PROCEEDINGS POST AWARD

Subsequent to the receipt of the Arbitrator's Award, the Parties apparently engaged in discussions regarding their possible reactions, as suggested by e-mails the Arbitrator received noting those discussions. Possible settlement and/or clarification of the award by the Arbitrator appear to have been among the topics of those discussions. At any rate, those discussions appear to have been unproductive, and the Arbitrator was served with the following pleadings by the Parties:

RESPONDENT'S MOTION FOR CLARIFICATION OF ARBITRATOR'S OPINION AND AWARD, dated June 30, 2011.

DECLARATION OF MARCOS RODRIGUEZ IN SUPPORT OF RESPONDENT'S MOTION FOR CLARIFICATION OF ARBITRATOR'S OPINION AND AWARD, dated June 28, 2001.

UNIONS OPPOSITION TO RESPONDENT'S MOTION FOR CLARIFICATION OF ARBITRATOR'S OPINION AND AWARD, dated August 12, 2011.

RESPONDENT'S REPLY TO UNION'S OPPOSITION TO MOTION FOR CLARIFICATION OF ARBITRATOR'S OPINION AND AWARD AND REQUEST FOR HEARING, dated August 24, 2011.

UNION'S OPPOSITION TO RESPONDENT'S REQUEST FOR HEARING, dated August 29, 2011.

On November 10, 2011, the Arbitrator rendered a decision directing that a hearing should be held on the matter of clarification of his Award. The hearing attending clarification of the Arbitrator's ruling was held on January 25, 2012. The Parties timely filed post hearing briefs, and the matter was deemed closed on March 22, 2012.

BACKGROUND

This matter is here upon the Department of Correction's (hereinafter "DOC," "Agency," or "Employer"), MOTION FOR CLARIFICATION OF ARBITRATOR'S AWARD AND REQUEST FOR HEARING, submitted after the entry of the Arbitrator's award herein. The arbitration generating the May 5, 2011 Award arose as a result of the Agency's actions taken in response to ESSB 6503, which called for the reduction of compensation costs across the State's several agencies, including the DOC, a department of, and standing in the shoes of the State. The legislation provided alternative routes in pursuit of that goal: Agencies had the option to formulate their own compensation reduction plan for approval by the Office of Financial Management, or, failing that, agencies would "close" on specified days, and employees would be laid off on those days. An exception was made in the case of DOC officers who were responsible for direct inmate supervision. The DOC did not formulate its own cost reduction plan or pursue any other alternative to the statute's default procedure, agency closure resulting in the layoff of employees, and directed all non-exempt personnel across all other classifications, without regard to seniority, not to report to work on the specified days. The Union grieved the DOC's action based upon lost hours of work and violation of seniority. The Parties disagreed on the issue to be submitted to arbitration: The Union stated the issue as: "Did the Employer violate the Collective Bargaining Agreement ("CBA", or "Contract') when it furloughed bargaining unit employees, and if so, what is the remedy?" The Employer stated the issue as, "Did the Department of Corrections violate the Collective Bargaining Agreement, the particular Articles at issue being 16, 26, 35, 44, and 45, when it implemented temporary layoffs as required by Senate bill 6503, and if so, what is the remedy?" Given the stipulation of the Parties so to act, the

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

Exhibit H, Award, p. 5.

The Arbitrator found that (1) The Contract between the Parties required the DOC to observe seniority in implementing temporary layoffs, and (2) The DOC violated the Contract by conducting the subject temporary layoffs without regard to seniority. The Arbitrator directed the DOC to "make employees affected by its action whole for any economic losses resulting from the Employer's action, including, but not limited to, lost wages and interest thereupon.” The Arbitrator retained jurisdiction “for the purpose of resolving disputes regarding the remedy directed herein." *Award, p. 26.* Within that sixty (60) day retention period, the DOC made a written "Motion for Clarification," supported by a Declaration made by a DOC Human Resources official, Marcos Rodriguez. The Employer's motion points to the analysis made in the declaration as establishing that, even if DOC had taken into account seniority in conducting the temporary layoffs required by ESSB 6503, the same employees would have been temporarily laid off. DOC has determined that no employees fall into the category of having been affected adversely by is action; thus, no DOC employees are entitled to reimbursement. *Er.’s MOTION, p. 2.* The Union, while agreeing that the Arbitrator may clarify his Award, argues that the Arbitrator is limited to clarifying the Award based on the issue(s) presented at the hearing.

PERTINENT PROVISIONS FROM THE COLLECTIVE BARGAINING AGREEMENT AND STATUTORY PROVISIONS

ARTICLE 35

LAYOFF AND RECALL

35.4 Temporary Layoff

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

35.5 Layoff

Employees will be laid off in accordance with seniority…

ESSB 6503

NEW SECTION. **Sec. 3. § 1 (b)** Each executive state agency...may submit to the office of financial management a compensation reduction plan to achieve the cost reductions as provided in the omnibus appropriations act. The compensation plan of each executive branch agency may include, but is not limited to, employee leave without pay, including additional mandatory and voluntary temporary layoffs, reductions in agency workforce, compensation reductions, and reduced work hours, as well as voluntary retirement, separation, and other incentive programs…

NEW SECTION. **Sec. 3 § (2)** Each state agency…and any institution that does not have an approved plan in accordance with subsection (1) of this section shall be closed on the following dates (omitted).

NEW SECTION. **Sec. 4.**

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

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

Position of the Employer:

A summary of the Employer's position with regard to its request for clarification is stated as follows:

The decision before the Arbitrator is now "all or nothing:" that is, whether all of the employees laid off as a result of the Employer's actions are entitled to the relief of the Arbitrator's make-whole remedy, or whether none of them are so entitled. There are two reasons why none of the employees are entitled to back pay:

1.) The Employer's action of laying off employees without regard to seniority did not affect employees any differently than had such layoffs been conducted with regard to seniority because of the provisions of ESSB 6503:

ESSB 6503 required a series of one-day temporary layoffs of all employees not exempt under its provisions. Because of that law's requirements, no employees were adversely affected. The DOC processes temporary layoffs differently than permanent layoffs. In the case of permanent layoffs, positions to be eliminated because of funding, lack of work, or reorganization are identified. Seniority is then considered to determine what "formal options"/alternative positions a laid-off employee might exercise under the Contract. Exercising a formal option may result in an employee being bumped. In conducting ESSB 6503 layoffs, the Human Resources Manager considered that bumping is not permitted in the case of temporary layoffs under Article 35.4 of the Contract. He interpreted that to mean that "seniority didn't come into play." *Testimony Rodriguez, Tr. p. 22.* Earlier laws imposing hiring freezes had referenced similar custody and care related categories of employees as exempt. In the case at hand, the DOC had to engage in a closer scrutiny of positions involving custody. Because entire job classifications were subject to layoff under the statute, even if DOC had considered seniority, the same employees would have

been impacted. Therefore, the Employer did not adversely affect any employees, layoffs with regard to seniority would have had the same result, and so no employees are entitled to compensation.

2.) Contract Article 9.5 prohibits the Arbitrator from fashioning an Award that provides an employee with more compensation than they would be entitled to in the absence of the contract violation:

Had there been no contract violation, if the DOC had conducted the temporary layoffs with regard to seniority, the same employees would have been laid off. Therefore, no employees were injured as a result of the EOC's contract violation. The Arbitrator therefore lacks the authority to order compensation to any employees.

Last, if the Arbitrator concludes that employees are entitled to back pay, the DOC is not liable for interest on such an award.

Position of the Union:

A summary of the Union's position with regard to the Employer's request for clarification is stated as follows:

The core of the arbitration leading to this clarification is whether the DOC violated provisions of the CBA when it implemented so-called temporary layoffs as its response to ESSB 6503. Initially, the Employer argued that it did not need to abide by seniority in implementing the layoffs. The Union argued that the layoffs were prohibited outright, or, in the alternative, if they were permitted, the CBA required that unbroken state service seniority must be followed. The Arbitrator found that the Employer had violated the CBA by "the denial of work to entire

classifications of represented employees without regard to seniority." Neither reconsideration nor recourse to the courts was sought by either Party.

The Arbitrator ordered the Employer "to make employees affected by its action whole for any economic losses resulting from the Employer's action, including, but not limited to, lost wages and interest thereupon." The Employer now seeks to avoid that ruling. The Arbitrator reserved jurisdiction solely "for the purpose of resolving disputes regarding the remedy directed herein." It is not appropriate, especially given an agreement that such decisions are final and binding upon the Parties, to expand that reservation of jurisdiction in the nature of a reconsideration.

The approach to determining the "employees affected" by the Employer's action is straightforward: At the hearing, the Employer introduced a document prepared by its witness as the Employer's response to the Arbitrator's Award, listing all of the staff that were impacted by the Employer's response to ESSB 6503, and their deductions. *Er. Ex. B* and *Testimony, Rodriguez, Tr. p. 29.* Employer Exhibit B was later supplanted by Employer Exhibit J to correct deficiencies in that exhibit. Through the testimony of Witness Rodriguez and the submission of Employer Exhibit J, the DOC has agreed that all of the employees listed in the exhibit were "affected" by its action in violation of the CBA. The appropriate measure of the Arbitrator's make-whole remedy is to refer to Column G of Employer Exhibit J, setting forth the gross amount of pay that each affected employee lost on each day of the temporary layoff program and add interest at 12 per cent.

The Employer's argument that the same employees would have been laid off had it followed seniority, and thus no employees were "affected" and entitled to a remedy does not meet its obligation to bear the consequences of its contractual violation, or acknowledge that it is more just that it should bear the cost of making employees whole than that an employee should be forced to suffer a denial of contract rights without a remedy. It should be noted that ESSB 6503 did not mandate the layoffs at issue. The statute expressly permitted the DOC to develop a compensation reduction plan as an alternative to the course taken by the DOC. Employer arguments concerning what they might have done and who might have been affected if it had complied with the contract are inappropriate speculation. Any assumptions should be made in favor of the innocent parties, the employees who lost wages as a result of the Employer's actions.

DISCUSSION

The office of a labor arbitrator resembles that of a judge in the civil courts in many regards, and includes features that are recognized as appropriately tailored to the specific context of labor relations in which the arbitrator functions. The labor arbitrator's unique role was aptly summarized by the United States Supreme Court:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts… The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the party's objective in using the arbitration process is primarily to further their common goal of uninterrupted production, under the agreement, to make the agreements serve their specialized needs.

Steelworkers v. Warrier & Gulf Navigation Co., 363 U.S. 574, 581-582 from the series of cases known as *The Steelworkers Trilogy*.

Unlike the civil court judge who finds himself in an environment facing parties who are often strangers to each other, and have no continuing relationship other than being embroiled in burdensome litigation, the labor arbitrator is conscious of the ongoing relationship between an employer, its employees, and their representative. This consciousness is a normal and desirable outgrowth of the public interests and policies announced in the statutes providing for labor arbitration as a mechanism supportive of "labor peace." In fashioning his Award in this matter, The Arbitrator was not unmindful of the unique relationships of the parties before him, nor was he unmindful of the societal and judicial policies, pronouncements, and values extant in the environment in which that relationship exists.

The Parties were unable to stipulate to a statement of the issue to be resolved by the Arbitrator, but agreed that the Arbitrator should, based upon all of the evidence, formulate the issue. The Arbitrator stated the issue as:

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

The role and status of the labor agreement in the consideration of labor disputes, especially when the employer is a state, has been considered by many courts over the years, the Washington State Supreme Court among them. In examining whether the State's "impairing" the contract before them was "reasonable and necessary," the Court queried whether the legislative purpose might have been achieved by means that did not impair, or less drastically impaired, the contract. The Court's observed that, "Financial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts on a par with other policy alternatives... If governments could reduce their financial obligations whenever an

important public purpose could be conceived for repudiating a contract, the Contract Clause would provide no protection at all" Carlstrom v. State, 103 Wn. 2d. 391, 395, (1985), citing U.S. Trust Company v. New Jersey, 431 U.S. 1, at 26 ((1977). In Pierce County v. State, 159 Wn. 2d., 16, (2006), The Court noted the policy need for the State to maintain "confidence in the stability of contractual obligations." Other judicial pronouncements include the following:

"Although limitations on public spending is a legitimate State goal, its weight is diminished in Contract Clause analysis when the State limits its own previous financial commitments." Continental Illinois National Bank and Trust Company v. Washington, 696 F. 2d. 692 at 701 (9th Cir. 1983). This is especially so where a problem of which the State was aware when it entered into a contract has only changed in degree, rather than in kind, and it has enacted a measure that would impair that contract.

"Where the State only relied on financial considerations to justify ESSB 4369 (the statute there at issue), its assertion of the police power does not save the measure." Carlstrom, supra;

"The test for legislative impairment of public contracts is more exacting than the test for legislative impairment of private contracts." Vine Street Commercial Partnership v. City of Marysville, 98 Wn. App. 541 (1999);

Washington courts have exercised strict scrutiny even in the case of "minimal impairments." Birkenwald Distributing Company v. Heublein, 55 Wash. App. 1 (1987),

Analyses of these disputes have observed standards such as whether an employer's action was "reasonable" and "necessary," in light of circumstances and alternatives, Carlstrom, supra, or have sought to harmonize a statute affecting a condition of employment with the collective

bargaining agreement. Brown County v. Wisconsin Employment Relations Commission, 742 N.W. 2d. 916 (2007).

In Washington State, another forum, specifically dedicated to resolving labor disputes, takes a somewhat different perspective of matters such as the one at issue here, in its realm of labor relations law. The Washington State Public Employment Relations Commission (PERC) subjects a unilateral action changing a condition of employment, wages, hours, working conditions, to an "unfair labor practice" analysis. In finding the employer guilty of an unfair labor practice in Amalgamated Transit Union Local 587 v. King County, Decision 10547-A (2010), PERC noted that nothing *required* the employer there to implement furloughs to achieve cost savings: the employer could have followed the contractual layoff process, or bargained other sources of cost reduction with the Union. "It simply chose not to." A similar result was reached by PERC in Technical Employees Association v. King County, Decision 10576-A (2010).

The Arbitrator has been mindful of the foregoing principles, peripheral to the case at hand, but the core of the Arbitrator's Award is his finding of a violation of the collective bargaining agreement between the Parties, finding a violation of contractual right requiring a remedy.

At the hearing, witness Marcos Rodríguez, the Human Resources Operations Manager who assisted the Employer in implementing ESSB 6503, testified that seniority only comes into account when looking for "options" for employees being laid off. In the context of permanent layoffs, he first identifies the positions being eliminated, generates a list of the employees to be laid off in seniority order, and then looks for "options." These options are placement alternatives

for an employee facing layoff, and can include moving to a vacant available position, or "bumping" (replacing) a less senior employee in a position. "The street" is the last alternative. The witness did not consider seniority in the case at hand because the Contract does not provide for bumping rights in the case of temporary layoffs. *Testimony, Rodriguez, Tr. pp. 20, 21.* As he was not "bumping" anyone, seniority "wouldn't have mattered." Because whole classifications were laid off, "the most senior employees would have been TLO'd (temporarily laid off) anyway." There were eight days of layoff conducted by the DOC, with approximately 800 employees represented by the Teamsters Union laid off on each day. *Testimony, Rodriguez, Tr. pp. 34-41.*

On cross-examination, the witness testified that:

- Pursuant to Section 3(1)(a) of ESSB 6503, the Office of Financial Management was directed to, and did, identify to the Employer the targeted amount of money needed to be saved well in advance of the layoff program;
- Subsection 1 (b) allowed the Employer to develop a plan that could serve as an alternative to the temporary layoff days otherwise required by the statute;
- Subsection 2 required that an agency not having submitted an approved plan would be "closed" on the days specified in the statute.
- Subsection 5(a) states that "The closure on an office of a state agency …under this section shall result in the temporary layoff of the employees of the agency. However, the prisons did not close, and the provision does not state that "all" employees were to be TLO'd.

Testimony, Rodriguez, Tr. pp. 44-48

When the Arbitrator's Award was presented to the witness, he attempted to identify all of the Teamster employees who were impacted by the DOC's program of temporary layoffs. In so doing, he generated Exhibit B, a spreadsheet identifying those employees and their wage

deductions. That initial spreadsheet was missing information relating to the March, 2011, layoff. Following the hearing in this matter, the DOC, as agreed at the hearing, supplemented the record with a complete spreadsheet, which the Parties have agreed to mark as Exhibit J.

In his Award, the Arbitrator found a violation of the Collective Bargaining Agreement by the Employer, and intended a make-whole remedy for a violation of right. The Arbitrator was mindful that the Employer always had other alternatives to the layoff program it conducted open to it: it could have developed an alternative cost reduction plan, perhaps in collaboration with the Union and consistent with the collective bargaining agreement; it could have achieved the directed cost savings by laying off the least senior employees of the affected classifications for an extended period, affecting far fewer employees; it could have followed those paths, and explored others, and perhaps "harmonized" its process with ESSB 6503. It chose not to, despite the opportunity, and despite strong statements of legislative intent and policy favoring the practice of collective bargaining, reflected in Washington's collective bargaining statutes, and in ESSB 6503. Further, ESSB 6503's provision,

> It is the legislature's intent that, to the extent that the reductions in expenditures reduce compensation costs, agencies and institutions shall strive to preserve family wage jobs by reducing the impact of temporary layoffs on lower-wage jobs.

was met with ironic effect by the Employer's action, visiting upon the very lower-wage earners the impact it sought to avoid, eight days of lost work for 800 employees. The Arbitrator could not credit the Employer's action, and intended a make–whole remedy. That remedy consists of making employees affected by the Employer's action whole for economic losses, including back pay with interest. The employees so affected are those set forth in Exhibit J, submitted by the Employer, and agreed as to its contents by the Union.

The Arbitrator has reviewed the arguments and authorities of the Parties with regard to awarding interest on back pay, and after due consideration, affirms his Award in that regard. Situations in which arbitrators have foregone interest on back pay awards have often included those involving the reinstatement of discharged employees. In those situations, a number of arbitrators have felt that the employer is already met with "double jeopardy," the need to pay a reinstated employee their back wages in addition to the wages they have paid to the employee who replaced them during their absence. Imposing interest in such cases has been thought to be excessive, and tending to chill the parties' relationship. That is not the case at hand. Also, the Arbitrator notes that the authoritative treatise, *The Common Law of the Workplace*, 2nd Edition, (2005) published by the National Academy of Arbitrators, recognized interest on back pay awards as becoming an emerging component of make-whole remedies at the time of that treatise's publication, seven years ago:

"Prior resistance to awarding interest in back pay awards is diminishing."

The Common Law of the Workplace, 2nd Edition, Chapter 1, §. 1.107, p. 62.

This Arbitrator's Award of interest on back pay in this case is not meant as a penalty upon the DOC, which clearly has faced a series of funding dilemmas, but as part of a fair make-whole remedy, having only an incidental effect of negating any gain from the Contract's violation, and not perceived by this Arbitrator as tending to undermine the relationship of the Parties.

CONCLUSION

The Arbitrator clarifies his Award of May 5, 2011, as follows:

The Employer is directed to make whole employees affected by its action, implementing eight days of temporary layoffs without regard to seniority, affecting employees in classifications of employment represented by Teamsters Union Local 117, from July 12, 2010, through March 11, 2011, for any economic losses, including lost wages and interest thereupon at the rate of 12% per annum. Employees so affected and their lost wages shall be determined as set forth in Exhibit J, presented by the Employer, and agreed as to content by the Union.

RESPECTFULLY SUBMITTED this 24th day of May, 2012.

SIGNATURE SENT UNDER SEPARATE COVER
ANTHONY D. VIVENZIO, Arbitrator