director Joy St. Germain to ask that the HG 3, 4, and 5 class specifications be modified to include the license requirement. Their request noted that “Ecology’s Hydrogeologists’ Group is committed to working towards the equitable treatment of those staff currently classified as hydrogeologist who are not able to obtain a license, or *whose job does not require hydrogeologic work.*” (Emphasis added.)

In December 2001, the Department's Environmental Programs Management Team met to consider issues related to the statutory change and the impact on Department hydrogeologists. That team decided that the license requirement should apply to the HG 3, 4, and 5 classifications. They also found that there were several positions in the Department's Stream Hydrology Unit and one in the Water Quality Program that were classified as hydrogeologists, but which were performing hydrologist duties and should be reclassified. Regarding work requirements, the team concluded:

Although most positions at the HG 3, 4 or 5 level may have a license requirement added, some positions may not need a license as determined by the law. For positions that do not require a license and therefore do not appropriately fit a revised job classification of the Hydrogeologist series, the agency will work in good faith with the Department of Personnel to determine a course of action that will have the least adverse impact on the employee.

In 2002, DOP was considering modifying the HG class specifications to include the new license requirement. Some Department hydrogeologists hired attorney Allen Miller to represent them in objecting to the proposed classification changes. On their behalf, he requested that DOP delete any reference to licensing in the HG classification. According to Miller, the Geologist Licensing Board had misinterpreted the statutory changes, and DOP's proposed changes were thus contrary to the statutory changes. He also claimed that the new licensing requirements were "unduly burdensome and negatively impact the careers of current state-employed hydrogeologists." DOP put off considering the proposed HG classification changes after receiving Miller's letter.

DOP consulted with the Department about revisions to the hydrogeologist class specifications. In November 2002, DOP modified the minimum qualifications for the HG 3, 4, and 5 positions by including this note: "Some positions require possession of a valid Washington State Geologist license. Some positions may additionally require possession of a Washington State Engineering Geologist specialty license and/or a Washington State Hydrogeologist specialty license." The legal requirements section of those class specifications was changed to read "There may be instances where individual positions must have additional licenses or certification. It is the employer's responsibility to ensure the appropriate licenses/certifications are obtained for each position."

Following these changes to the class specifications, the Department decided to give its managers the responsibility for determining which specific positions required licenses. In April 2003, Deputy Director Linda Hoffman sent an email to various Department program managers and supervisors concerning application of the hydrogeology licensing requirements in the Department. The goal was to make sure that licensing requirements were applied consistently throughout the Department. Hoffman stated that managers and supervisors, as the ones who assigned duties, would “need to make the determination as to what specific program activities would warrant the need for a license....”

In 2003, DOP was consolidating class specifications. By an October 2003 memorandum to DOP, St. Germain pointed out three concerns the Department had about the impact of the proposed consolidation on the HG class: (1) the HG class was tentatively assigned to the “Life and Physical Sciences” category rather than the more appropriate “Engineering” category; (2) the proposal labeled HG 1 and HG 2 positions as journey level, which was inconsistent with the license requirement; (3) the proposal did not recognize that some HG positions at the Department did not require a license. On this last point, St. Germain stated:

Ecology has chosen to apply licensing criteria to each Hydrogeologist job on a case by case basis, depending on the job duties assigned and accompanying responsibilities. As a matter of policy, Ecology has determined that most employees who are working as a Hydrogeologist 3, 4 or 5 must have professional licenses. However, some job assignments do not require a license because the nature of their work is that of the field of hydrology. Because of this conflict with state licensing requirements and state job classification definitions, the agency would like to see an ability to align the positions that do not require a license into a job classification(s) that allow full utilization of a series. We hope that as the new job specifications are developed under “Washington Works” that consideration is given to reviewing these positions for alignment purposes.

Bargaining history. Sections 9.1 and 9.2 were first negotiated during bargaining for the 2005-2007 contract. The negotiations over Section 9.1 concerned maintaining “appropriate” licensure. According to State Labor Relations Office (LRO) Director Diane Leigh, the focus of the discussion was on licenses that were required, typically by law, for an employee to perform certain duties. She understood that both parties agreed that agencies had the authority to determine job requirements. Leigh’s

understanding was confirmed by Diane Lutz, then lead negotiator for the Union. (Lutz is now employed as a negotiator by LRO.)

The bargaining over Section 9.2 focused on two issues: who would pay for licenses; and whether employees would be given paid release time for activities necessary to maintain a license. The Union proposed that the State would pay for licenses. The State found that agencies had different practices with respect to both issues. The parties then agreed to the language as it appears, requiring agencies to continue their current practices.

Position allocation history. In December 2002, James Shedd was appointed to a position classified as an HG 3 in training in the Department Environmental Assessment Program's Stream Hydrology Unit. His classification actually remained HG 2 until completion of the one year training period after which it became HG 3. His job title is Senior Hydrologist. He is not a licensed hydrogeologist. The Department concluded that his duties did not require a license.

Brad Hopkins is employed by the Department as the supervisor of the Stream Hydrology Unit. In April 2003, Hopkins was reallocated from the Ecology Supervisor B classification to the HG 4 classification. His working title remained the same. Hopkins does not have a hydrogeologist license. The Department concluded that the duties of his position do not require one.

Effective June 1, 2006, the Department Water Resources Program's Policy and Planning Section hired Kurt Unger as an HG 3. The position Unger filled had been classified as an Environmental Planner 3; the Department reallocated it to the HG 3 classification before recruiting to fill it. Unger's job title is Climate Change/Flow Restoration Specialist. Unger is not a licensed hydrogeologist. The Department determined that his duties did not require a license.

William Ehinger was reallocated from the Natural Resource Scientist 3 classification to the HG 4 classification effective September 1, 2006. Ehinger worked in the Department's Watershed Ecology Section of the Environmental Assessment Program. The explanation for the reallocation request was that his position had evolved and now included "significant new duties overseeing multi-agency research projects related to state and federal salmon recovery efforts." The justification document stated that the HG 4 classification "more accurately reflects the Senior-Level technical

expertise needed” for the position’s responsibilities. Ehinger is not a licensed hydrogeologist. The Department determined that his duties did not require a license.

Jim Carroll, Joe Joy, and Anita Stohr were reallocated from the Natural Resource Scientist 3 classification to the HG 4 classification effective May 1, 2007. It was the reallocation of their positions that prompted the grievance.

They worked as senior modelers in the Department’s Environmental Assessment Program. The working title for all three positions is TMDL Modeler/Project Manager. Prior to the reallocation, senior modelers in the program were allocated to either the Environmental Specialist or Natural Resource Scientist classifications. Management officials in the program decided that those classifications were too broad and limited the program’s ability to attract and retain senior level modelers.

The decision was made to reallocate current senior level modelers into either the Environmental Engineer or HG classifications because those classifications more closely fit the high level of technical expertise required of the positions. In a memo to Employee Services requesting the reallocation, Program Manager Bill Backous stated that the positions “will not require licensure because the modeling expertise is in surface water hydrology, which is not a specialty area under the state’s geology licensing program.”

As of February 2008, the Department employed 45 HG 3s; three positions, including Shedd’s and Unger’s, were listed as not requiring a license, and two positions that were listed as requiring a license were held by employees who were unlicensed. The Department employed 46 HG 4s; eight of those positions, including the ones occupied by Carroll, Ehinger, Hopkins, Joy, and Stohr, were listed as not requiring a license.

Licensing dispute history. In June 2005, the Union filed a petition for arbitration with the State Personnel Board, the entity that resolved employee grievances until the parties’ current contract went into effect. The focus of the grievance concerned the Department’s refusal to reimburse license fees for its hydrogeologists. According to the grievance, the DOP class specifications did not require licenses as a condition of employment, but the Department was requiring licenses and the interim agreement provided that the Department would pay for licenses if it required them.

The Department moved to dismiss the grievance. Its position was that the State Personnel Board did not have jurisdiction to resolve a dispute over the interpretation of language in the parties’ interim agreement. The Union opposed dismissal, arguing that a

decision about what the Department was required to do was critical because Section 9.2 of the 2005-2007 agreement would require agencies to “continue their current practices.”

In May 2007, a number of Department hydrogeologists filed this grievance. They claimed that the Department was violating both the contract, Sections 9.1 and 9.2, and the licensing law, RCW 18.220.

In a July 2007 letter to Grievant Huckaby, Department Labor Relations and Personnel Operations Manager Myla Hite listed 11 employees who had been reallocated into either the HG 3 (five employees) or HG 4 (six employees) classification and who were not licensed as hydrogeologists. Four were moved from the Natural Resource Scientist 3 classification. Three were moved from the Environmental Specialist 4 classification. Two were moved from the HG 2 classification. One was moved from the Ecology Supervisor B classification. One was not previously classified.

In October 2007, Grievants Huckaby and Charles San Juan filed a complaint with the Department of Licensing (DOL). Their complaint alleged that some of the reallocated employees were practicing geology without a license, in violation of the law. The complaint was reviewed by a member of the licensing board. That board member concluded that the complaint did not support a conclusion that unlicensed individuals were practicing geology; he recommended no further action by the board. The recommendation was adopted by the board, and the complaint file was closed without a final order being issued.

V. CONTENTIONS OF THE PARTIES

A. Union

The evidence established that the Department violated Section 9.2 by allocating unlicensed individuals to the HG 4 classification. The Arbitrator should also conclude that the Department’s action violated Section 9.1.

Section 9.2 unambiguously requires the Department to continue current practices regarding licensure. On its face, that provision does not limit or restrict which practices must be continued. Because the language is clear, there is no need to consider the Department’s bargaining history evidence.

Moreover, giving weight to that evidence and interpreting Section 9.2 as suggested by the Department would essentially result in modifying the contract by

reading in a limitation the parties did not bargain. The grievance procedure prohibits the Arbitrator from modifying or amending the contract.

The licensing history supports the claim that a practice existed of requiring all individuals in the HG 4 classification to be licensed. The licensing law was passed in 2000 and went into effect in 2001. Individuals who were then working as hydrogeologists had a year to obtain a license, which required certain education and experience.

At the time the law went into effect, Department HG 4s understood that all their positions would require a license. That understanding was conveyed by Department managers. By the time the contract went into effect in July 2005, all but one HG 4, Hopkins, was licensed.

The Department apparently intended to make a position by position determination about whether a license was required. There is no evidence that it did so. The employees classified as HG 4s during this period were expected to get a license. The failure to analyze individual positions' duties likely grew out of practical necessity—Department HG 4s would be required to review the work of outside hydrogeologists who would be licensed so as a matter of comity they needed to be licensed as well.

Whatever the reason, the Department's policy to consider individual positions was never put into practice. Instead, there was a universal requirement for HG 4s to be licensed. That practice was understood and accepted by both parties and consistently followed over several years.

Hopkins was an exception to this clear practice. But a few variations from an otherwise clear practice do not make it less binding.

Hopkins' position was allocated to the HG 4 classification in 2003. There is no evidence that his duties were ever analyzed to determine if a license was required. Though his position is in stream hydrology, at his level he almost certainly will have some duties that would be considered hydrogeology. A review of his position description, particularly the education and experience requirements, supports the conclusion that his position should require a license. And the program manager who put Hopkins in the HG 4 classification is also the one who allocated the three individuals that led to this grievance.

The Department's allocation of these unlicensed individuals to the HG 4 classification also violates Section 9.1. Putting unlicensed employees into a classification titled "hydrogeologist" is contrary to the express terms of the licensing law. The law prohibits unlicensed individuals from holding themselves out as geologists. Even though these individuals might have different job titles, the fact that they are in a classification that labels them as hydrogeologists violates that legal prohibition.

Section 9.1 requires employees to maintain appropriate licenses. Because being an unlicensed individual in a hydrogeologist classification is contrary to the licensing law, it necessarily violates the license requirement of Section 9.1 as well.

B. Department

The Union failed to prove that the Department violated either Section 9.1 or 9.2 by allocating unlicensed individuals to the HG 4 classification. The grievance should be dismissed.

Contrary to the Union's contention, the evidence did not show that the Department had a practice of allocating only licensed individuals to the HG 4 classification. What the evidence established is that the Department's practice was to allow managers and supervisors to determine, on a position by position basis, whether particular positions were performing duties that required a license. That practice was memorialized by Hoffman's communication to managers. St. Germain affirmed the practice in her communication with DOP. And between March 2003 and May 2007, the Department followed that practice by allocating seven unlicensed individuals to the HG 3 or 4 classifications, after determining that those positions were performing hydrology duties that did not require a license.

To be binding, a practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as fixed and mutually acceptable. Absent persuasive proof of mutuality, there is no binding practice.

Section 9.2 is ambiguous with respect to which practices had to be continued. Under the circumstances, it is appropriate to consider bargaining history. Negotiators for both parties acknowledged that only two issues were discussed in conjunction with this section: who pays for the license and whether agencies would grant paid time off for license-related activities. There was no discussion of about which positions would be

licensed, and both parties recognized that the agencies had the authority to set licensing requirements.

Arbitrators will not enforce a practice that restricts traditional management functions, or one that does not concern a major condition of employment. Likewise, practices that develop by happenstance or that are set unilaterally by management will not become binding merely because they happen over a period of time.

The contract recognizes the Department's right to determine job requirements. The Department exercised that right by deciding that licensure would be determined on a position by position basis. That approach was made part of the class specifications, which do not require a license for all HG 3 or 4 positions.

The Union and its members have taken inconsistent positions about licensing. After the law was passed, some Union members protested inclusion of any reference to licensing in the class specifications. Then, in a Personnel Board grievance over paying for licenses, the Union acknowledged that the class specifications do not require licenses for all positions in the class. Now the Union is asserting that there is a mandatory license requirement.

There is no evidence that adding these unlicensed individuals to the HG 4 classification harmed Grievants in any way. Pay is based on duties performed, not licensure. Pay did not go up because the license law passed, nor did it increase after the employees got their licenses.

Position classification is an inexact science. Class specifications are broadly written to encompass a range of similar jobs. Agencies must allocate positions to the best fit.

Under the personnel law, employees can challenge their own classification, but not that of other employees. Grievants thus have no standing to challenge the classification of other employees, who have not objected to the classification to which they were assigned. In any event, both the personnel law and the contract provide that classification disputes are reserved to the Personnel Resources Board and are beyond the scope of arbitration. The Arbitrator would exceed the scope of his authority by ruling in Grievants' favor.

With respect to the Union's claim that the Department violated Section 9.1, it failed to prove that the Department did not "recognize the necessity" for employees

performing hydrogeologist duties to have a license. The contract recognizes the Department's right to manage its workforce, including determining the requirements for a position.

The Union also failed to prove that the Department's action violated RCW 18.220. The licensing board already determined that the claim that the allocation of these unlicensed employees to the HG 4 class was without merit. That board has the statutory authority to determine whether a license is required. The Arbitrator does not have the authority to decide if RCW 18.220 was violated.

As argued in the motion to dismiss, filing that complaint with the licensing board was an election of remedies. The contract has an election of remedies provision. Since the issue has already been submitted to and dismissed by the licensing board, the Union has waived its right to pursue the claim in arbitration.

It should be noted that, although it does not concede that there is any merit to the grievance, the Department has already provided one of the remedies sought. The grievance asked that a position by position review of all positions in the HG series be ordered to make sure that the licensing law was being followed. The Department conducted such a review while the grievance was being processed.

VI. DISCUSSION AND ANALYSIS

A. Arbitrability.

The Department filed a motion to dismiss the grievance on September 10, 2008. The motion raised both procedural and substantive arbitrability claims. The Union filed a responsive pleading on September 19. The Arbitrator issued a letter ruling on September 24, denying the Department's motion. In its post-hearing brief, the Department renewed the three substantive arbitrability arguments discussed below.

The Department contended that the Union had waived the right to pursue the grievance to arbitration. The waiver argument was based on the complaint that had been filed with the DOL. Section 29.7 of the parties' agreement provides that a claim is waived and cannot be pursued to arbitration if a party pursues that same claim in some other forum.

In denying the motion, I rejected that contention because the claim at the heart of this grievance is not the same as the complaint filed with the DOL. The DOL complaint was filed by two of the named Grievants in this matter, Alisa Huckaby and Charles San

Juan. Their complaint alleged that Carroll, Stohr, and Hopkins were in violation of the licensing law because they were practicing hydrogeology without a license and holding themselves out as hydrogeologists.

In contrast, this grievance claims that the Department violated Sections 9.1 and 9.2 in allocating unnamed individuals who did not have a license into the HG 4 classification. Section 9.1 is a mutual acknowledgement of the necessity for employees to maintain the necessary licensure for “the duties of their assigned positions.” Section 9.2 requires agencies such as the Department to “continue their current practices related to licensure and certification.”

While the subject matter of the DOL complaint and the grievance both concern the allocation of unlicensed individuals into the HG 4 classification, it cannot be said that they represent the *same claim*. Even had the DOL issued a decision on the merits of the complaint, that decision would not necessarily have resolved the contract violation issue. Likewise, a decision that the Department violated the contract would not necessarily mean that there was a violation of the licensing law. I reaffirm my earlier ruling that pursuit of the complaint before the DOL did not constitute an election of remedies, within the meaning of Section 29.7.

The Department also contended that the grievance raised a question of appropriate licensure that was beyond the Arbitrator’s authority. According to the Department, licensing matters are the exclusive province of the DOL.

In denying the motion, I rejected that contention because the grievance primarily concerns the Department’s alleged failure to continue its practice regarding licensure. To resolve the issue raised by the grievance, I need not determine whether any unlicensed HG 4s are performing duties that require a license, are practicing hydrogeology, or whether they are inappropriately holding themselves out as hydrogeologists. The issue before me is one of contract interpretation concerning Sections 9.1 and 9.2.

It is undisputed that several unlicensed individuals have been allocated into the HG 4 classification. To resolve the issue raised by the grievance, I must determine whether the Department had, as alleged, a practice of only assigning individuals licensed as hydrogeologists into the HG 4 classification. Having heard the testimony and

reviewed the exhibits from the hearing, I reaffirm my ruling that the subject matter of this grievance is arbitrable and within my authority to resolve.

The Department further contended that the grievance concerned classification and allocation issues, and that such matters are beyond the Arbitrator's authority. According to the Department, both the contract and the law give authority over such issues to the DOP and the Personnel Resources Board.

In denying the motion, I rejected the Department's contention because, as already discussed, the subject of the grievance is whether the Department acted contrary to its contractual obligation to continue its practices concerning licensure. Resolution of that issue does not require me to determine whether unlicensed HG 4s were incorrectly allocated to that classification, whether that is an appropriate classification for them, or whether a different classification would be a better fit for their duties.

The DOP is responsible for maintaining the State's employee classification system; DOP officials are the ones who write the class specifications for State jobs. Since 2005, the Personnel Resources Board has had the responsibility to serve as the final arbiter of disputes raised by employees about their classification.

Here, none of the employees who were allocated into the HG 4 classification appealed to either the DOP or the Personnel Resources Board. Grievants do not have standing to challenge the classifications of other employees through either of those agencies. They do, however, have standing to raise the issue presented here: whether the Department violated its contractual obligation to continue a certain practice concerning licensure for HG 4s. Nothing in the evidence or argument persuades me that my initial ruling should be modified. Therefore, I reaffirm that the subject matter of the grievance is within my authority, and the grievance is substantively arbitrable.

Finally, the Department contended that the grievance was not timely, because it was not filed within the required 21 days of when Grievants knew or should have known that non-licensed employees had been allocated to the HG 4 classification. I rejected the Department's contention because the documents offered to support it did not establish that Grievants knew about the allocation of unlicensed individuals to the HG 4 classification. The Department did not pursue this contention in its post-hearing brief.

B. Merits.

The grievance alleges that the Department violated Sections 9.1 and 9.2, which concern licensure. As the dispute presents a question of contract interpretation, the Union bears the burden of proving that the Department's action violated the contract. For the reasons explained below, I conclude that the Department did not violate the contract when it allocated unlicensed employees to the HG 4 classification.

In contract interpretation disputes, the arbitrator's role is to determine what the parties intended by the language at issue. The starting point for that determination is the language itself. Evidence of bargaining history or past practice, or certain contract interpretation principles, may be useful in making that determination where the language is unclear or ambiguous.

Section 9.2. The primary focus of the grievance is Section 9.2. That section requires State agencies, including the Department, to continue "current practices" concerning licensure. According to the Union, the Department's decision to allocate unlicensed individuals into the HG 4 classification was contrary to its practice of allocating only licensed individuals to that classification. The Union argues that the language is unambiguous and does not limit in any way the types of practices that must be continued. The Union also contends that, because the language is clear, it is neither necessary nor appropriate to consider the bargaining history evidence offered by the Department.

The Union is correct in contending that the language of Section 9.2 is clear in its requirement that agencies continue current licensure practices. The Union is also correct that the language contains no express limitations about the practices to be continued.

That lack of specificity, however, creates an ambiguity because it cannot be determined from reading Section 9.2 exactly which practices the parties had in mind. Likely for practical reasons—this is a master agreement covering several different State agencies—the parties did not list or otherwise define the practices they intended to cover. Under these circumstances, it is appropriate to consider extrinsic evidence to aid in the determination of the parties' intent.

The Department presented bargaining history evidence from LRO Director Diane Leigh, who was a State negotiator for the 2005-2007 contract and wrote most of the State's proposals, and Diane Lutz, who is now with LRO but who was the Union's lead

negotiator for the 2005-2007 agreement. They both testified that there were only two practices discussed during negotiations on Section 9.2: whether agencies would pay for required licenses, and whether agencies would grant paid release time for employees to do what was necessary to maintain those licenses. The Union did not present evidence to the contrary.

That evidence establishes that the parties intended to continue practices then in effect concerning payment for required licenses and release time for maintaining licenses. However, the bargaining history does not show conclusively that those were the only two practices the parties intended the language to encompass. If they intended it to be so limited, it would have been a simple matter to expressly say so. They did not, and in fact agreed to language that is quite broad.

Thus, the bargaining history, while somewhat indicative of the parties' intent, is not dispositive. To answer the question posed by the grievance concerning the alleged violation of Section 9.2, the focus must be on the Department's licensure practice in place at the time the contract went into effect.

The Union claims that the Department's practice was to only place licensed employees in the HG 4 classification. The Department claims that its practice was to review individual positions and make the determination about whether a license was required based on a position's duties.

The evidence about the Department's licensure practice was mixed. In November 2001, some Department hydrogeologists requested that the class specifications for HG 3, 4, and 5 be rewritten to include the license requirement. They also recognized that there were employees like hydrologists in the HG series whose duties concerned surface water who neither needed a license to perform their duties nor who could be licensed because their duties did not meet the legal definition of hydrogeology.

About a month later, a Department management team issued a memorandum regarding hydrogeologist classification and licensing issues. That team concluded that most employees who were then classified as HG 4s would need licenses. Their memorandum stated that positions classified as HG 4 "should be licensed as they meet the intent and requirements of the law and are required to be the responsible charge individual." At the same time, however, they also stated that some employees in the HG series "may not need a license as determined by the law."

A few months later, when the DOP was proposing to include the licensing requirement in the HG class specifications, other Department hydrogeologists objected. Their protest led to a delay in adding any mention of a license requirement to the class specifications.

After further discussions between the Department and the DOP, the class specifications eventually were rewritten to include reference to the license requirement. However, the class specifications did not mandate that every person allocated to the HG 4 classification possess a license.

In 2003, after the class specifications had been modified, the Department announced to its managers that it would thereafter be up to them to determine whether particular positions were performing duties that required a license.

Consistent with that approach, the Department reallocated Hopkins into an HG 4 position after concluding that his duties as the head of the Stream Hydrology Unit did not require a license. At the time the contract went into effect, Hopkins was apparently the only unlicensed HG 4. In 2006, before the allocations that led to this grievance, the Department also allocated Ehinger into an HG 4 position.²

This chronology of events does not establish that a definitive practice of only placing licensed employees in the HG 4 classification existed when Section 9.2 became effective.

The practice claimed by the Union also does not meet the fundamental tests to be a binding past practice for several reasons. A past practice may be defined as a pattern of prior conduct consistently followed in response to a set of circumstances that occur with sufficient regularity over such an extended period of time that it is recognized and accepted by the parties as the appropriate response to the circumstances. A practice becomes binding not simply because it is the way things have always been done, however, but because of a mutual recognition by the parties that the practice has in effect become part of their contractual relationship. Past practices may be used to clarify ambiguous contract language, create an enforceable condition of employment where the contract is silent, or more rarely, to modify or amend clear and unambiguous contract language.

² Regarding Ehinger, the Union's argument appears to be that his allocation did not occur until after the effective date of the contract, and that Grievants were unaware of it until after this grievance was filed.

As discussed previously, there was no clarity to the Department's practice. There was also a lack of consistency in the Department's position about licenses between 2001 and 2005. Department managers favored requiring a license for current employees but recognized that not all positions would be doing work that would require a license. In addition, there is evidence of some lack of consistency among affected employees; some favored a license requirement, but some were opposed.

Further, there was no mutuality. To the extent the Department required a license for employees in the HG 4 classification, that requirement was the product of a unilateral management decision regarding its operations. As noted in a respected treatise, while mutuality may be implied when the subject matter of an alleged practice concerns an existing employee benefit, it is less appropriate when the subject matter concerns "methods of operation or direction of the workforce." *Elkouri & Elkouri: How Arbitration Works*, 6th Ed., Ruben, ed., 609 (BNA Books, 2003).

Beyond its role in determining mutuality, the subject matter is another reason the Union's practice claim fails. The alleged practice concerns the requirements to hold a position. Determination of job requirements is within the Department's discretion.

In Article 4, the parties provided that the employer will determine "the skills and abilities necessary to perform the duties of the specific position with a job classification." In Article 35, the parties recognized the employer's right to "establish, allocate, reallocate, or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions. Article 34 defines skills and abilities: "Skills and abilities are documented criteria found in license/certification requirements, federal and state requirements, position descriptions...."

Even without such contract language, arbitrators will hesitate to enforce a practice that infringes on an employer's authority to operate its business and direct its employees. The practice the Union seeks to make binding would interfere with the Department's ability to determine the qualifications necessary to perform certain jobs.

Moreover, it cannot be said that the alleged practice was longstanding or had been frequently repeated. Before 2001, there was no practice about licensing because there was no requirement for a license. After the law went into effect, the Department initially concluded that most of its HG 4s were performing duties that required a license. A couple of years later, the Department took a different approach after the class specifications were modified. Acting on the flexibility of the modified class specifications, the Department reallocated Hopkins' position.

The Union argues that Hopkins is an exception and contends that his allocation to the HG 4 classification should not defeat the otherwise clear practice of requiring a license for all HG 4s. The Department's reallocation of Hopkins, however, is consistent with the approach explained by Hoffman and St. Germain in 2003. Rather than an exception, it is an exemplar.

In sum, the Department's conclusion in 2001 that HG 4s then employed had duties requiring licensure did not set a practice in stone. As the license and classification situation evolved, the Department adopted a different position. That resulted in the decisions to allocate certain unlicensed employees to the HG 4 classification. In so doing, as explained above, the Department did not violate the requirement of Section 9.2 to continue its current practices.

Section 9.1. The grievance also alleges a violation of Section 9.1. That section states that both parties "recognize the necessity for bargaining unit employees to maintain appropriate licensure * * * to perform the duties of their assigned positions."

According to the Union, the licensing law prohibits unlicensed individuals from practicing hydrogeology or holding themselves out to be hydrogeologists. By placing unlicensed employees in HG 4 positions, the Union contends the Department violated because those employees, by being in such positions, are holding themselves out to be hydrogeologists. Since it is a violation of the law for those employees to be in HG 4 positions, the Union asserts that it necessarily violates the requirement of Section 9.1 for employees to maintain appropriate licenses.

The Department counters that the Union failed to prove that the Department did not comply with its obligation to "recognize the necessity" for employees to be appropriately licensed.

As discussed previously, whether the employees in question are in violation of the law is not a matter for arbitration. Further, it is not clear from this record that these employees are in fact holding themselves out as hydrogeologists or are practicing hydrogeology. The job titles of their positions do not include hydrogeology. Their duties appear to be in the field of hydrology, which is specifically exempted from the geology licensing requirements.

In any event, Section 9.1 imposes an obligation on the parties to make sure that employees have the licenses required to do their jobs. The Department has decided that the jobs these employees occupy do not require a license. Unless or until the DOL says otherwise, that is the Department's call to make. The decision to allocate unlicensed employees to the HG 4 classification did not violate Section 9.1.

Other arguments. The Union also argues that a review of Hopkins' duties support a conclusion that his position should require a license. The question of whether the work being performed by any particular position requires a license does not fall within the scope of the issue here. The law reserves such disputes to the DOL.

Grievants' frustration on this point is understandable. They did attempt to raise the license question by filing a complaint with the DOL. Contrary to the Department's argument that the DOL concluded that complaint was without merit, the evidence establishes that no reasoned decision on the merits was reached. The DOL held no hearing; Grievants were not given the opportunity to present evidence and be heard. Whether or not there is any merit to Grievants' concern, however, arbitration is not the appropriate forum to decide who needs to be licensed as a hydrogeologist.

The Department raised several other contentions in support of its argument that the grievance should be dismissed. Those contentions mainly concern the Department's arbitrability claims and are addressed above.

Conclusion. The evidence established that there was no "current practice" in place at the time the contract went into effect of only allocating licensed individuals to the HG 4 classification. Likewise, there is no evidence that the Department violated any obligation it had regarding employees maintaining appropriate licenses. The grievance will be denied and dismissed. In reaching my conclusion, I considered all the evidence and arguments presented by the parties even if not specifically addressed above.

AWARD

Having fully considered the whole record in this matter, and for the reasons explained in the Opinion, I conclude:

1. The Department did not violate Section 9.1 or 9.2 by allocating certain unlicensed employees to the HG 4 classification.
2. The grievance is denied and dismissed.
3. Pursuant to Article 29, the Arbitrator's fees and expenses will be shared equally by the parties.

Respectfully issued this 3rd day of December, 2008.

David W. Stiteler
Arbitrator