

IN THE MATTER OF THE ARBITRATION BETWEEN	)	AMERICAN ARBITRATION
	)	ASSOCIATION
	)	CASE #75-390-00038-11
	)	
WASHINGTON FEDERATION OF STATE EMPLOYEES	)	
Union,	)	ARBITRATOR'S
	)	OPINION AND AWARD
	)	
And	)	
	)	GRIEVANT:
WASHINGTON STATE EMPLOYMENT	)	CYNTHIA WAMBACH, ET AL.
SECURITY DEPARTMENT	)	
Employer	)	

**ARBITRATOR: ANTHONY D. VIVENZIO**

AWARD DATE: October 13, 2011

**APPEARANCES FOR THE PARTIES:**

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## PROCEDURAL HISTORY

The Washington State Department of Employment Security is hereinafter referred to as “the Employer,” or the “ESD.” The Washington Federation of State Employees is hereinafter referred to as “the Union.” Collectively, they are hereinafter referred to as “the Parties.” Cynthia Wambach and her affected coworkers associated herein are collectively referred to as “the Grievants.”

The Collective Bargaining Agreement between the Parties basing the grievance at issue here is the agreement between the State of Washington and Washington Federation of State Employees, effective from July 1, 2009 through June 30, 2011. This Agreement is hereinafter referred to as the “Agreement,” the “Contract,” or the “CBA.” The Parties’ dispute goes to the Employer’s laying off the Grievants from their positions on July 1, 2010. The matter was timely grieved pursuant to Article 29 of the Agreement. Following unsuccessful attempts at resolution through the grievance procedure, Anthony D. Vivenzio was selected by the Parties and appointed Arbitrator to hear the matter. An arbitration hearing was held at the Employer’s premises on July 22, 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 July 22, 2011. The Parties timely filed post-hearing briefs and the Arbitrator closed the full record and deemed the matter submitted on September 9, 2011.

## **BACKGROUND**

The Employment Security Department's mission is to help workers and employers succeed in the global economy by delivering superior employment services, timely benefits, and a fair and stable unemployment insurance system. The ESD is an active partner in the WorkSource system, which includes partners from city and county governments, nonprofits, and others. In 2010, the WorkSource system helped more than 8000 businesses with their hiring and training needs and helped more than 370,000 residents look for work. The ESD also administers Washington's unemployment insurance system. In 2010, the Department paid nearly \$4.7 billion in unemployment benefits to more than 500,000 jobless workers. The Washington Federation of State Employees represents employees in various bargaining units within the ESD, including the bargaining unit involved in this matter. These Grievants are classified as WorkSource Specialists in grades 2, 3, and 4. They range in seniority from 10 to 23 years of service. In July, 2010, the Grievants were laid off from their project worksite in the Columbia Gorge region of Washington State when the ESD lost Workforce Investment Act (WIA) funding. Other, less senior employees at the worksite, who had been hired pursuant to ARRA funding, a different grant program, were retained by the Employer. This Arbitration concerns the Employer's actions in laying off these Grievants.

## ISSUE BEFORE THE ARBITRATOR

The Parties were able to agree to a statement of the issue involved in this matter, and stated it as follows:

Did the Employer violate Article 34.17 of the Collective Bargaining Agreement between the Parties when the only laid-off options offered to the project employees were within the Columbia Gorge? If so, what is the remedy?

### **PERTINENT COLLECTIVE BARGAINING AGREEMENT PROVISIONS:**

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

#### **ARTICLE 4 HIRING AND APPOINTMENTS**

##### **4.5 Types of Appointment**

###### **D. Project Employment**

- 1 The Employer may appoint employees into project positions for which employment is contingent upon state, federal, local, grant, or other special funding of specific and of time-limited duration. The Employer will notify the employees, in writing, of the expected ending date of the project employment.
  
- 5 The layoff and recall rights of project employees will be in accordance with the provisions in Article 34, Layoff and Recall.

#### **ARTICLE 29 GRIEVANCE PROCEDURE**

##### **29.3 Filing and Processing (Except Departments of Corrections and Social and Health Services Employees)**

###### **B. Processing**

###### **Step 5 – Arbitration:**

If the grievance is not resolved at Step 4, or the OFM/LRO Director or designee notifies the Union in writing that no pre-arbitration review meeting will be scheduled, the Union may file a request for arbitration. The demand to

arbitrate the dispute must be filed with the American Arbitration Association (AAA) within thirty (30) days of the mediation session, pre-arbitration review meeting or receipt of the notice no pre-arbitration review meeting will be scheduled.

D. Authority of the Arbitrator

1 The arbitrator will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
- c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;
- d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.

**ARTICLE 34  
LAYOFF AND RECALL**

**34.1 Definition**

Layoff is an Employer-initiated action, taken in accordance with Section 34.3 below, that results in:

- A. Separation from service with the Employer,

**34.3 Basis for Layoff**

Layoffs may occur for any of the following reasons:

- A. Lack of funds
- E. Termination of a project

**34.7 Layoff Units**

- A. A layoff unit is defined as the geographical entity or administrative/organizational unit in each agency used for determining available options for employees who are being laid off.
- B. The layoff unit(s) for each agency covered by this Agreement are described in Appendix D, Layoff Units.

### **34.9 Formal Options**

- A. Employees will be laid off in accordance with seniority, as defined in Article 33, Seniority, among the group of employees with the required skills and abilities, as defined in Section 34.8, above. Employees being laid off will be provided the following options to comparable positions within the layoff unit, in descending order, as follows:

## **APPENDIX D LAYOFF UNITS**

### **19. Employment Security Department**

- 1 For all locations except Thurston county:
  - A . Office
  
  - B . If no option is available within the office layoff unit, the county in which the employee's permanent workstation is located will be considered the layoff unit.
  
  - C . If no option is available within the county layoff unit, the department statewide will be considered the layoff unit.

### **34.17 Project Employment**

- A. Project employees have layoff rights within their project. Formal options will be determined using the procedure outlined above in Section 34.9.
  
- C. Project employees who are separated from state service due to layoff and have not held permanent status in classified service may request their names be placed into the General Government Transition Pool Program. Upon layoff from the project, project employees who entered the project through the competitive process and remain in project status for two (2) years will be eligible to have their names placed on the internal layoff list for the classes in which permanent project status was attained. Bumping options will be limited to the project boundaries.

## **ARTICLE 35 MANAGEMENT RIGHTS**

Except as modified by this Agreement, the Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to, the right to:

- K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer, and temporarily or permanently lay off employees;
- O. Determine the reasons for and methods by which employees will be laid- off, and

## **POSITIONS OF THE PARTIES AND DISCUSSION**

### **Position of the Union**

The position of the Union is stated in summary as follows:

The Grievants were all Project Employees designated as WorkSource Specialists with seniority dates ranging from 1988 to 2001 working the Workforce Investment Act (WIA) project when they were laid off on July 1, 2010. When they were laid off, other Project Employees with less seniority kept working. The Agreement limits their formal laid-off options to jobs within their project. Their layoff rights, tied to seniority under Article 34.9, were limited by the Employer to only the project positions within their office, rather than those in their county and the departments, statewide. They were not offered other project positions outside WIA Columbia Gorge that encompassed the same or similar work performed by the Grievants. This violated Agreement Articles 34.7 and 34.17, and Appendix D. 19.

While the Employer asserts that a “wall” exists between projects, these walls do not exist in the field, where the actual work is performed. While these employees may have been funded through WIA, their duties for many years were “universal” one-stop

services and not limited to WIA specific services. Those services are not controlled by the source of grant funding supporting an employee's position. The lines between universal or "base" work (work done by regular permanent ESD employees), WIA specific work, and the ARRA project work under which the retained employees worked, became blurred, and broke down the barriers between the WIA project and the ARRA project. Employee work plans and time sheets reflect this. The employees' time sheets did not reflect actual work performed, but, instead, the amount of work that should be designated to a given source of funding, to satisfy that fundor's requirements. The result of this history is that the Arbitrator should not view a "project" as a single entity, tying the Grievants to the limitations of that entity. Differentiating these employees at this point in time is artificial, given the reality of their work history and reasonable understanding of their employment status.

### **Position of the Employer**

The position of the Employer is stated in summary as follows:

This case is the result of the unfortunate circumstances of reduced funding, a reflection of what is going on in this country and in our state. This case involves a very specific group of project employees within the Employment Security Department. The Parties agree that the contracts, which fund the projects, lost partial funding. These Grievants were affected by this reduction in funding. In some cases individuals were moved from full-time to part-time employment, or laid off entirely. The funding for the Grievants' project came from the federal government to the ESD, and then to local Workforce Development Councils which are not part of the ESD. Public and private sector entities bid for these projects on a competitive basis. In the past, ESD has been successful in winning the contracts which have funded these projects and these

employees. That was not the case in this situation. The ESD followed its customary policies as well as the Collective Bargaining Agreement in the layoff process involving these Grievants.

## **DISCUSSION**

At the outset, the Arbitrator would like to express his appreciation for the professional manner in which the Parties conducted themselves in the course of the proceedings, rendering vigorous, but courteous, advocacy. The Arbitrator has studied the entire record in this matter carefully and has considered the Parties' arguments and briefs. 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.

The Arbitrator is called upon to resolve whether the Employer's process surrounding its July 1, 2010, layoff of the Grievants, limiting their layoff rights to their WIA project sited at Columbia Gorge, violated the language in the CBA, or a contract-like principle that would have afforded the Grievants rights protecting them from the Employer's actions. In matters involving claims of violation of contract, the burden of proof is upon the grieving party, in this case, the Union, which has the burden of proving the violation by a preponderance of the evidence, or "more probably than not." This means that there must be more than equally weighted competent evidence on the side of the Union in order for it to prevail. That said, the Arbitrator turns his attention to the written agreement of the Parties at issue in this matter.

## **The Contract**

On its face, the language of the Parties' Agreement is found by the Arbitrator to be plain and unambiguous. In sum, it provides that the Employer may appoint employees into project positions as a form of employment distinct from that of a regular, permanent, full-time aka "base" employee. The appointment is contingent upon external, specific, time-limited funding. *Jt. Ex.1, Article 4.5 D (1)*. Layoffs can occur in this workplace because of the termination of a project. *Article 34.3 E*. Employees are laid off by seniority, and have options to comparable positions within their "layoff unit." *Article 34.9 A*. Article 34.7 A describes "Layoff Units" as "the geographical entity or administrative/organizational unit... used for determining available options for employees who are being laid off. Subsection B thereof refers the reader to Appendix D of the Agreement, which lists geographic alternatives for layoff units for the purposes of an employee's asserting layoff rights: the laid-off employee's office, then the surrounding county, and finally, the statewide Department. Article 34.17 provides, in its separate section specifically addressing project employees, that project employees, unlike regular, permanent employees, "have layoff rights within their project." Their layoff options are determined using the procedure outlined in Section 34.9, which, as noted, recognizes seniority, and applies layoff options "within the layoff unit..." The Arbitrator reads the language of the Agreement as holding project employees as a class separate from the Employer's "permanent" employees. The great bulk of the language of the Agreement contemplates the Department's "permanent" employees. Project employees are recognized as a specific type of appointment, and their layoff rights are set forth in a specific subsection, 34.17. Interpretation is complicated by the Employer's using the word "permanent" to also apply to project employees who have completed a probationary

period. There are permanent “regular” employees, and permanent project employees. The Agreement overall, including its provisions regarding layoff, is generally concerned with addressing its “permanent,” regular, non-project employees. The references to project employees are set apart and are specific. Recognizing that such separate, specific references are taken as having precedence over general references, the Arbitrator finds that the language of the Agreement requires that a project employee’s layoff rights must be exercised within their “project.” The Arbitrator now directs his analysis to examining whether these Grievants were “project employees” to which the Employer properly applied its layoff procedure within their “project,” or whether the meaning of the terms “project employee” and “project” have been rendered ambiguous or have been amplified by other factors determining the characterization of the Grievants, or whether the scope of their project expanded their “layoff unit” beyond their project site in light of arbitral principles collateral to the CBA.

### **The Grievants in the Workplace**

Much of the testimony offered by the Union at the hearing was presented through the testimony of Grievant Juliene Brete Underhill. His employment with the ESD begins with a letter dated February 7, 2001, welcoming him to the Department. The letter confirms the witness’s:

“appointment to the classification of Job Service Specialist 3, position number FP02 in the Welfare-To-Work Project-KlicitatCounty... This project is currently funded through June 30, 2001... Upon successful completion of a six-month probationary period you will attain permanent status in this classification and gain the rights of a permanent state employee.” *Er. Ex. 3. p. 2.*

This initial letter is a bit confusing. In the first paragraph, it does reference appointment to a project and gives the termination date of its funding, and as a reasonable

inference, the termination of employment. In the third paragraph it speaks of attaining permanent status in the classification and gaining rights as a permanent state employee. As has been mentioned above, the Agreement generally addresses regular "permanent" employees. The Agreement itself contains no direct reference to the existence of a "permanent project employee." Later, on September 6, 2002, the witness received a letter to "confirm your 'temporary' appointment to the classification of WorkSource Specialist 4 in the WIA Project-Klickitat County... This project is currently funded through June 30, 2003... A temporary appointment shall not exceed nine months... A temporary appointment may be terminated with one full working day's notice... Upon termination of this appointment, a permanent or probationary employee will return to a position in their former job class." *Er. Ex. 3. p. 4.* On cross-examination, asked whether he was made a permanent project employee and moved from a temporary position within the project to the permanent position within the project, the witness testified:

- A. Actually, it was not stipulated that way. It's a full-time permanent position. I was a full-time permanent WorkSource Specialist 3, to start. That was my designation. That was the heading that I fell under... And then I would be promoted to the next level of WorkSource Specialist 4. And the steps were always done-and it did vary. Often times it would come out as a temporary position, meaning they're working through the paperwork, I'd become funded as a full-time permanent... that status didn't change.

In sum, this Grievant saw a long, uninterrupted history of continued funding, suggesting , from his point of view, that funding would continue into the future and ensure his permanence.

This Grievant testified to the array of duties he has performed as part of his workplace's one-stop approach to serving customers seeking employment: assessing the qualifications of customers; providing core services including assistance with writing résumés and cover letters; interviewing; career counseling; orienting customers to

resources available the office; making office machine services available; registering customers in appropriate programs; collecting information and taking history from customers; skills assessment; taking job orders from possible employers; one-on-one counseling; referrals to other agencies; and, services common to equipping customers for employment in providing an interface with the job market and employers. In sum, the Grievant's activities were a mix of core, or "base," functions and project-related functions. Employees in the Grievants' positions sought seamless interactions with office customers, with the goal of having one person serve the customer throughout their association with the office. One office location, White Salmon, served as home base, but these employees also served satellite operations in Goldendale and Stevenson. *Testimony, Underhill, Tr. pp. 11,12, 16.* The Grievant was directed in his work through work plans generated by the Employer. *Un. Ex. 1.* The Employer was contracted to a number of grant funding sources, all requiring varying portions of the Grievants' time. Through the work plans, the Employer would direct the Grievants as to what percentage of time should be reflected as dedicated to work on behalf of a given grant. This required the Grievants to work across different programs associated with different funding streams, as well as to perform "base" work for the "universal customer" seeking unemployment benefits or other basic services. This Grievant was most directly responsible for working with youth under the WIA grant, but during various times spent from 20% to more than 40% this time performing this other work. The Grievant testified that, given the realities and exigencies of the workplace, drop in customers, etc. his timesheets, which he was directed to correspond to the work plans, often did not resemble his actual work. Otherwise, he endeavored to keep his efforts in line with the plans. Further, he testified that his position did not have the "time-and the duration" element

noted in the description of "project employment" in Article 4 of the Agreement, as did the ARRA employees who were retained. A 10 year employee, the Grievant's actual work has not substantially changed since its inception. *Testimony, Underhill, Tr. 18,22,25,28-33* On cross-examination, the Grievant related: his familiarity with the contract project process; how the offices were run at different times depending upon different funding streams and time frames; some grants were being repeatedly renewed, others added or changed; the streams were consistent enough to maintain a large base of employees over a long period of time. He allowed that he had been hired under the WIA Project program initially, but maintained that the expanded range of his work, including working alongside base positions, brought him beyond the definitions of "project employment" and "project" contained in the Agreement. *Testimony, Underhill, Tr. 37-48.*

The nominal Grievant, Cynthia Wambach, was a 23 year full-time employee with the ESD. She received a letter memorializing her appointment as a project employee with the ESD dated July 27, 1989. That letter states in pertinent part:

This letter is to notify you of your project appointment to the position of Jobs Service Specialist 2 in the Bingen JTPA Center Project... Upon completion of your probationary period of six months, you shall be entitled to appropriate rights within project employment... once permanent project status has been gained, you may have your name placed on the transfer or voluntary demotion register for regular positions in the same or similar job classes for which permanent project status has been gained. *Er. Ex. 2, p.2.*

Ms. Wambach testified that over the course of her career she has performed a range of duties working across various projects, also performing "base" work. In all, her work activities were similar to those performed by Grievant Underhill. She did not work under exactly the same funding streams, but worked across base and project work categories. The work performed was tagged to various funds bearing different codes, and its performance depended upon the availability of funding and need. Ms. Wambach

reiterated the one-stop nature of customer service. The goal is for the same employee to provide a range of services to the customer, from greeting them at the door to the more technical re-employment services, initial assessments, and the like. Ms. Wambach testified that she thought she was entitled to full rights under Article 34 of the Agreement as a Washington State employee. Reading Section 34.17, she found that project employees were boxed in, and that the full rights of Article 34 did not apply to her, making her 23 years of seniority worthless. Further, she did not believe that the work she was doing, in the manner it was being performed, met the definition of a “project employee” for purposes of the application of Section 34.17. Ms. Wambach testified that she had never performed services only under a specific project; there were always “blended funds;” “That’s how we survived in the Gorge.” When the ARRA employees were hired, they performed mostly “front-end” services, re-employment services, business services, taking job orders, etc. The Grievant was cross trained in these areas as well. The Grievant’s perception was that the Employer addressed the cut in funding by deciding to lay off the permanent project employees who had been there for up to two decades and keep the 10 new employees. This was done though the source of funding for both the Grievants’ and the ARRA’s project was federal. The work was essentially the same, except these Grievants performed additional services. *Testimony, Wambach, Tr. pp/ 52-61.*

Ignacio Marquez, the Permanent Area Director whose jurisdiction includes the subject workplace, testified to the relationship between the funding process and the Employer’s employment practices: In the case of the subject grant, the WIA, money flows directly from the Department of Labor to the statewide office of ESD. The ESD then allocates those funds to the 12 different workforce development areas in the state, to

their Workforce Development Councils (WDC). They are not part of the ESD. The funds are again allocated by formula. Both private and public organizations can apply for these funds. In the past, the ESD has applied for and received those funds while competing against other organizations. The funds are based on a two-year grant cycle. The ESD establishes a program, and determines how much money will be spent on customers, overhead, and staff. Upon renewal of a grant, the person performing the same duties will generally be retained to keep performing them. Employees hired under the WIA grant are allowed by law to provide core services, base work, to the universal customer. *Marquez, Tr. pp. 69-73.*

Colleen Blake has been the Project Coordinator for the ESD for 25 years. This witness described the structuring of project employment and its relationship to the layoff process: project employment is determined within guidelines and tests, e.g., whether the activities would be outside the ESD's regular function, whether the project is performed by contract or under a specific funding source, or is a pilot program, for example. *Testimony, Blake, Tr. pp. 75-77.* Initially, project employment determinations came under the jurisdiction of the Department of Personnel, regulated by provisions of the Washington Administrative Code. After the Personnel System Reform Act of 2002, the Collective Bargaining Agreement took precedence. *Testimony, Blake, Tr. p. 78.* These Grievants have never held status as regular base employees in the ESD, so their seniority/bumping rights are limited within their project unit. As an example, the ARRA funded project employees that came into the Grievants' workplace would have no bumping rights into the WIA projects if and when their funds are cut, even if they performed some work under WIA funding. Also, base employees cannot bump project employees. Once a project is established, it is assigned position numbers, identifying

which employees have been hired into a given project. This provides a clear delineation of what makes up a project, and aids the determination of the project unit boundary for purposes of layoff. A project is defined as being dedicated to doing that function for which a majority of its funding comes. These dedicated functions should not be disrupted. *Testimony, Blake, Tr. p. 82-85.* That is the idea behind separate layoff boundaries. Separate projects are under separate contracts with different operational needs; one contract should not impact another. For example, all of the Columbia Basin WIA project funding was lost. Those laid off employees could not impact these Columbia Gorge project employees: There is a "wall" between projects and between base employees and project employees.

With regard to the layoff process at issue here, the witness testified that it was handled the in the same manner as previous layoffs, governed by the status of the employee and their seniority. The Grievants have always been designated as project employees. The Union has always been notified of impending layoffs and has never grieved them. *Testimony, Blake, Tr. pp. 88-93.* The Union's requested remedy of statewide bumping rights would not fit the Agreement's limitations on projects unless the project was a statewide project. Here, the project's boundaries are contained within the Columbia Gorge office. These employees' status is determined when they are initially hired, and it is that status and position that is determinative. Their project work is their predominant work, and it doesn't prevent them from doing other work or charging that work to another funding source.

The Arbitrator must interpret and apply contractual language remorselessly, unless the Union comes forward with sufficient proof to challenge that language in its intent and application. That proof may come in several forms, including evidence

showing an ambiguity requiring reference to outside facts, evidence concerning contrary intent derived from negotiations, or later behavior by the Parties under or apart from the Agreement, that would constitute a. past practice, or provide compelling arbitral grounds for moving beyond the pronouncements of the Agreement. Here, the Union has asserted a course of dealing with the subject positions akin to a concept known as “past practice” as supporting the Grievants’ entitlement, a concept which, if proven, can result in a modification or expanded interpretation of contract language. In sum, it argues that the positions, requirements and pay existed for a substantial period, was known to and agreed to by the Parties, and must be applied to the Grievants’ activities through the present.

The Grievants’ testimony referenced a historical trend of continued funding for their positions through mixes of funding streams. The Grievants’ argument appears to be that because the ESD always found ways to fund their positions, doing so with a mixture of various grant contracts, such became the practice, and either removed these Grievants from “project” employee status to base employees, or, should be found to have ensured continued funding of the positions, or should permit seniority-based bumping beyond the Columbia Gorge WIA project.

The requirements for establishing a past practice are strict, and rightly so, as the practice becomes part of the contract between the Parties. The Union here bears the burden of proving by a preponderance of the evidence that a binding past practice has been established of guaranteeing funding and, in effect reconstituting these positions as base positions, and that the past practice has continued vitality. Arbitrators have pronounced the following as requirements for establishing a past practice:

Mutuality: Both Parties must consent to the practice and regard the practice as the normal, proper response to a particular situation.

Clarity and Consistency: This concept of specificity supports the mutual understanding of the Parties with regard to the practice, and provides the Arbitrator with security as to what he is enforcing.

Frequency and Duration: This requirement underscores the preference for a substantial history of the practice occurring with great frequency, supporting the element of the intent of the Parties with regard to the practice.

There are other phrases that are permutations of the above, but they all come down to the proposition that a pattern of behavior, no matter how often or how long repeated, does not become an established past practice without the knowledge and (at least implied) consent of both Parties. Without these tests, there is the risk of finding "agreements" between the Parties where none ever existed.

First, it should be noted that a past practice involves behavior between the *Parties*, not necessarily between the Employer and individual employees. The first test, mutuality, cannot be met in these circumstances. Given the funding realities of grants, the Employer cannot be found to have had the ability to contemplate, let alone consent to, an arrangement guaranteeing funding levels that would sustain the Grievants' positions. The remaining tests are tainted with that reality as well. There is thus an insufficient basis for finding clarity and consistency, or reliable frequency of a practice, so as to vest it with the standing of a binding past practice. In sum, there is no established past practice of keeping project positions funded, or of evolving, by continued funding, project employees into base employees. As to these Grievants being able to reach across contractually funded projects for the purposes of seniority-based bumping, there is no evidence of this ever having happened in the past. If there is a "past practice" or course of dealing here, it is that the Employer has traditionally had cross-program work, and,

when project funds have been cut, has laid off employees within their projects only, without seniority-based bumping rights being applied beyond a project, as defined by its administrative or geographical boundary, or across projects. Credible testimony, uncontroverted, established that the Union had been aware of the ESD's layoff practices for a considerable period without grieving them.

Testimony offered by Grievants included assertions that they believed they were, or had become, regular ESD employees, by virtue of their long term experience of and in the workplace, as well as by performing work associated with base work; alternatively, they assert that the mixture of work on behalf of other grants entitled them to cross project lines for seniority-based bumping rights. This line of reasoning sounds in terms of creating or implying a new contractual arrangement based upon the Employer's management of the Grievants, including the programming of their work. The first assertion suggests that the Grievants were, in a manner, lulled over time into coming to understand that they were regular base employees. It may be true that the Employer might have done more to educate the Grievants as to the nature and implications of their appointment, an appointment, in some cases, chosen. However, the Employer has not done so little as to support a finding that the Employer has taken affirmative steps that misled the Grievants as to the nature of their appointment. The engagement letters and subsequent documentation adequately give notice of project status. *Er. Ex. 2. pp. 1, 2. Er. Ex. Pp. 3-5.* Moreover, these are represented employees, with their Union available as a resource. Finally, the Grievants had been exposed to and became somewhat familiar with the vagaries of the funding game, and could not have reasonably believed it to provide security. As to the ramifications of performing a mix of work across project lines, with no "wall" between such work, and arguing that no corresponding "wall" should be found

between projects for purposes of layoff, credible testimony, uncontroverted, established that the WIA grant, and the law supporting it, permit project employees to work on other projects, and on base work. Likewise, such testimony established the history of cross project work and the legitimate purposes for not permitting cross-project seniority based bumping.

The Arbitrator finds that the Grievants were not misled by the Employer into believing they possessed a job structured as other than project employment, nor was the course of dealings such that an implied contract of base employment or other equitably based theory creating a different interpretation of the contract of employment, or a different contract, is found to have arisen by virtue of the Grievants' dealings with the Employer, or their matriculation in the workplace.

The Arbitrator has not been presented with a sufficient basis to view the Agreement of July 1, 2009, as other than the best evidence of the intent of the Parties, or to apply the contract in other than the straightforward manner that it prescribes, and in which it has been applied by the Employer with regard to the layoffs which are the subject of this arbitration.

There is no question that these Grievants have been hard-working contributors to the mission of the ESD, a praiseworthy mission. That an agency like the ESD must constantly struggle to cobble together funds to provide its services is a regrettable comment on our times. Grant-dependent project employment has the potential to create substantial hardship for the employees so designated, especially those of long standing employment. It may be of little comfort that the employees who were retained under the ARRA project have the same sword hanging over their heads. The equities and values attending the workplace, the tradeoffs, are deemed in arbitral practice to have been

considered and merged in the Parties' discussions and proposals at the negotiating table. On this record, given the language of the Parties' Agreement, and the lack of a cognizable basis for finding otherwise, the Arbitrator finds that the Employer's actions in laying off the Grievants did not violate the Collective Bargaining Agreement.

### **CONCLUSION**

The Union did not sustain its burden of proving by a preponderance of the evidence that the Employer was in violation of the Collective Bargaining Agreement between the Parties when, on July 1, 2010, it proceeded with its process of laying off the Grievants, limiting their layoff rights to their WIA project sited at Columbia Gorge. The Arbitrator will enter an award consistent with this conclusion.

