AMERICAN ARBITRATION ASSOCIATION
BEFORE ARBITRATOR PAUL M. GRACE
Case No. 75 390 00002 12 TAFL
Washington Federation of State Employees and
State of Washington Department of Corrections

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

Representatives:

For the Federation:
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October 24, 2012

Paul M. Grace
Labor Arbitrator

I. INTRODUCTION

At issue is a grievance between the Washington Federation of State Employees (the "Union") and the Department of Corrections of the State of Washington (the "Employer"). At an arbitration hearing on the merits of the grievance on October 5, 2012 at Employer's offices in Yakima, Washington, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine 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. Closing arguments were made at hearing by both parties, and upon receipt by the Arbitrator of the hearing transcript on October 18, the hearing was declared closed and the case stood fully submitted for decision.

II. STATEMENT OF THE ISSUE

The parties submitted the following joint statement of the issue:

Was Teresa Carlson properly laid off?
If so, was she provided the proper formal option?
If she was not properly laid off, what is the remedy?
If she was properly laid off but not provided the proper formal option, what is the remedy?

III. SUMMARY OF THE EVIDENCE

On June 8, 2011, Jessica Wammock, a Human Resource Consultant 3 (HRC) in Yakima, received notice that as a result of reorganization in the Organizational Development Unit, her position was being relocated to Walla Walla effective June 27. She had the contractual right to seek a position that she currently held or had status in rather than move to Walla Walla, which she chose to do on June 10. (Ex3)

After determining there were no HRC positions available, the Employer reviewed options available to Ms. Wammock and identified two Community Corrections Specialist (CCS) positions – Community Victim Liaison and Violent Crimes Task Force – filled by less senior employees. However, the Employer determined that she did not have the skills and abilities for either position. On June 20, the Employer offered her a formal option of moving to a Community Corrections Specialist (CCS) position in the Yakima Community Justice Center

(CJC) – Regional Housing Specialist SE98 – or to seek informal options within the Department. On June 23, she informed the Employer that she would accept the formal option of the CCS position at the Yakima CJC. (Ex3)

On June 16, Grievant Teresa Carlson, a CCS Regional Housing Specialist, was notified that due to the reorganization, her position was identified as a formal job option for a more senior employee, Jessica Wammock. Ms. Carlson was offered the formal option of a vacant CCO 3 position at the Yakima CJC (BF08), and told that she could also pursue informal options per the Agreement or place herself on the layoff lists of all job classifications for which she held permanent status. (Ex6) On June 20, she informed the Employer that she was accepting the formal option of the vacant CCO3 position at the Yakima CJC. (Ex7)

On July 7, the Union filed a grievance on behalf of Ms. Carlson alleging that the Employer had not followed the proper procedures in placing Ms. Wammock. The Union claimed Ms. Carlson should be returned to her CCS Regional Housing position, and reimbursed for any lost benefits and pay. (Ex1) In a grievance meeting on July 26, the Union argued that Ms. Wammock's option should have been to a less senior CCS position instead of bumping Ms. Carlson from her housing position, stating that Ms. Wammock could have received training to meet the job requirements.

After a grievance meeting on July 26, the Employer denied the grievance on August 1. The Union clarified its grievance by email stating the Department also violated the Agreement because the Union's executive director did not receive notice of the layoffs, per Article 38.1, 38.2. The Employer issued a revised denial to the grievance on August 31. It stated that the employee initially affected, Ms. Wammock, could not be offered the CCS position the Union alleged she should have because she (Ms. Wammock) did not have the required experience and mandatory qualifications. (Ex12) The Union then took the grievance to Step 4, filing a demand for arbitration with the American Arbitration Association.

IV. RELEVANT CONTRACT PROVISIONS

Article 4	Hiring and Appointments
Article 29	Grievance Procedure
29.3	Step 5 - Arbitration
29.4	Filing and Processing (DOC Non-Panel Process)

Article 34	Layoff and Recall
34.7	Layoff Units
34.8	Skills and Abilities
34.9	Formal Options
34.11	Notification for the Union
34.12	Notification to Employees with {Permanent Status
Appendix D	Layoff Units

V. POSITION OF THE PARTIES

Arguments for the Union

The Union argues that Department did not follow proper administrative procedures when a layoff situation resulted from a departmental reorganization. First, it posits that Ms. Wammock was qualified for the violent crime taskforce position and, had she been offered it, Ms. Carlson would not have been forced to find another position.

Next, it argues that, while it agrees that Ms. Carlson did not possess a firearms certificate, she should have been given a reasonable time to get it. It argues that the most important criteria in the contract is seniority and that as Ms. Carlson was more senior than the employee who filled the position, she should have been allowed time to get the certification.

The Union argues further that it was not its intent in agreeing to Article 34 that the Employer would have no flexibility to allow an employee to meet qualifications when that could be accomplished in a short time without disruption to the operation.

It asks that the Arbitrator order the Employer redo the layoff procedure, reallocate the employees, and reimburse Ms. Carlson for any back pay owed to her.

Arguments for the Employer

The Employer urges the Arbitrator to look at the plain language of the contract, noting that it does not state that an employee should be allowed time to obtain required job criteria. It further argues that changes in the contract can be made only through negotiations, not via an arbitrator's decision.

The Employer argues that it met all the requirements of the layoff procedures in Article 34. It first looked at the proper layoff unit, then the skills and abilities section. It reviewed all documented criteria noting that the first criteria mentioned was the required licenses and certifications. The Employer notes that the contract does not say a person can obtain a required certification after a layoff. It further notes that the formal options were offered in order of seniority to those with the required skills and abilities.

The Employer points to the skills and abilities language, which refers to documented criteria that must be met when determining an employee's suitability for a position. With regard to the violent crimes CCS position, the Employer argues that it determined correctly that neither Ms. Wammock nor Ms. Carlson met its documented criteria. However, Ms. Wammock met the criteria for Ms. Carlson's position and was offered that position.

The Employer disagrees that Ms. Carlson should have been allow time to get her firearms certification, noting that just because the firearms course was merely eight hours does not mean that Ms. Carlson would have passed the course. She had never carried a firearm or had a concealed weapon permit. The Employer also notes that after Ms. Carlson received the informal notice of the pending layoff and before she received formal notice, she could have taken the course and gotten her certification if she was able, completed a revised skills and abilities form, and been qualified for the job.

VI. ANALYSIS & DECISION

The Arbitrator will address three questions in reaching a decision in this case:

1. Did the Employer use the proper layoff and option procedures?
2. Should the Department have provided a reasonable time for the Grievant to get her firearms certification to meet the skills and abilities requirement?
3. Does the Arbitrator have the authority to allow the Grievant time to get her certification and to order a reallocation of positions?

1. Layoff and Option Procedures

The Union argues that the Employer made several errors in its layoff procedures. First, it argues that Ms. Wammock was qualified for one of the CCS positions for which the Department determined she was not qualified, and had the Employer determined differently, the Grievant

would not have been bumped from her CCS Regional Housing position. Next, it argues that Ms. Carlson's experience supervising sex offenders from 1999 to 2002 involved criminal investigations and apprehension and met the criteria for the CCS violent crimes and community victim positions. Lastly, it argues that Ms. Carlson should have been allowed reasonable time to get the required firearms certification, which would have qualified her for the CCS Violent Crimes Taskforce position.

After listening to Ms. Carlson's testimony at the hearing, the Employer's human resource manager, J'Anna Young, appeared convinced that Ms. Carlson's experience supervising sex offenders met some of the qualifications as described in the Violent Crimes Taskforce Position Description. (Ex 4c) However, she maintained that Ms. Carlson was not qualified because she did not have a primary qualification, a firearms certification. Ms. Young maintained she did not have authority to give Ms. Carlson time to "train up." (TR 75-76)

After reviewing the evidence, both documentary and testimonial, the Arbitrator finds no error in the Employer's judgments about Ms. Wammock's qualifications and finds that in general the Employer's procedures were followed as required by Agreement. The one exception is noted above. However, even if Ms. Carlson had been credited with the supervisory experience, it is undisputed that she would not have met this documented firearms requirement:

> Carrying firearms is mandatory. It requires successful completion of the firearms academy, psychological screening, Level 1 and 2 defensive tactics, ground fighting and weapons retention. Required to work with and around armed officers. (Ex4c)

The issue of flexibility in getting a firearms certification is addressed below.

2. Skills and Abilities

The Employer argues that an employee's skills and abilities are a key requirement in determining suitability for a position, and that the Agreement requires that these criteria be met with each formal and informal layoff and recall option. It also argues that staff's determinations that Ms. Wammock and Ms. Carlson did not meet certain criteria were accurate based on their reading of the Position Descriptions (Ex4 a, b, and c) and the employees' training records. (Ex5, Ex8)

There was no dispute that the skills and abilities criteria for all positions at issue in this grievance met the requirement of Article 34.8, namely that they were:

> found in license/certification requirements, federal and state requirements, position descriptions, bona fide occupational qualifications approved by the Human Rights Commission or recruitment announcements that have been identified at least three (3) months prior to the layoff.

This emphasis on skills and abilities is found in numerous provisions of the Agreement in addition to Article 34, the layoff and recall article. For example, when filling a position as noted in Article 4.1:

> Only those candidates who have the position-specific skills and abilities required to perform the duties of the vacant position will be referred for further consideration by the employing agency. *(Emphasis added)*

This language is repeated in Article 4.F.2 when addressing filling a vacant position and there are no names on the internal layoff list: "All candidates certified must have the position-specific skills and abilities to perform the duties of the position to be filled." *(Emphasis added)*

The Arbitrator concludes that given the prominence and repetitiveness of the phrase "skills and abilities" throughout the Agreement, the parties must have intended that meeting the documented criteria was a core job requirement.

3. Flexibility and the Arbitrator's Authority

The Union argues that the Arbitrator should interpret the Agreement to include some reasonable time for an employee to attain a job-required skill or ability she or he may be lacking if that is the only impediment to getting a position. In this case, it argues that the Employer should have given Teresa Carlson reasonable time to get her firearms certification and that this flexibility was the intent of the Agreement.

Arbitrator Murphy's holding on this point is germane:

> "[the] intent manifested by the parties to each other during negotiations by their communications and their responsive proposals – rather than undisclosed understandings and impressions – is considered by the arbitrators in determining contract language." Kahn's & Co., 83 LA 1225, 1230 (Murphy, 1984), cited in How Arbitration Works, 456.

There was no evidence presented at the hearing that the parties discussed this matter in negotiations and intended to read such flexibility into otherwise plain language requiring that employees to have all the skills and abilities to meet job criteria. Further, when questioning witnesses, the Union's counsel was not clear himself if that flexibility was meant to be a few extra hours, a few days, or a few months.

Importantly, the agreed-upon language makes it clear that the Arbitrator has no authority to rule that Ms. Carlson should have been given time to get her firearms certification. As noted by a respected arbitration treatise:

> An arbitrator cannot 'ignore clear-cut contractual language' and 'may not legislate new language, since to do so would usurp the role of the labor organization and employer.' Elkouri & Elkouri, How Arbitration Works (sixth edition), 435-436, citing Clean Coverall Supply Co., 47 LA 272,277 (Witney, 1966)

Article 29.D.1 states that the arbitrator will have "no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement." To do as the Union suggests would be to modify the Agreement unilaterally, in violation of Article 29. The proper venue to explore this modification of the Agreement is in collective bargaining.

The Union also claimed that the Employer failed to notify it of this layoff action, in violation of Article 34.11. However, no evidence was presented at hearing on this allegation.

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

1. The Employer followed proper layoff and option procedures with regard to Teresa Carlson, per Article 34.
2. The Arbitrator is prohibited from adding to or modifying the Agreement, per Article 29.3.
3. Therefore, the grievance is denied.
4. Per Article 29.3.E, the costs and fees for the arbitration will be shared equally by the parties.

October 24, 2012

Paul M. Grace

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Labor Arbitrator