

IN THE MATTER OF THE ARBITRATION BETWEEN  
WASHINGTON FEDERATION OF STATE EMPLOYEES

And

THE STATE OF WASHINGTON

BEFORE IMPARTIAL ARBITRATOR: DOROTHY A. FALLON

Grievant: GWEN LEDFORD

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### **OPINION AND AWARD**

Appearances:

For the Union: Greg Rhodes, Esq.  
Gwen Ledford

For the Employer: Courtlan Erickson, Asst. Attorney General  
Steven Albright  
Coleen Blake  
Cheri Lingle  
Christina Peterson

### **INTRODUCTION**

Pursuant to the terms of the Collective Bargaining Agreement (CBA) in effect from July 2011 – June 30, 2013, between the State of Washington (the Employer) and the Washington Federation of State Employees (the Union), I was selected to serve as impartial arbitrator in the above referenced matter. A hearing was held on October 21, 2014 in the State offices located at 7141 Clearwater Drive, Tumwater, Washington. The parties were represented by counsel, and each had a full opportunity to call and present witnesses, to adduce evidence, to cross-examine witnesses and to argue their respective positions. All witnesses testified under oath and Grievant Gwen Ledford was present throughout the hearing. A transcript of the hearing was made and copies were provided to the Union, Employer and Arbitrator. As neither party raised objection to the fairness of this proceeding,

the record was closed upon the receipt of Closing Argument(s)/Post-Hearing Brief(s) on December 10, 2014.

The following is the:

### **ISSUE**

Did the Employer violate the terms of Article 42.7, 42.11, or 42.21 of the 2011 – 2013 CBA when it issued an overpayment notice to Gwen Ledford on June 3, 2013? If so, what shall be the remedy?

### **FACTS IN EVIDENCE**

The parties agree that there are few facts in dispute in this matter. The parties are in disagreement over the meaning and application of terms of the CBA, Article 42.7 Salary Assignment Upon Promotion, 42.11 Reversion, and 42.21 Salary Overpayment Recovery. The Employer maintains an agency, the Office of Employment Security (ESD) to provide unemployment benefits to State residents. The Employer employed Ms. Ledford from 2008 through August 2013 in ESD in positions of increasing responsibility, as she progressed from an Unemployment Investigator (UIS) Level 1 to UIS Level 3. Ms. Ledford currently is employed in another agency. In June 2010, Ms. Ledford was notified of having a temporary assignment to a UIS Level 4 position. She performed in that role for slightly more than one year at a rate set forth in the CBA and initially communicated in a memo from Tele-center Manager Steve Albright, and subsequently by the Appointing Authority, the Deputy Commissioner. (Exh. J #3, J #4) Mr. Albright testified as to the process for interviewing, recommending and selecting candidates for positions, relating that the managers directly involved are not authorized to make final decisions and/or salary determinations. Such responsibility rests, according to Mr. Albright, with the agency appointing authority, typically

at the assistant commissioner level, and with the Human Resource Department. There is no dispute as to the handling of Ms. Ledford's salary in the non-permanent position.

In 2011, when the UIS Level 4 position was permanently approved, Ms. Ledford was unsuccessful in the selection process and informed that she would return to her original UIS Level 3 position. Ms. Ledford testified that her immediate supervisor indicated that Manager Albright had said he was going to hold her pay at the level she had attained in the UIS Level 4 position. No record of such action is in evidence, and Mr. Albright denied making such indication. In a letter dated July 21, 2011, the ESD Administrator Lynette Destefano officially notified Ms. Ledford of her return to the UIS Level 3 position. (Exh. J #5) This letter made no mention of the salary to which she would return.

Employer witness Coleen Blake, who worked in the Human Resources Department at the State for over 30 years, testified extensively about job classifications, salary ranges, salary step increases (which are periodic increases given at intervals for time in position) and typical business practices. Ms. Burke reviewed the rates of pay provided to Ms. Ledford during the period of her temporary assignment and upon her return to the UIS Level 3 position. (Exh. J #2) Ms. Blake explained how she discovered that Ms. Ledford, without explanation, was assigned in her Pay Range 48 to Step L. At this time, Ms. Burke was engaged in an audit for unrelated purposes. Effectively, while serving as a UIS Level 4 Ms. Ledford was at a base pay of \$3355/month. When assigned back to the UIS Level 3 position she was given a rate of \$3704/month, an increase of \$349 per month. Ms. Blake's undisputed testimony was that State practice has consistently been that when a person returns *"from a non-permanent, they are placed back into the class level they were in the range. And then any periodic increases they would have received while they were gone are factored in, so they are returned as if they had never left that position."* (Trans. pp 61-65) Thus, as Ms. Blake explained, following past established practice, Ms. Ledford should have been placed at Step J with periodic increases added. Ms. Blake's audit also uncovered

others who were being incorrectly paid. When Ms. Blake completed her examination of pay rates, she notified her supervisor Cheri Lingle of the discrepancy between what she believed should have been paid and what was being paid for each employee. Ms. Lingle verified there was no agreement to pay Ms. Ledford the higher rate and notified her there was an overpayment, which would have to be returned to the State. (Exh. J #8) Ms. Ledford availed herself of the grievance procedure leading to the matter in arbitration.

Ms. Blake also testified as to how the discrepancy between what Ms. Ledford should have been paid and what was approved might have occurred. When an investigation into the salary was conducted, there was no “salary exception” indication, even though the form setting her salary at Level L had been processed through the appropriate agency authority. Ms. Blake explained that at that particular point in time, the administrative assistants to the agency administrators were allowed to put such payroll actions through without the executive having personally reviewed such documents. (Exh. J #7 and Trans. pp 102-106)

The pertinent provisions of the CBA are as follows:

Article 42.7 Salary Assignment Upon Promotion was applied when Ms. Ledford accepted a temporary assignment, and there is no dispute as to the correct assignment of wages at that time. Article 42.11 Reversion states:

*Reversion is defined as voluntary or involuntary movement of an employee during the trial service period to the class the employee most recently held permanent status in, to a class in the same or lower salary range, or separation placement onto the Employer’s internal layoff list. Upon reversion, the base salary the employee was receiving prior to promotion will be reinstated.*

The parties agree that while this particular language in the CBA may be instructive, Ms. Ledford was not involved in a “Reversion” as she was not within a trial service period during her temporary assignment to the non-permanent UIS Level 4 position.

Article 42.21 Salary Overpayment Recovery states:

- A. *When an agency has determined that an employee has been overpaid wages, the agency will provide written notice to the employee which will include the following items*
  1. *The amount of the overpayment,*

2. *The basis for the claim, and*
3. *The rights of the employee under the terms of this Agreement.*

*B. Method of Payback*

- paying back the*
1. *The employee must choose one of the following options for overpayment*
    - a. *Voluntary wage deduction*
    - b. *Cash*
    - c. *Check*
  2. *The employee will have the option to repay the overpayment over a period of time equal to the number of pay periods during which the overpayment was made, unless a longer period is agreed to by the employee and the agency. The payroll deduction to repay the overpayment shall not exceed five percent (5%) of the employee's disposable earnings in a pay period. However, the agency and employee can agree to an amount that is more than the five percent (5%).*
  3. *If the employee fails to choose one of the three options described above, within the timeframe specified in the agency's written notice of overpayment, the agency will deduct the overpayment owed from the employee's wages. This overpayment recovery will take place over a period of time equal to the number of pay periods during which the overpayment was made.*
  4. *Any overpayment amount still outstanding at separation of employment will be deducted from their final pay.*

*C. Appeal Rights*

*Any dispute concerning the occurrence or amount of the overpayment will be resolved through the grievance procedure in Article 29 of this Agreement*

## **UNION POSITION**

The Union claims that it has, by the preponderance of evidence, met its burden to show the Employer did not pay Ms. Ledford an illegal or impermissible salary, and the Employer explicitly sanctioned that salary prior to paying it. The Union avers that it is possible, though not the Employer's past practice, to recognize the skills developed when an employee assumes a non-permanent position. The Union posits that assignment of a higher salary is not precluded by the CBA.

Additionally, the Union claims that the overpayment claim of the Employer cannot exist where such payment was designated and approved by all in the appropriate chain of command. The Union argues that the documentary evidence supports the finding that all involved in the normal course of the approval process

signed off on the submitted paperwork, and thus the newly established rate was designated by those charged with such responsibility. The Union submits that the new salary was within the range for the classification under the existing CBA, and thus allowable.

The Union further argues that it never opposed the action of placing Ms. Ledford at the higher salary, and that nothing in the CBA prohibited the Employer from approving the higher salary. Consequently, the Union posits that permitting the Employer to mishandle a salary action and then to return to said action years later and claim an error is an untenable position that should not be allowed by the arbitrator.

Finally, the Union asks the arbitrator to sustain the grievance.

### **EMPLOYER POSITION**

The Employer asserts that the CBA is silent regarding the salary an employee should receive when the employee returns from a non-permanent appointment to the employee's permanent job classification. The Employer argues that Ms. Ledford did not in fact experience a "reversion" since she was not involved in a trial service period. The Employer opines that since the Union bears the burden to prove a violation of the CBA and no specific provision addresses the exact circumstance of this case, the Union cannot prevail in its argument. The Employer further claims there is no dispute over the amount that was overpaid, based on the established past practice nor the method used to recover the overpayment.

The Employer posits that absent a specific provision in the CBA, the Employer properly applied its uniform past practice when Ms. Ledford returned from her non-permanent appointment and asserts that the details of why and how of the mistaken assignment of a higher than "due" salary can only be viewed as an error.

The Employer claims that the combination of long established practice and the absence of a "Salary Exception" request affirm the higher salary was inappropriate. Further, the Employer admits the inappropriate action was a regrettable mistake, as was the length of time it took for discovery. The Employer, while admitting the mistake, argues that it is still bound to recover the overpayment.

The Employer asserts that the action to recover the overpayment was justified as it properly addressed the absurd result of an employee receiving higher pay when moving back to a lower-level position. Given the reduced amount of responsibility in the UIS Level 3 position, the Employer avers, there can be no justification for a higher salary.

Additionally, the Employer opines that once the overpayment was determined, it was required by the CBA to take the steps necessary to recover the excess payment. To ignore that requirement, the Employer argues would be impermissible under the CBA and violate the State's own policy, accounting requirements and State law.

Finally the Employer asserts the Union case failed to meet the burden of proving a violation of the terms of the CBA and therefore asks the Arbitrator to deny the grievance.

## **DISCUSSION**

I find the evidence does not support the Union position and I do so for the following reasons:

First, an arbitrator is bound by the terms of the CBA and how that agreement is interpreted and applied in the workplace. In this instance, the absence of a specific provision addressing the manner in which a salary is to be adjusted upon return to a permanent position, from a non-permanent position, places a difficult burden on the Union. When the CBA does not address a specific issue, I as an arbitrator must rely on established practices for persuasion that a term or condition of

employment has been recognized and then violated. The Union does not here argue that the CBA addresses this set of facts. The burden is for the Union to show by the preponderance of the evidence that such past practice has been inconsistently or haphazardly applied, or that the unique circumstances of this case supports its position or warrants consideration. In this instance, the evidence establishes the Employer acted consistently when returning employees to a lower level position after a temporary non-permanent assignment. The record is clear that temporary assignment to non-permanent positions is a common occurrence in State government agencies. Ms. Blake, who testified with more than 30 years of experience, indicated that not once could she recall a situation where a person returning to a lower level assignment was granted a higher level of pay than what they had been earning in the temporary assignment. While the Reversion language of Article 42.11 is not explicitly pertinent here, it is helpful in showing standard practice. A person is treated as though they never left their former position. The record is vacant of evidence showing anyone was treated differently when being returned to a permanent position after an assignment to a non-permanent position.

Next, while the Union argues valiantly that the increase in pay was approved through the proper channels, and it therefore cannot be viewed as an overpayment, I am not persuaded. It defies all reason that a person should get a "raise" when moving into a lower level position. While I agree the CBA does not prohibit the assignment of a higher salary, the record is void of any suggestion that such action was considered in this instance. Ms. Ledford claimed her supervisor indicated Mr. Albright had indicated he would hold her salary at that of a Level 4. Nothing in evidence suggests Mr. Albright would approve a "raise" for Ms. Ledford as she returned to her former Level 3 position. Absent more compelling evidence, I am left to find this was perhaps simply a supervisor trying to ease the pain Ms. Ledford felt

after she failed to earn the permanent position. Regardless, nothing in evidence supports her being given a salary higher than what she was earning in the non-permanent position.

Absent evidence that the manager or authorizing authority intended the higher level pay, I am left to view the salary assignment as a mistake, albeit one with significant impact on the grievant. With the testimony of Mr. Albright, Ms. Lingle and Ms. Burke, there is no doubt that the “system” of checks and balances failed miserably. No one, it appears, fully considered the documents that moved from one person in the agency to another. The testimony that administrative assistants were essentially given the responsibility to “approve” without further review, salary actions on behalf of those charged with such responsibility, is alarming. While this may have been in violation of State Policy or Regulations, it does not create a violation of the CBA. Violations of State Policy or Regulation are outside the purview of this arbitration.

Next, the Union understandably argues that the length of time it took to discover the overpayment should not be ignored in my consideration. While I might agree that it should not have taken well over a year for the mistake to be discovered, it appears unlikely that this is an extraordinary situation. Having specific contract language related to recovery of overpayment of wages suggests this is not the first time this has occurred. Indeed, Ms. Burke discovered other errors in the audit. Ms. Ledford was not the only one being paid the incorrect salary. Evidence was not provided regarding any of those other employee experiences. Importantly, Article 42.21 provides no time limit or required methodology for the State to discover an error, nor a cap on the amount that might be recovered. The provision simply states that *“When an agency has determined that an employee has been overpaid wages...”*

The contract is unambiguous that when an error is discovered, the State will notify the employee and will take the steps necessary to recover the overpayment. The Union's position that she "could have been" and therefore "should have been" held at the higher salary level is not sustained in the record. It is undisputed that Ms. Ledford aided in the introduction and training of the permanently assigned person, and then returned to the USI Level 3 duties. It is worth noting that Ms. Ledford was not obligated to notify management when she realized something was incorrect in her pay a few months after returning to the Level 3 duties. Had she brought any question or thoughts forward, the timeline for correction would have been far shorter. Ultimately, I find no evidence of a violation of Article 42.21 occurred.

In conclusion, I find the Employer evidenced an established practice for those instances when a person returned to a position held immediately before assuming a non-permanent assignment, adjusted for increments, and the Union failed to evidence a violation of the CBA. I hereby issue the following

**AWARD**

The Employer did not violate Article 42.7, 42.11, or 42.21 of the 2011 – 2013 CBA when it issued an overpayment notice to Gwen Ledford on June 3, 2013 and engaged in overpayment recovery. The grievance is therefore denied.

Date: December 16, 2014

*DOROTHY A. FALLON.*

DOROTHY A. FALLON, ARBITRATOR

Arbitrator Dorothy Fallon  
WFSE and  
State of WA  
Grievant: Gwen Ledford

**AFFIRMATION**

On this the 16<sup>th</sup> day of December 2014, I Dorothy A. Fallon, do hereby affirm that I have executed the foregoing as my OPINION AND AWARD.

**DOROTHY A. FALLON**