

IN THE MATTER OF THE ARBITRATION BETWEEN) FMCS CASE NUMBER
)
) 10-04604-8
TEAMSTERS LOCAL UNION NO. 117,)
)
) Union) ARBITRATOR'S
) OPINION AND AWARD
)
)
And)
) GRIEVANCE NO 149-10:
)
STATE OF WASHINGTON)
)
DEPARTMENT OF CORRECTIONS,)
)
) Employer)

ARBITRATOR: ANTHONY D. VIVENZIO

AWARD DATE: MAY 5, 2011

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OFFICE OF THE ATTORNEY GENERAL
LABOR & PERSONNEL DIVISION

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PROCEDURAL HISTORY

The Washington State Department of Corrections, is hereinafter referred to as "the DOC", "the State," or "the Employer." Teamsters Local Union 117 is hereinafter referred to as "the Union." Collectively, they are hereinafter referred to as "the Parties." The Collective Bargaining Agreement between the Parties applicable to this matter, hereinafter referred to as the "CBA," "Agreement," or "Contract," is effective from July 1, 2009 to June 30, 2011. It is noted as Joint Exhibit 1 in the record.

The Parties' dispute goes to the interpretation and application of that Agreement as it relates to the Employer's action, termed a "temporary layoff" by the Employer and as a "furlough" by the Union, requiring affected employees to forego compensated work for a number of days set forth in ESSB 6503, a cost saving measure enacted by the Washington State Legislature in 2010. To the date of the arbitration hearing herein, the Department of Corrections had imposed July 12, August 6, September 7, October 11 and December 27 of 2010, and January 28 of 2011, as the relevant days. The Union filed a bargaining-unit-wide grievance against the Department of Corrections on June 22, 2010, claiming violations of a number of articles of the Agreement, including, but not limited to, Articles 5, 16, 26, 35, 44, and 45. At the hearing, the Union withdrew its claim regarding Article 5 of the Agreement, "Union-Management Relations," as it was pursuing the underlying unfair labor practice claim before the Washington State Public Employment Relations Commission. The Parties subsequently agreed to process this grievance using the non-panel grievance procedure in Article 9.2. The Parties also agreed to bypass Step 2 of the grievance procedure, as set forth in Article 9 of the Agreement. Following unsuccessful attempts at resolution, the Union requested arbitration. Anthony D. Vivenzio was

selected by the Parties and appointed Arbitrator to hear this matter. An arbitration hearing was held in Tacoma Washington on February 11, 2011. The Parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on February 11, 2011. The Parties filed post hearing briefs. The deadline for submission of such briefs was initially set for March 28, 2011. The Parties later agreed to modify the date to March 29, 2011. The Arbitrator received timely briefs from both Parties submitted on that date. The full record was deemed closed and the matter submitted on March 29, 2011.

FACTUAL BACKGROUND

The Washington State Department of Corrections is responsible for the housing, and monitoring upon their release into the community, of persons convicted of felony offenses. The Department employs approximately 8,000 men and women. Teamsters Local 117 represents approximately 5800 of these employees in a number of classifications, including, but not limited to, corrections officers responsible for direct inmate management, nurses, counselors, psychologists, chaplains, cooks, and office assistants. As of December 31, 2010, approximately 18,000 offenders remained in confinement, over half of whom were serving terms ranging from five years to life in prison. Another 18,690 persons were being supervised in the community, of whom over a third were considered "high violent" with a risk to reoffend. The paramount interests of the Department include preserving the safety of the public, Department staff, and inmates.

In order to deal with a revenue shortfall of unprecedented proportion, the Washington State Legislature enacted Engrossed Substitute Senate Bill 6503 (hereafter "ESSB 6503," "the bill," or "the law" effective April 27, 2010). Its purpose was to reduce expenditures during the 2009-2011 fiscal biennium. The means chosen by the Legislature to reduce its impending deficit was to reduce funds going to compensation of state employees. The law provided two options for state agencies to follow in addressing their compensation costs: One option provided that an agency might submit a "compensation reduction plan" to be reviewed by the state's Office of Financial Management (hereinafter "OFM"). Among the elements the law contemplated as appropriate for inclusion within such a plan was "temporary layoffs." If the plan passed muster with OFM, the agency could proceed with its plan. If an agency did not file a plan, the law generally provided that it would close for business on ten (10) designated days, which "shall result in the temporary layoff of the employees of the agency." [Sec.3(5)(a), p. 6 of the bill] Realizing that certain business of government should be allowed to continue, the law recognized certain "activities" as appropriate for exemption. The activities, and thus, the employees performing them, that would not be subject to the law limiting compensated employment included employees engaged in direct custody, supervision, and care of inmates in the state's corrections system.

On June 2, 2010, the Director of OFM notified the Union's Secretary that DOC would not be submitting a compensation plan. This meant that DOC would instead be implementing a system that would affect employees not exempt from the operation of the law. This was followed by a letter to DOC employees from DOC Secretary Eldon Vail, describing the process for implementation that would be followed. The Union filed the grievance at issue here before the first day of implementation, July 12, 2010, as approximately 800 of its members were affected by the law and DOC's response to it.

ISSUE BEFORE THE ARBITRATOR

The Parties were not able to agree to a statement of the issue at the hearing. The Union proposed a statement of the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it furloughed bargaining unit employees, and if so, what is the remedy?

The Employer stated the issue differently:

Did the Department of Corrections violate the Collective Bargaining Agreement, the particular Articles at issue being 16, 26, 35, 44, and 45, when it implemented temporary layoffs as required by Senate Bill 6503, and if so what is the remedy?

Acknowledging the differences between their characterizations of the issues, the Parties stipulated that the Arbitrator may, upon receiving all the evidence, testimony, exhibits and arguments, formulate the issue. The Arbitrator states the issue as follows:

Did the Employer violate the Collective Bargaining Agreement between the Parties when it directed certain bargaining unit employees not to report for work on certain specified unpaid days in 2010 and 2011, and, if so, what is the remedy?

PERTINENT COLLECTIVE BARGAINING AGREEMENT, AND STATUTORY PROVISIONS:

Collective Bargaining Agreement effective July 1, 2009 through June 30, 2011

**ARTICLE 16
HOURS OF WORK**

16.3 Scheduled Work Period Employees

A. Regular Work Schedules

The regular work shift for scheduled work period employees will consist of either:

1. Five (5) consecutive uniform work shifts of not more than eight (8) consecutive hours of work (excluding any meal period) in a twenty-four (24) hour period followed by two (2) consecutive days off;

Or

2. Four (4) consecutive uniform work shifts of not more than ten (10) consecutive hours of work (excluding any meal period) followed by three (3) consecutive days off.

**ARTICLE 32
COMPENSATION**

32.1 Pay Range Assignments

- A. Effective July 1, 2009, each classification represented by the Union will continue to be assigned to the same salary range of the "Washington State Salary Schedule Effective July 1, 2008 through June 30, 2009" applicable to Teamsters bargaining units (the 2008-2009 Teamsters Salary Schedule) that it was assigned on June 30, 2009. Effective July 1, 2009, each employee will continue to be assigned to the same range and step of the 2008 - 2009 Teamsters Salary Schedule that he/she was assigned on June 30, 2009.
- B. Effective July 1, 2009, the Teamsters Salary Schedule effective July 1, 2008 through June 30, 2009 will remain in effect until June 30, 2011 as shown in Appendix B, attached.

**ARTICLE 34
SENIORITY**

34.2 Layoff Seniority

This Subsection (Article 34.2) applies only to Article 35 Layoff and Recall. Seniority for full-time employees will be defined as the employee's length of unbroken state service. Seniority for part-time or on call employees will be based on straight time hours worked. For the purposes of layoffs, a maximum of five (5) years' credit will be added to the seniority of permanent employees who are veterans or to their unmarried widows or widowers, as provided for in RCW 41.06.133(13).

**ARTICLE 35
LAYOFF AND RECALL**

35.4 Temporary Layoff

The Employer may temporarily layoff an employee for up to ninety (90) calendar days due to an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equipment, or other unexpected or unusual reasons. Employees will normally receive notice of five (5) calendar days of a temporary layoff. An employee who is temporarily laid off will not be entitled to be paid any leave balance, bumped to any other position or be placed on the internal layoff list.

35.5 Layoff

Employees will be laid off in accordance with seniority, as defined in Article 34, Seniority, subject to the employee possessing the required skills and abilities for the position.

ESSB 6503

NEW SECTION. **Sec. 1.** The legislature declares that unprecedented revenue shortfalls necessitate immediate action to reduce expenditures during the 2009-2011 fiscal biennium. From the effective date of this section, it is the intent of the legislature that state agencies of the legislative branch, judicial branch, and executive branch including institutions of higher education, shall achieve a reduction in government operating expenses as provided in this act. It is the legislature's intent that, to the extent that the reductions in expenditures reduce compensation costs, agencies and institutions shall strive to preserve family wage jobs by reducing the impact of temporary layoffs on lower-wage jobs.

NEW SECTION. **Sec. 3. § 1 (b)** Each executive branch state agency other than institutions of higher education may submit to the office of financial management a compensation reduction plan to achieve the cost reductions as provided in the omnibus appropriations act. The compensation reduction plan of each executive branch agency may

include, but is not limited to, employee leave without pay, including additional mandatory and voluntary temporary layoffs, reductions in the agency workforce, compensation reductions, and reduced work hours, as well as voluntary retirement, separation, and other incentive programs authorized by section 912, chapter 564, Laws of 2009. The amount of compensation cost reductions to be achieved by each agency shall be adjusted to reflect voluntary and mandatory temporary layoffs at the agency during the 2009-2011 fiscal biennium and implemented prior to January 1, 2010, but not adjusted by other compensation reduction plans adopted as a result of the enactment of chapter 564, Laws of 2009, or the enactment of other compensation cost reduction measures applicable to the 2009-2011 fiscal biennium.

NEW SECTION. **Sec. 3. § 1 (d)** The director of financial management shall review, approve, and submit to the legislative fiscal committees those executed branch state agencies and higher education institution plans that achieves the cost reductions as provided in the omnibus appropriations act. For those executive branch state agencies and institutions of higher education that do not have an approved compensation and operations reduction plan, the institution shall be closed on the dates specified in subsection (2) of this section.

NEW SECTION. **Sec. 3 § (2)** Each state agency of the executive, legislative, and judicial branch, and any institution that does not have an approved plan in accordance with subsection (1) of this section shall be closed on the following dates in addition to the legal holidays specified in RCW 1.16.050:

- (a) Monday, July 12, 2010;
- (b) Friday, August 6, 2010;
- (c) Tuesday, September 7, 2010;
- (d) Monday, October 11, 2010;
- (e) Monday, December 27, 2010;
- (f) Friday, January 28, 2011;
- (g) Tuesday, February 22, 2011;
- (h) Friday March 11, 2011;
- (i) Friday, June 10, 2011.

NEW SECTION. **Sec. 3 § (4).** The following activities of state agencies and institutions of higher education are exempt from subsections (1) and (2) of this section:

- (a) Direct custody, supervision, and patient care in: (i) Corrections;

NEW SECTION. **Sec. 4.** A new section is added to chapter 41.80 RCW to read as follows:

(1) To the extent that the implementation of section 3 of this act is subject to collective bargaining:

NEW SECTION. **Sec. 4 § (e).** For agencies that do not have an approved compensation reduction plan under section 3 (3) of this act, negotiations regarding impacts of the temporary layoffs under section 3 (2) of this act shall be conducted between the governor or governor's designee and the exclusive bargaining representatives subject to chapter 41.80 RCW.

POSITIONS OF THE PARTIES

Position of the Union:

The Position of the Union is summarized as follows:

The Employer has violated the Parties' Collective Bargaining Agreement by furloughing certain classifications of bargaining unit employees represented by Teamsters Local Union Number 117. This violation compromises and undermines the principles of seniority and compensation protections for which the Union bargained. The furlough process imposed by the Employer reduces the hours of all employees in the affected classifications across the board, without regard to seniority, on stand-alone days distributed across the fiscal year. This will result in a 3.84% pay cut for approximately 800 union-represented employees. The Employer attempts to characterize these furloughs as "temporary layoffs" despite the fact that employees were not laid off.

The Employer's action violates the plain language of the Parties' contract. Even if the furloughs are characterized as "temporary layoffs," such layoffs are required by the contract to be conducted by inverse order of seniority. An examination of the Contract's bargaining history reinforces this conclusion. Unlike most other state employee agreements, the Union's contract does not permit furloughs or reduction in hours. On the contrary, the bargaining history demonstrates that the Union has rejected Employer proposals that would have expressly permitted unilateral involuntary reduction in hours since the inception of their bargaining relationship. The Employer points to the passage of ESSB 6503, passed in 2010, as justifying its actions. While that legislation addresses genuine fiscal needs by imposing cost-cutting measures throughout state government, it does not, and constitutionally cannot, operate to impair the valid contract executed between the parties. The Union recognizes the financial challenges facing the

public sector, and has already negotiated substantial cost savings with the Employer in other areas.

This case tests the integrity and durability of collective bargaining commitments when they matter most: during times of severe economic pressure. Financial challenges, even significant ones currently facing the Employer, cannot excuse the Employer from disregarding its contractual commitments. Were that to be permitted, the Parties' Contract and the collective bargaining process as a whole would be rendered meaningless.

ESSB 6503 gave the Employer an option of developing a compensation reduction plan as an alternative to temporary layoffs or reduction in hours. The Employer chose not to develop and submit such a plan, instead opting to unilaterally impose furloughs. The Employer has no right unilaterally to reduce the contractually specified work week. Moreover, the agreement mandates a 5-8 or 4-10 consecutive day workweek. The agreement also guarantees monthly and annual compensation levels and prohibits the imposition of leave without pay (furloughs).

Position of the Employer:

The Position of the Employer is summarized as follows:

Facing an unprecedented fiscal crisis, the Washington State Legislature enacted ESSB 6503 in the spring of 2010. The purpose of the law was "to reduce expenditures during the 2009-2011 fiscal biennium." The law provides that each state agency "may submit to the Office of Financial Management a compensation reduction plan to achieve the cost reductions as provided in the Omnibus Appropriations Act." Each agency that does not have an approved compensation reduction plan was directed to be closed on 10 specified dates beginning with July 12, 2010, and ending with June 10, 2011. "The closure of an office of a state agency," the act provides, "shall result in the temporary layoff of the employees of the agency..." Section 3 (5)(a)

of the act. Understanding that certain state functions could not reasonably be shut down in the public interest, the Legislature further provided that certain activities of state agencies would be exempt from closures and, thus, from the temporary layoffs. The Legislature recognized that prisons, like hospitals and other institutions that operate in a 24/7 environment, cannot ever be closed. Exemptions were provided for "direct custody, supervision, and patient care" within the Department of Corrections. The clear intent of the law was to provide that employees not engaged in direct custody, supervision, and care of offenders would be laid off on the specified dates.

The Union argues that because Article 35 of their Agreement, unlike that of many other unions, does not contain language providing for reductions of working hours, the Employer violated the contract when it temporarily laid off non-exempt employees as required by law. The Union also argues that the Employer violated the Contract by temporarily laying off entire classifications of employees rather than implementing temporary layoffs according to seniority. These arguments are without merit.

The language of Article 35 of the Agreement clearly and unambiguously provides for the temporary layoffs at issue in this matter. Collective Bargaining Agreements are governed by the ordinary rules of contract law. No ambiguity exists in article 35.4. The Teamsters argue that the Employer's action was a reduction of employees' work hours but they failed to prove that anything other than a temporary layoff, as required by law, occurred. The Union presented no evidence that employees were on leave without pay, or in some other active pay status during the temporary layoff days. Contrary to the Union's assertion, an employee is not employed on the day of the temporary layoff. Employees represented by other unions whose agreements contain provisions relating to temporary reductions in work hours were also temporarily laid off.

Regardless of the particular contract language, those employees received a temporary layoff letter that in fact referenced temporary layoff.

The Teamsters characterize the temporary layoffs as "furloughs" and contend they cannot be imposed because the Agreement has no reduction of hours language. However, no rational basis exists for creating a distinction between a furlough and the temporary layoff, so there is no rational basis to conclude that a "furlough" is a temporary reduction of hours. The Union's argument that a temporary layoff, to be such, has to be for two or more consecutive days, is likewise baseless.

Last, the temporary layoff provision of the Agreement, Article 35.4, is not governed by Article 35.5, which provides that employees are to be laid off in accordance with seniority. Article 35 generally governs "layoff and recall." Article 35.4 carves out an exception to govern the specific situation of a temporary layoff, containing its own notice provision and barring payment of any leave balance, bumping to another position, or placement on the internal layoff list. Further supporting this position is the fact that one of the other state employee unions negotiated language in its agreement that requires temporary reductions of work hours and temporary layoffs to be done accordance with seniority. The Teamsters could have chosen to negotiate similar language in their agreement but they did not.

DISCUSSION

The Arbitrator has fully considered the testimony exhibits and briefs of the Parties. That a matter has not been discussed in this award does not indicate that it has not been considered by the Arbitrator. Only those matters that were found to be essential to the resolution of this matter have been addressed.

At the outset, the Arbitrator notes the differences between the Parties concerning the terminology that permeates this matter. References to describe the actions taken by the Employer at issue here, such as, "temporary layoff," "furlough," "reduction in hours," "leave without pay," and the like, abound in the evidence and arguments of counsel. The Arbitrator will explore the essence of the actions taken by the Employer in this matter, and their meaning under the Collective Bargaining Agreement, and for economy refer to "the Employer's actions," or the Employer's designation of its actions, "temporary layoffs."

The Grievance and Response

To begin our inquiry, we begin with the Union's grievance, *Joint Ex. 2*, dated June 22, 2010, and the Employer's response in this matter *Joint Ex. 3*, dated August 8, 2010. The Union filed its grievance before the first day of the Employer's implementation of its temporary layoff plan, hoping to stay the DOC's intended actions. The Union alleges a number of violations of the Collective Bargaining Agreement *Joint Ex. 1*: Article 16 (hours of work), Article 26 (leave without pay), Article 35 (layoff and recall), Article 44 (entire agreement), and Article 45 (term of agreement). The Union withdrew claims under Article 5 of the agreement (Union/Management relations) at the arbitration hearing. Based upon that assertion at the hearing that matters relevant to collective bargaining obligations were before the Washington State Public Employment Relations Commission, the Arbitrator has not considered claims related to Article 5 of the Agreement. The grievance complains of the State's unilateral imposition of ten (10) furlough days on certain of their bargaining unit members in violation of the Agreement, which, it asserts does not provide the Employer with that option. The Employer mischaracterizes furlough days as "temporary layoffs", the Union claims, and attempts to unilaterally modify the agreement. The Union became aware of the violation on or about June 2, 2010 when it received a letter from

the Director of the State's OFM. That letter, *Joint Ex. 7*, states in brief that the Department of Corrections had notified OFM that it would not be submitting a "compensation reduction plan," the alternative to closure and temporary layoff provided in ESSB 6503. The grievance goes on to state that when the Union attempted to resolve the matter with Todd Dowler, Labor Relations Manager at DOC, he told them DOC did not have the ability to resolve the matter. The Employer's response notes that the Parties agreed to bypass Step in 2 the processing of this grievance. The response goes on to note that Article 35.4 "provides that the Employer can temporarily layoff employees for up to ninety (90) calendar days." The Employer rejected arguments that its action was really a "furlough" or reduction of work hours, as a layoff would have to involve consecutive days off, thus, an impermissible not-bargained-for "reduction in hours" is what had actually occurred. The Employer noted that the only limitation to its ability to impose temporary layoffs is that it must demonstrate the layoffs were done in accordance with one of the five reasons specified in the Contract: an unanticipated loss of funding, revenue shortfall, lack of work, shortage of material or equivalent or other unexpected or unusual reasons. The Employer cited three reasons for its actions: unanticipated loss of funding, revenue shortfall, and unexpected or unusual reasons. The Employer found the legislatively imposed budget constituted anticipated loss of funding, and the enactment of ESSB 6503, directing state agencies to impose temporary layoffs, constituted an unexpected or unusual reason justifying the layoffs. As the Contract between the parties grants the Employer the right to implement temporary layoffs, the Employer asserted that the Union had waived its right to bargain over the DOC's actions. The Employer found no violation of Article 26 (Leave without Pay) as an employee is not employed on the day of the temporary layoff.

The Statute: ESSB 6503

At the outset, the Arbitrator notes that the statute, and his references thereto, are discussed for the purposes of setting forth the context for the Employer's actions, and the Union's responses. The Arbitrator does not see his role as examining whether or not the statute is unconstitutional as effecting an impairment of contract or upon any other ground.

The bill, effective April 27, 2010, declares an emergency. In Section 1, the Legislature cites unprecedented revenue shortfalls as necessitating immediate action to reduce expenditures during the 2009-2011 fiscal biennium. State agencies are to achieve a reduction in government operating expenses. To the extent those reductions in expenditures reduce compensation costs, the agencies are directed to strive to preserve family wage jobs by reducing the impact of temporary layoffs on lower wage jobs. Temporary layoffs are not the only option provided by the bill to agencies as a means of reducing their compensation cost reductions. Section 3 (1)(b) provides that an agency may submit a "compensation reduction plan" to achieve the required cost reductions. Such a plan, could include, but not be limited to, employee leave without pay, including additional mandatory and voluntary temporary layoffs, reductions in the agency workforce, compensation reductions, and reduced work hours...Section 3(1)(d) provides that an agency that does not submit such a plan approved by OFM, shall be closed on the dates specified in subsection (2) of this section." (relevant dates referenced above). Section 3 (4)(a) exempts from these "the following activities of state agencies: (a) direct custody, supervision, and patient care in: (i) corrections. Section 4 (1) provides that "to the extent that the implementation of Section 3 of this act is subject to collective bargaining:" "(e) for agencies that do not have an approved compensation reduction plan under Section 3(1) of this act, negotiations regarding

impacts of the temporary layoffs under Section 3(2) of this act shall be conducted between the governor or governor's designee and the exclusive bargaining representative subject to chapter 41.80 RCW.

The bill seeks to address an unprecedented shortfall, one that threatens the state's ability to provide governmental services, many of them critical to the public's well-being and safety. These include the workplace here, the DOC. The bill also recognizes a goal of seeking to protect the lowest wage earner in a given workplace that the bill may impact. Finally, the bill is not a stranger to the institution of collective bargaining, and provides that negotiations regarding impacts of temporary impacts *shall* be conducted. The Arbitrator was informed at the hearing that the Union was withdrawing contract Article 5 claims, relating to bargaining of Employer initiated changes, as those matters were before the Washington State Public Employment Relations Commission. The Arbitrator makes no findings relating to whether the Employer was obligated to initiate and participate in bargaining regarding its decision to proceed with its temporary layoffs, or whether impacts bargaining proceeded with good faith.

The Employer's Actions

Following the receipt of *Joint Ex. 7*, from the director of OFM, stating that DOC would not be submitting a compensation reduction plan, thereby subjecting employees not exempt under the bill to temporary layoffs, the Union pressed its argument that the temporary layoffs were reductions in hours not permitted in the agreement. *Thompson, Tr. P. 25*. Witness Thompson testified that determining which employees would be subjected to the temporary layoffs became a "moving target." Richard Morgan, Prisons Director for DOC wrote on June 18, 2010, that "An argument can be made that every employee who has an inmate in their area is responsible for the inmate." *Joint Ex. 9*. On the same day, Eldon Vail, Secretary of the DOC

attempted to clarify the temporary layoff plan: “We have done the best we can (to apply the bill to DOC’s complex operations), but much of the bill seems unfair, and in fact, is not fair... The law provides several exemptions for DOC including those who provide ‘direct custody, supervision, and patient care.’ This is the same language used in the statewide hiring freeze, and we believe we should use the same definitions.” The Secretary’s letter goes on to state which employees would be temporarily laid off, indicating the implementation decision, and advises employees to review the Department of Personnel’s Question and Answer web site as an authoritative source for answering any questions they may have. *Joint Ex. 10* Also on June 18, a DOC Q&A was made available to DOC employees, explaining, among other things, that “The terms (“furlough” and “temporary layoff”) have been used interchangeably. Temporary layoff is the term used in the statute, collective bargaining agreements, and rules. Furloughs is the term used more often in the media. The correct term is temporary layoff.” The Q&A was generated without input from the Union. *Thompson, Tr. p. 40-41* On June 22, the Union filed its grievance, *Joint Ex. 2.* and sought an injunction to halt implementation. On June 29, the Secretary wrote to all employees again, letting them know when notices would be sent to affected staff members. *Joint Ex. 11.* On June 30, a letter from the Director of the Olympic Corrections Center was sent to Pamela Olekas, a shop steward at the Olympic Corrections Center, a letter stating that temporary layoffs would begin in July, and that the layoffs were undertaken in accordance with the ESSB 6503 and Article 35 of the contract between the State of Washington and the Teamsters. The Union’s Secretary Treasurer testified that the Union had not been apprised of the letter and its contents. *Thompson, Tr. p. 48*

On September 13, 2010, Washington’s Governor, in Executive Order 10-04, called for an across the board, general state fund agency reduction of 6.3%. *Joint Ex. 30* As a result of this

Executive Order calling for additional cuts, an eleventh day was added to the ten previously imposed, *Joint Ex. 31*, though the original belief was that only seven days would be required. The scope of those affected expanded to employees who were previously exempt under the bill. *Thompson, Tr. p. 52-53, Joint Ex. 32* An example of problems arising from efforts to relate the complexities of the DOC workforce to the provisions of the bill is described in the testimony of a Correctional Healthcare Spec. 2, Timothy Panek, a primary healthcare provider. He was exempt from the bill, but came within the ambit of the Employer's response to the Executive Order. Witness Panek testified that he believed this meant correctional healthcare for inmates would be significantly cut back on the days he and his colleagues were not permitted to work. His is an officially salaried position, overtime exempt. He was directed not to work more than thirty-two (32) hours in a week in which the Employer's temporary layoffs occurred, as that would convert his status, and he would become overtime eligible. In effect, he became an hourly employee at those times. That did not happen in regular weeks. *Joint Ex. 35* Unlike the definition of "layoff," his employment was not severed. *Panek, Tr. 134-136* During weeks when he was not permitted to work over 32 hours, the witness, being overtime eligible, was told not to take a "medical call," in which he would otherwise advise, prescribe medication, or give instructions regarding inmate care. The nature of that work, however, is that someone has to be on call. In the end, the witness was instructed that, as a represented employee, he would receive the contract standard for an overtime eligible employee: standby pay. *Panek, Tr. 137-140*

Bargaining History of Article 35 of the Collective Bargaining Agreement

The Arbitrator undertakes this discussion to explore any latent ambiguity not apparent in the language of the Agreement of a nature that would broaden his deliberations beyond the

words themselves. In sum, the Employer points to the term “temporary layoff,” and rejects terms such as “furlough,” or “involuntary leave without pay,” or “reduction in hours” argued by the Union. The Union accepts the term “Temporary Layoff ” only upon the condition that it be recognized as invoking the seniority provisions of the Contract, Articles 34.2 and 35.5.

Much of the testimony at the hearing centered around whether a “reduction in hours,” or a “furlough” had actually occurred as the Union argued, or whether “temporary layoffs” were conducted, as the Employer maintained. The Union asserted that it had resisted language indicating a reduction in hours from the very beginning of full scope bargaining under the Personnel System Reform Act of 2002, as it undermines the seniority system. Simply put, the Union views the Employer’s action as harming entire classifications of employees, spreading the loss among all employees regardless of seniority, rather than protecting the full employment of senior employees to which they are entitled by contract. The Union views the Employer’s actions as equating to a mechanism known as “reduction in hours,” which are typically performed by management without regard to seniority. The other resemblance lies in the extent of the impact: reductions in hours tend to be conducted in portions of days, or a day in length. The scheme put forth by the Employer broke up the subject days and arrayed them individually over individual weeks over a several month period, across whole classifications of employees regardless of seniority. Layoffs have tended to consist of more than one day, running consecutive days, though no language in the Agreement specifically requires this. Witnesses at the hearing testified (in summary): “Temporary layoff is a leave without pay;” “On the temporary layoff day, the employee is not employed;” “The employment relationship is not severed; employment continues but not in a compensation status;” “ Under Article 26, leave without pay can only be initiated by the employee.” The Arbitrator finds the Employer’s action

something of a hybrid, possessing some of the features of a reduction in hours, while possessing characteristics of a layoff, albeit temporary.

John Williams, former Secretary-Treasurer of the Teamsters, was involved in the bargaining in 2004 that led to the 2005-2007 Collective Bargaining Agreement. As the Parties have noted, Article 35 has continued, unchanged, since the 2005-2007 Agreement. He testified that his goal was to have a system that would afford seniority protections to his members, rather than have management possess rights that would allow them to do whatever they wanted as long as it didn't violate civil laws. *Williams, Tr. 72*. He sought to apply basic labor principles: alternatives to layoff, layoff by seniority, adequate notice to employees. The witness rejected the Employer's initial proposal, *Joint Ex. 17*, because it would allow the Employer to reduce employees' hours of work across the board as a means of reducing the work force, as opposed to a layoff by seniority. Economic loss across the entire bargaining unit was to be avoided. The witness granted that the Employer may temporarily lay off employees under Article 35.4, but that Article 35.5 requires that they be laid off in accordance with seniority. Spencer Thal, Counsel for Teamsters Local 117, was also involved in the 2004 bargaining rounds. His testimony referenced the rules regarding reduction in force that had been previously in place under the Department of Personnel system, which system was to be replaced under the Personnel System Reform Act of 2002. *Joint Ex. 19*, a Department of Personnel document from 2004, defined layoff in a way that included "reduction in hours" within the concept of a "layoff." Reductions in hours are typically done across the board without regard to seniority, and the Union was not interested. *Thal, Tr. 87-89*. The Teamsters did not want the proposed Employer option of reduction in hours as an alternative to layoff with its associated seniority protections. *Thal, Tr. 89*. The Union's counterproposal, *Joint Ex. 20*, removes the reduction in hours option.

The Employer's August 19, 2004 counterproposal at X.5 eliminates the option. *Joint Ex. 21*. The Union saw this as movement in the negotiations process. *Thal, Tr. 89-91*. The remainder of Mr. Thals' testimony dealt with a number of other collective bargaining contracts between the State and other unions, *Jt. Ex. 's 24-29*, all of which have "reduction in hours" similar to the language that the Teamsters rejected. The Employer elicited testimony concerning the Washington Federation of State Employees' Collective Bargaining Agreement. The Employer found significant the presence of WFSE's Article 34.6, providing that temporary layoffs would be done in accordance with seniority. The Employer found the absence of such language within Local 117's contract as bolstering its position that seniority did not apply to the temporary layoff here. The Arbitrator addresses this matter below.

Diane Leigh, Director of OFM since 2007, testified that she was the Employer's lead spokesperson in negotiations in 2004 for the 2005-2007 Collective Bargaining Agreement. She has not been a negotiating team member for bargaining with the Teamsters except for that first year of full-scope bargaining. The witness testified that the reduction in hours provision proposed by the Employer in the initial round of bargaining did not survive because a prison workplace like DOC requires that whole shifts be continually staffed, and that the hours of a given shift in the DOC's three-shift workplace could not be reduced. She testified that the Union was uncomfortable with the reduction in hours language because of that fact. The witness did not recall Union discomfort over the proposal because of seniority concerns. *Leigh, Tr. 156*. Ms Leigh further testified that seniority is a practice associated with bumping, whereby an employee displaced from one position may "bump" a less senior employee in another position. If temporary layoffs were done by seniority and directed at only portions of job classifications, in a seniority system there would be bumping. Insofar as Article 35.4 of the contract eliminated

bumping, the witness maintained, this was further evidence that the article was an exception to the seniority provisions of the contract. She did not recall the Union raising the issue of seniority with regard to Article 35.4. The Employer also had proposed language that would have permitted it to select a number of less senior employees to exempt from the adverse effects of seniority. The Union opposed that language. *Leigh, Tr. 157-158*. Ms. Leigh further testified that if the Employer were to conduct temporary layoffs, it would be for a day or more, that reductions in hours were for periods of less than a day, and that the Union understood that distinction. On cross-exam, the witness acknowledged that in her response to the Union's grievance, *Joint Ex. 3*, there was no indication that reductions in hours only apply to a part of a day; there is no authority that a reduction in hours is limited to a daily event; Article 35.5 doesn't distinguish permanent layoffs from temporary layoffs; nothing precludes applying Article 35.5 to require the layoff of the least senior employees in an affected classification and, for example, the least senior fiscal techs (not exempt from the bill) could be laid off without bumping rights. The remainder of the witness's testimony centered largely around the issue of a distinction drawn between a furlough, or reduction in hours, and a temporary layoff, based upon whether the action consisted of a day or less, or two or more consecutive days. The core of the witness's testimony was that the DOC had to conduct their temporary layoff or else be in violation of ESSB 6503.

The Arbitrator's review of public employers' approach to "reduction in hours" indicates: the preference is to limit the reduction so that an employee works no less than twenty (20) hours a week so as to maintain eligibility for medical insurance; one eight-hour day reduction a week across the board to all employees is preferred to shortening each day of the week to equate to a thirty-two hour week, reducing personnel costs without incurring costs for unemployment benefits. Temporary layoffs tend to be defined as a period of unemployment with a defined

duration coupled with a commitment to rehire. The Washington State Department of Personnel, to which the Employer has referred employees as an authority to respond to questions, states on its website, in explaining ESSB 6503, under a heading that reads: “Temporary Layoffs/Furloughs” that the mechanism is not a “break in service,” that the employee is “placed on leave without pay” and that an employee on a temporary leave of absence should not be placed on “standby.”

The Arbitrator harkens back to Article 26 of the contract, holding leaves without pay as being at the initiation of the employee, and to the testimony of Timothy Panek, discussing medical calls and receiving standby pay. The suggestion is that the administration of ESSB 6503 has presented problems of consistency.

The Employer points to Article 34.6 (D) of the State’s 2009-2011 Collective Bargaining Agreement with the Washington Federation of State Employees, which states that “A temporary reduction of work hours or layoff will be in accordance with seniority...” and argues that the Teamsters could have bargained such language in their agreement here. The Arbitrator's review of the rest of the WFSE contract reveals that its structure differs from the contract at hand. Its article governing seniority, Article 33, does not contain a reference to their Article 34 Layoff and Recall. The Teamster’s Article 34.2 does reference Article 35, Layoff and Recall, without limitation. Teamster’s Article 35.5 then provides that layoff shall be in accordance with seniority. It is within its Article 34, layoff and recall, that WFSE has placed both 34.6(D), covering temporary layoffs, and 34.9 (A), layoffs generally. The Arbitrator views this as a somewhat different array, but accomplishing the same end. The Teamster’s contract in 34.2 injects seniority for the application to their Article 35 as a whole. Its Article 35.5 then refers back to Article 34.2. The WFSE Article 33 does not inject seniority as a consideration for layoff in its

Article 34. Given that Teamster contract Article 34.2 references Article 35 entitled Layoff and Recall as an umbrella or “superset,” and given Article 35.5, providing that employees will be laid off in accordance with seniority, referencing back to Article 34.2, the burden of proof to prove an exception to the seniority scheme for temporary layoffs as anything other than a mere “subset” of layoffs, falls to the Employer. The Arbitrator further notes that within the WFSE contract, it is viewed that seniority is an appropriate condition for a temporary layoff, and that a temporary layoff is compatible with the elimination of bumping rights in that contract.

The Arbitrator has reviewed the bargaining history of the Contract presented through exhibit and testimony at the hearing. Upon such review, the Arbitrator does not find a basis to divert the focus of his deliberations from the language of the contract. Negotiations are a form of advocacy, and advocacy is concerned with strategy. The reason a party gives to motivate a move by its negotiating counterpart may differ from its actual reason. There is wisdom in the arbitral saw that the bargaining notes speak for themselves, and testimony regarding meaning or intent should be received cautiously, especially seven (7) years after negotiations have concluded, as is the case here. Upon considering the bargaining history, testimony, and exhibits of the parties, the Arbitrator finds insufficient basis to declare the contract language surrounding temporary layoffs as being ambiguous and requiring recourse to extrinsic evidence to complete its meaning.

The Arbitrator finds that there is insufficient basis in the record to find that Article 35.4 carves out an exception from the umbrella of Article 35 simply because other indicia of layoffs are treated differently therein. The Arbitrator appreciates the Employer’ situation in this matter, managing in an environment including a state revenue shortfall, the legislature’s response to that shortfall in the form of ESSB 6503, and the Collective Bargaining Agreement with the Teamsters. The Arbitrator is limited to addressing the issue placed before him, that is, whether

the Employer, the DOC, violated the Collective Bargaining Agreement between the Parties when it took the course it did in responding to ESSB 6503.

Considering the Collective Bargaining Agreement of the parties as a whole and the totality of the circumstances developed in the record, the Arbitrator finds that the nature and quality of the action taken by the Employer, the denial of work to entire classifications of represented employees without regard to seniority, constituted a violation of Articles 34.2, 35.4, and 35.5 of the Collective Bargaining Agreement, (and, by extension, Articles 16 and 32) in that, actions such as the one taken here by the Employer, called by whatever term, must be done in accordance with seniority.

CONCLUSION

The Arbitrator is persuaded that the Union has carried its burden of proving by a preponderance of the evidence that the Employer's action of denying compensated work time to whole classifications of its represented employees without regard to seniority was in violation of the Collective Bargaining Agreement between the Parties. The Arbitrator will enter an Award to that effect.

<p>IN THE MATTER OF THE ARBITRATION BETWEEN</p> <p>TEAMSTERS LOCAL UNION NO. 117,</p> <p style="padding-left: 100px;">Union</p> <p>And</p> <p>STATE OF WASHINGTON</p> <p>DEPARTMENT OF CORRECTIONS,</p> <p style="padding-left: 100px;">Employer</p>	<p>) FMCS CASE NUMBER</p> <p>) 10-04604-8</p> <p>)</p> <p>) ARBITRATOR'S</p> <p>) OPINION AND AWARD</p> <p>)</p> <p>) GRIEVANCE NO 149-10</p> <p>)</p> <p>)</p> <p>)</p>
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Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussion, the Arbitrator finds in FMCS Grievance No.10-04604-8 as follows:

The grievance is granted in part as follows:

The Employer was in violation of Articles 34.2, 35.4, and 35.5 of the Collective Bargaining Agreement between the parties, effective 2009-2011, from and after July 12, 2010, when it implemented "Temporary Layoffs" under Article 35.4 without regard to seniority, affecting classifications of employees represented by Teamsters Union Local 117.

The Employer is directed to make employees affected by its action whole for any economic losses resulting from the Employer's action, including, but not limited to, lost wages and interest thereupon.

The Employer shall, in the future, cease and desist from engaging in a practice of denying employees represented by Teamsters Union Local 117 contracted-for compensated employment, whether by layoff or temporary layoff, or by whatever term, that is conducted without regard to seniority.

The Arbitrator will retain jurisdiction of this matter for sixty (60) days, that is until 4:30 p.m., July 5, 2011, for the purpose of resolving disputes regarding the remedy directed herein. If the Arbitrator is advised by phone, email, or regular mail by 4:30 p.m., July 5, 2011, of any dispute regarding the remedy directed herein, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy by that time and date. The Arbitrator's jurisdiction over this Grievance shall then cease.

RESPECTFULLY SUBMITTED this 5TH day of May, 2011.


 Anthony P. Vivencio, Arbitrator