

**AMERICAN ARBITRATION ASSOCIATION
BEFORE ARBITRATOR PAUL M. GRACE
Case No. 75 390 00369 12 TAFL
Washington Federation of State Employees and
State of Washington / Washington State Patrol
Edwin Lord et al. Grievance**

In the Matter of the Arbitration)
Between)
Washington Federation of Public Employees) **ARBITRATOR'S**
And) **DECISION**
Washington State Patrol, State of Washington)
_____)

Representatives:

For the Federation:

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June 17, 2013

Paul M. Grace
Labor Arbitrator

I. INTRODUCTION

At issue is a grievance between the Washington Federation of State Employees (the “Union”) and the Washington State Patrol of the State of Washington (the “Employer”). They are parties to a collective bargaining agreement (the “Agreement”), effective July 1, 2011 through June 30, 2013. At an arbitration hearing on the merits of the grievance on April 18, 2013 at Employer’s offices in Olympia, Washington, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn and affirmed witnesses, and argue the issues in dispute. At the hearing, the parties stipulated that the dispute was properly before the Arbitrator and that he had jurisdiction to issue a final and binding award. They also agreed that for the purposes of an award, should there be one, the Arbitrator would retain jurisdiction for 90 days after issuance. Upon receipt of closing briefs filed by both parties on May 23, 2013, the Arbitrator declared that the hearing was closed and the case was fully submitted for decision.

II. STATEMENT OF THE ISSUE

The parties submitted the following joint statement of the issue:

Did the State of Washington, Washington State Patrol, violate Article 16 of the collective bargaining agreement by and between the State of Washington and the Washington Federation of State Employees (WSFE), 2011-2013, as it pertains to the facts of this case?
And if so, what should the remedy be?

III. SUMMARY OF THE EVIDENCE

The Washington State Patrol operates an Aviation Section at the airport operated by the Port of Olympia, Washington. At the facility, it employs three Jet Aircraft Technicians and an Administrative Assistant who are members of the Union. The Technicians (Edwin Lord, Shannon Francisco and Gary Bade) are the Grievants in this matter.

On January 18-19-20, 2012, Western Washington State experienced a severe winter storm that resulted in the closure of many State highways and facilities. The Aviation facility had no power from the afternoon of January 18 until the following week. The three Jet Technicians were not able to get from their homes to the Aviation Section and took paid leave for the days they could not get to work.

During the three days that are the subject of this grievance, other State Patrol employees did get into work at the facility: Lieutenant Nobach, the Commanding Office of the Section, and several trooper pilots. The Lieutenant made the decision to keep the facility open due to the emergency nature of the Section's mission. He and the pilots plowed snow around the facility and in the parking lot and ensured that aircraft were operationally ready for flight. The Lieutenant testified that he received calls from the governor's office asking the Section to ready an aircraft. The Grievants returned to work the following week.

The Union filed a grievance on February 7 alleging that the worksite should have been declared non-operational because of its lack of power. For a remedy, the Union sought restoration of the Grievants' leave for January 18-19-20. It also sought that the Employer's commanders would "provide leadership during inclement weather and work alongside bargaining unit employees required to work at worksites where heat or electricity has been lost." (Ex U1) The Employer responded on March 16 denying the grievance, noting that management had deemed the Aviation worksite operational, that significant work could have been accomplished by the Grievants, and that the Grievants had been unable to report to work. (Ex E6) A Step 3 meeting was held on April 10, and the Employer responded on April 13, again denying the grievance. It noted that it is the Employer's decision whether a worksite is operational or non-operational and its right to direct the workforce. (Ex E7) The parties then filed a request for arbitration with the American Arbitration Association.

IV. RELEVANT CONTRACT PROVISIONS

Article 16 / Severe Inclement Weather and Natural Disaster Leave

16.1 If the Employer decides that a state office or work location is non-operational or inaccessible, due to severe inclement weather, conditions caused by severe inclement weather, natural disaster or other emergency circumstances, the following will apply:

A. Non-emergency employees will be released with no loss of pay during the disruption of services, unless:

B. Non-emergency employees are able to be reassigned to similar positions at locations within a reasonable driving distance from the non-operational location during the disruption of services; or

C. At the discretion of the Employer, non-emergency employees may be subject to a temporary reduction of work hours or temporary layoff consistent with Section 34.6 of Article 34, Layoff and Recall, of this Agreement.

16.2 If a work location remains fully operational but an employee is unable to report to work or remain at work because of severe inclement weather, conditions caused by

inclement weather or a natural disaster, the employee's leave will be charged in the following order:

- A. Any earned compensatory time or previously accumulated exchange time.
- B. Any accrued vacation leave.
- C. Any accrued sick leave, up to a maximum of three (3) days in any calendar year.
- D. Leave without pay.

Although the types of paid leave will be used in the order listed above, and each type of paid leave will be exhausted before the next is used, employees will be permitted to use leave without pay or their personal holiday rather than vacation or sick leave at their request.

Employees who report to work late because of severe inclement weather, conditions cause by severe inclement weather or a natural disaster will be allowed up to one (1) hour of paid time ... If the Employer suspects abuse, the Appointing Authority may deny an employee up to one (1) hour ... of paid time.

- 16.3** If the Director or Secretary or designee of any agency determines a state office or work locations is non-operational after the work shift has begun, employees will be released for the balance of the day without loss of pay. Any employee who was unable to report to work because of severe inclement weather, conditions caused by severe inclement weather or a natural disaster and is on leave in accordance with Subsection 16.2 of this Article, will be compensated for the balance of his or her work shift remaining after the determination that the state office or work location is non-operational and will not be charged leave for that time. An employee who is on approved leave for reasons other than severe inclement weather, conditions caused by severe inclement weather or a natural disaster will not have his or her leave restored.

ARTICLE 29 / GRIEVANCE PROCEDURE

29.3 Filing and Processing (Except Department of Corrections)

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;

E. Arbitration Costs

- 1. The expenses and fees of the Arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

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:

- A. Determine the Employer's functions, programs, organizational structure and use of technology.
- B. Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;
- C. Direct and supervise employees;

- D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies;
- E. Determine the Employer's mission and strategic plans;
- F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;
- G. Determine or consolidate the location of operations, offices, work sites, including permanently or temporarily moving operations in whole or part to other locations;
- H. Establish or modify the workweek, daily work shift, hours of work and days off;
- I. Establish performance standards which include but are not limited to, the priority, quality and quantity of work;
- J. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions;
- K. Select, hire, assign, reassign, evaluate, retain, promote, demote, transfer, and temporarily or permanently lay off employees;
- L. Determine, prioritize and assign work to be performed;
- M. Determine the need for and the method of scheduling, assigning, authorizing and approving overtime;
- N. Determine training needs, methods of training and employees to be trained;
- O. Determine the reasons for and methods by which employees will be laid-off; and
- P. Suspend, demote, reduce pay, discharge, and/or take other disciplinary actions.

V. POSITION OF THE PARTIES

Arguments for the Union

The Union's principal argument is that the Employer did not exercise appropriate discretion when it determined that its Aviation Section facility was operational during the winter storm on January 18-19-20, 2012. It cites the lack of power at the facility and severe inclement weather, as well as the closure of many other State facilities. It argues that the decision not to close the facility went against the negotiated intent of Article 16.

The Union cites numerous other operational requirements that could not be met on those days including access to on-line maintenance programs, sufficient cold weather apparel, and phone service so that technicians could perform work. It also notes that given the serious weather conditions, it would have been irresponsible to fly which would potentially endanger lives. It urges the Arbitrator to find that the Employer was arbitrary and capricious in determining that the facility was operational.

Arguments for the Employer

The Employer argues that Article 16.1 clearly and unambiguously gives the Employer, not the Union or individual employees, the authority to decide if a facility is operational or not. It notes

that where contract language is clear, that language controls. The Employer continues that the Union is asking the Arbitrator to modify the plain language of the Agreement by adding a definition of “non-operational,” and that is prohibited by Article 29-2 of the Agreement.

Lastly, the Employer argues that if the Arbitrator does examine whether the facility was operational, he would conclude that it was because the hangar could be opened; planes could fly; there were sufficient tools and light for the technicians to perform work; and there was a clear runway. In urging the Arbitrator to deny the grievance, the Employer notes that it was the employees’ choice not to come to work which required them to take leave.

VI. ANALYSIS & DECISION

Two questions must be addressed in reaching a decision in this case:

1. Is the Agreement clear and unambiguous that it is the Employer’s sole decision to determine if a work location is operational?
2. Did the Union meet its burden of proof that the Employer was arbitrary and capricious in its decision to keep the Aviation Section operational on January 18-19-20, 2012?

1. Is the Agreement clear and unambiguous that it is the Employer’s sole decision to determine if a work location is operational?

The Employer argues that there is no ambiguity in Article 16.1 that “the Employer decides that a state office or work location is non-operational or inaccessible, due to severe inclement weather.” (Emphasis added.) There is no qualifying clause in Article 16 that gives the Union a role in this decision-making. In his decision in Yale University (53 LA 482, 485, 1969), Arbitrator Sandler addressed a similar issue. The contract provision read that “the Division Manager (in consultation with the Union Steward) shall decide...” The Arbitrator ruled that if the Union wanted the contract to read “the Division Manager and the Union Steward shall decide” or “the Division Manager together with the Union Steward decide,” it would have to seek such a modification at the bargaining table, not from an arbitrator, particularly when that contract provided, as does this contract, that the Arbitrator may not “add to, subtract from, or modify any of the provisions of this Agreement.” (Article 29.D)

Notably, the Management Rights clause of the Agreement (Article 35) reinforces the specifically stated management right in Article 16.1. It reads in part:

... 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: ...

C. Direct and supervise employees;

D. Take all necessary actions to carry out the mission of the state and its agencies during emergencies; ...

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

The Agreement clearly and unambiguously gives the Employer the sole discretion to determine whether a work location is operational.

2. Did the Union meet its burden of proof that the Employer was arbitrary and capricious in its decision to keep the Aviation Section operational on January 18-19-20?

While the Agreement gives management the sole and exclusive right to determine if a facility is operational, there is one well established exception to following clear and unambiguous language: when it can be proven that a management decision was arbitrary or capricious. The Union is arguing in this case that the decision was arbitrary or capricious. This concept was explained by Arbitrator Stouffer in one ruling:

Management is entitled in the first instance to determine whether it has the required machinery, tools and equipment to perform a job ... If it be ultimately found that Management's judgment was arbitrary, capricious, unreasonable, or made in bad faith, then its decision may be set aside. However, a mere error in judgment is not in itself sufficient reason to set the same aside, provided it is made in good faith.

Green River Steel Corp., 41 LA 132,136 (Stouffer, 1963), cited in R. Schoonhoven, editor, Practice and Procedure in Labor Arbitration (third edition, 1991), 215

This same conclusion was drawn in the noted arbitration treatise, How Arbitration Works:

Even where the agreement expressly stated a right in management, expressly gives it discretion as to a matter, or expressly makes it the "sole judge" of a matter, management's action must not be arbitrary, capricious, or taken in bad faith.

Elkouri & Elkouri, How Arbitration Works (7th edition, 2012), 13-7, 8

Where the Union challenges a management decision, "it must sustain the burden of proving discrimination, caprice, arbitrariness or bad faith on the part of the employer or that the

employer's [decision] was clearly wrong." 42 LA 1093, 1096 Christy Vault Co. (Koven, 1964) Union representative Robyn Steacy testified that she communicated with the Employer's Labor and Policy Advisor on January 24, 2012 and received this response about the Employer's decision-making process:

Commanders within the WSP will consider the totality of circumstances in deciding whether an office work site is open. In the case of the Aviation hangar, the hangar did not close due to recent inclement weather. By relying on a combination of generator power, heaters, and issued equipment/apparel, commanders determined that significant work need to, and could be, accomplished. Therefore, the hangar did not close. (Ex U4)

The Union argues that because the facility was without power, phone or heat and that employees had no foul weather gear on January 18-19-20, management was in error in declaring the facility was operational. (Tr. 55-57) At hearing, Section Commander Lt. Nobach testified about his decision-making process:

...due to my longevity and my rank as lieutenant and section commander, it was based upon my decision whether the aircraft facility was open or closed. And then also knowing that we're an emergency service operation and provider, we briefed that we were open and ready. ... I looked at the overall operation, I looked to see if we could actually get the hangar open, get aircraft out, and availability of aircraft.

At that time our King Airs were up. Cessna aircraft were up. So the planes, of course, operated under their own power. They were fully functional, and so the facility was open. We did receive numerous calls to launch aircraft ... and then also during that time we received a call from the governor's executive protection unit, put on a ready alert that the governor may need the aircraft to tour the state.

... We [the Lieutenant and pilots] got the facility operational ready. We plowed snow with the tractor. We shoveled snow from the walkways. We cleared the parking lot, and we also worked with the Port to make sure we had an operational path to the runway on that day. (Tr. 120-122, 124)

As found by Arbitrator Hayes in Sandia Corp. 31 LA 338, 341 (1958), "Where the arbitrator is confronted with the evidence that reasonably supports the decision of the company, the decision should not be set aside." Based on the Lieutenant's uncontroverted testimony, the decision to maintain operations at the aviation facility was a difficult, but reasonable one, fully in line with the mission of the Section. Further, had the Grievants been able to travel to the worksite, they would have been assigned work and paid for those three days. The decision to keep the facility open was not arbitrary or capricious.

VII. CONCLUSION

The Employer's decision to maintain operations at the Aviation Section on January 18-19-20, 2012 was reasonable and not arbitrary or capricious. While another person may have made a different decision, the commander in charge, with full knowledge of the agency's mandate as an emergency operation, took steps to ensure that aircraft would be available should emergency need arise.

Further, Article 16.1 of the Agreement states clearly and unambiguously that it is the Employer's decision to determine the operational readiness of a facility. This management right is reinforced in the Management Rights provision (Article 35), which states in part that "the Employer retains all rights [to] take all necessary actions to carry out the mission of the state and its agencies during emergencies."

Because the Agreement gives management both specifically delineated decision-making authority in Article 16 and a residual management prerogative in Article 35 to manage during an emergency, and the Employer's decision to keep the Aviation Section operational on the days in question was reasonable and not arbitrary or capricious, the grievance is denied.

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Having carefully considered the evidence and arguments, the Arbitrator rules that:

1. The Employer was within its right to decide to maintain flight operations at its Aviation Section worksite on January 18-19-20, 2012.
2. The Employer's decision was neither arbitrary nor capricious.
3. Therefore, the grievance is denied.
4. Per Article 29.3.E.1, the costs and fees for the arbitration will be shared equally by the parties.

June 17, 2013

Paul M. Grace
Paul M. Grace
Labor Arbitrator