

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**IN ARBITRATION BEFORE
ANTHONY D. VIVENZIO**

TEAMSTERS LOCAL 117,

Grievant,

v.

WASHINGTON STATE,
DEPARTMENT OF CORRECTIONS,

Respondent.

FMCS No. 100818-04604-8

BRIEF OF RESPONDENT
DEPARTMENT OF CORRECTIONS
FOLLOWING HEARING ON
CLARIFICATION OF REMEDY

The Respondent, State of Washington Department of Corrections (DOC), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and KARI HANSON, Assistant Attorney General, submits the following brief on clarification of the remedy ordered by the Arbitrator in his Opinion and Award dated May 5, 2011.

I. NATURE OF PROCEEDINGS

In the above-mentioned Opinion and Award, the Arbitrator ruled that DOC violated its Collective Bargaining Agreement (CBA) with the Teamsters by “denying compensated work time to whole classifications of its represented employees without regard to seniority” when responding to the temporary layoffs mandated by ESSB 6503. The Arbitrator therefore directed 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.”

1 DOC then filed a motion seeking clarification of this remedy. DOC explained its
2 position that, based on the language of the Opinion and Award, no employees are entitled to
3 compensation:

4 DOC interprets the Arbitrator's ruling as requiring it to compensate any employee
5 who would not have been temporarily laid off under the provisions of ESSB 6503
6 if DOC had taken seniority into consideration when conducting those temporary
7 layoffs. DOC has determined that no employees fall into this category; thus, no
8 DOC employees are entitled to reimbursement.

9 Respondent's Motion for Clarification at 2.

10 DOC also submitted evidence to support its conclusion that no employees are entitled
11 to reimbursement, and asked for a hearing to elaborate on that evidence. The Arbitrator agreed
12 to hold a hearing to clarify the remedy in this case, and that hearing was held on January 25,
13 2012. The due date for briefs on the issue of clarification was originally March 15, 2012, and
14 has been extended by agreement to March 22, 2012.

15 II. ARGUMENT

16 The Arbitrator aptly summarized the parties' positions in his "Decision Regarding the
17 Agency's Motion for Clarification":

18 Here, the Union's position is that *all* of the employees laid off as a result of the
19 Employer's actions are entitled to the benefit of that remedy. The Employer's
20 position is that *none* of the laid off employees are entitled to the benefit of that
21 remedy.

22 Decision on Clarification of Award at 7.

23 In other words, the decision now before the Arbitrator is "all or nothing"; that is,
24 whether all of the employees listed on DOC's spreadsheet are entitled to back pay for all of the
25 temporary layoff dates listed therein, or whether no employee is entitled to any back pay.

26 For the following reasons, the Arbitrator should clarify his May 5, 2011 Opinion and
Award to state that none of the Teamsters-represented employees who were laid off pursuant to
ESSB 6503 are entitled to any back pay. No employees are entitled to any back pay for two
reasons. First, because of the mandates of ESSB 6503, the "Employer's action" of laying off
employees without regard to seniority did not affect employees any differently than had such

1 layoffs been conducted with regard to seniority. Second, Article 9.5 of the CBA prohibits an
2 arbitrator from making an award that provides an employee with more compensation than he or
3 she would be entitled to in the absence of any CBA violation.

4 If the Arbitrator nevertheless concludes that his Opinion and Award entitles all of these
5 employees to back pay, DOC is not liable for interest on that award; DOC asks the Arbitrator
6 to strike the language in his Opinion and Award providing for such interest.

7 **A. Because the Temporary Layoffs of Specific Employees Were Mandated by ESSB**
8 **6503, No Employees Were Adversely Affected by DOC's Failure to Consider**
9 **Seniority**

10 ESSB 6503 required one-day temporary layoffs of all non-exempt employees on
11 specified dates. For DOC, exempt employees were those engaged in "direct custody,
12 supervision and patient care" of offenders. Joint Exhibit 5, Sec. 3(4), p. 4. The Arbitrator has
13 ruled that DOC was required to use seniority as defined in Article 35.4 in conducting those
14 layoffs. As the following discussion demonstrates, because of the law's requirements, no
15 employees were adversely affected as a result of DOC's failure to use seniority in conducting the
16 layoffs.

17 To understand the context for conducting temporary layoffs, it is helpful to contrast the
18 process for temporary layoffs with that for permanent layoffs. At the January 25, 2012
19 clarification hearing, former DOC human resources manager Marcos Rodriguez explained that
20 the first step in conducting a permanent layoff is to identify the positions to be eliminated due
21 to lack of funds, lack of work, or reorganization. See Joint Exhibit 1, Article 35.1.
22 Mr. Rodriguez noted that seniority is used in permanent layoffs to determine what "formal
23 options," or alternative positions, an employee being subject to layoff may be entitled to under
24 Article 35.7 of the CBA; acceptance of a "formal option" may in turn result in a less senior
25 employee being bumped out of that position. Tr. 17-21. Mr. Rodriguez testified that, in
26 conducting the temporary layoffs mandated by ESSB 6503, he primarily focused on the fact
that bumping is not allowed under Article 35.4 of the CBA; therefore "that meant that . . .

1 seniority didn't come into play." Tr. at 22. In other words, seniority was irrelevant, given the
2 wide reaching temporary layoffs mandated by ESSB 6503: seniority is used in permanent
3 layoffs to determine "bumping" options, but "bumping" is not allowed for temporary layoffs.

4 DOC was familiar with the categories of employees who were exempt from the
5 temporary layoffs, because this same language had been used previously in laws imposing a
6 freeze on hiring new employees unless they provide "direct custody, supervision or patient
7 care" of offenders. Tr. at 22-23. The temporary layoffs, however, required DOC to more
8 closely examine, in many cases, whether a particular employee's work involved direct custody;
9 as a result, more custody positions were exempt from temporary layoff than were exempt from
10 the hiring freeze. Tr. at 24-25. Approximately 800 Teamsters-represented employees were
11 subject to temporary layoff. Tr. at 27.

12 Mr. Rodriguez testified about the list that DOC compiled after the Arbitrator's May
13 2011 Opinion and Award, showing all of the Teamsters-represented employees that were
14 subject to temporary layoff, and the amount that would be owed to each, for each temporary
15 layoff day, as well as the total amount that would be owed.¹ Tr. at 29-31; *see* Exhibits B, J.

16 After explaining which classifications of employees were subject to temporary layoff
17 and which were exempt, Mr. Rodriguez explained that, even if DOC had considered seniority,
18 the same employees would have been impacted because entire job classifications were subject
19 to layoff under the language of ESSB 6503. Tr. at 40-41. He explained that in conducting
20 temporary layoffs:

21 I would consider seniority if I was bumping folks. But under the collective
22 bargaining [agreement], I was not bumping anyone, so irregardless if I consider

23 ¹ Exhibit B is the spreadsheet about which Mr. Rodriguez testified. He testified it had recently come to
24 his attention that the final ESSB 6503 temporary layoff day, which occurred in March 2011, was missing from
25 that spreadsheet. Tr. at 35-36. Following the hearing, DOC supplemented the record with a complete spreadsheet,
26 which the parties have agreed to mark as Exhibit J. Exhibit J does not include columns reflecting various
paycheck deductions, which were included in Exhibit B, and it does not include interest amounts. However, those
figures are not relevant to the questions before the Arbitrator, which are simply whether DOC owes back pay to
the employees on Exhibit J, and if so, whether it also owes interest. Again, the parties are not asking the Arbitrator
to engage in any mathematical calculations.

1 seniority or not, it wouldn't have mattered because you had wholesale
2 classifications that were temporarily laid off. And the most senior person would
3 have been laid off anyways because [for example] all administrative assistant 3's
4 were laid off.

5 Tr. at 41.

6 As noted above, the Arbitrator concluded that DOC violated the CBA when it denied
7 work to "entire classifications of represented employees without regard to seniority." Opinion
8 and Award, at 25. DOC was therefore directed to "make employees affected by its action
9 whole for any economic losses resulting from the Employer's action" Tr. at 6.

10 The "Employer's action" in this case is presumably the temporary layoff of entire
11 classifications without regard to seniority. Mr. Rodriguez explained that in light of the
12 Arbitrator's decision, DOC analyzed the layoffs to determine whether any employees would
13 not have been affected—that is, not subject to layoff—if DOC had used seniority in conducting
14 the layoffs. As discussed above, Mr. Rodriguez testified that the results of this analysis showed
15 that even if seniority had been used, the same employees would have been laid off, because of
16 the mandates of ESSB 6503. Thus, the "Employer's action" (layoffs *without regard to*
17 *seniority*) did not adversely affect any employees, since layoffs *with regard to seniority* would
18 have had the same result. For this reason, no employees are entitled to compensation.

19 **B. Because DOC's Violation Did not Result in Injury, Compensation for These**
20 **Employees Is Prohibited by the CBA**

21 In granting authority to an arbitrator to resolve disputes, the CBA states that "The
22 arbitrator will not have the authority to make any award that provides an employee with
23 compensation greater than would have resulted had there been no violation of the Agreement."
24 Joint Exhibit 1, Article 9.5. As discussed above, had there been no contract violation—that is,
25 had DOC conducted the temporary layoffs with regard for seniority—the same employees
26 would have been laid off. No employees were injured as a result of DOC's contract violation;
thus, the Arbitrator does not have the authority to order that any employees be compensated.

1 **C. If the Arbitrator Concludes that Employees Are Entitled to Back Pay, DOC Is Not**
2 **Liable for Interest on that Award**

3 Should the Arbitrator nevertheless conclude that the Teamsters-represented employees
4 who were temporarily laid off are entitled to compensation, DOC also asks the Arbitrator to
5 clarify his remedy by striking the language in the Opinion and Award that provides for interest
6 on that back pay. For the following reasons, an award of interest is not available to the
7 Teamsters in this case.

8 DOC concedes that an arbitrator resolving a labor grievance may in certain
9 circumstances award interest. *See Yakima County v. Yakima County Law Enforcement Officers*
10 *Guild*, 157 Wn. App. 304, 346, 237 P.3d 316 (2010). However, the State cannot be held liable
11 for interest on its debts without its consent. *Architectural Woods, Inc. v. State*, 92 Wn.2d 521,
12 524, 598 P.2d 1372 (1979); *Spier v. Department of Labor and Industries*, 176 Wash. 374, 376-
13 77, 29 P.2d 679 (1934). Liability for interest requires a waiver of the State's sovereign
14 immunity. While sovereign immunity can be waived in individual cases by contract, only the
15 Legislature can adopt a blanket waiver of the State's sovereign immunity. *State v. Turner*, 114
16 Wn. App. 653, 660, 59 P.3d 711 (2003). There is no indication that the Legislature has waived
17 sovereign immunity with respect to prejudgment interest in cases involving claims for wages
18 against the State. *See Our Lady of Lourdes Hospital v. Franklin County*, 120 Wn.2d 439, 456,
19 842 P.2d 956 (1993) (finding that there was no statute or contract indicating consent to any
20 obligation to pay interest).

21 While the Supreme Court has held that the State impliedly waived sovereign immunity
22 when it entered into an authorized contract with a private party, "the State is not liable for
23 interest on its obligations unless it has placed itself expressly, or by *reasonable construction* of
24 a contract or statute, in a position of attendant liability." *Union Elevator & Warehouse Co.,*
25 *Inc., v. State*, 171 Wn.2d 54; 248 P.3d 83 (2011), citing *Architectural Woods*, 92 Wn. 2d at 526
26 (emphasis added). Unlike the contract at issue in *Architectural Woods*, the collective

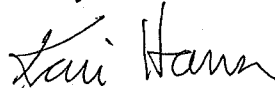
1 bargaining agreement between the Teamsters and the State cannot be reasonably construed as
2 providing for an award of interest. Neither the CBA itself nor the statutory scheme authorizing
3 the State to engage in bargaining with labor unions (RCW Chapter 41.80) evidences any intent
4 to authorize an award of interest by a labor arbitrator. Thus, no implied waiver can be found
5 here. Negotiating a labor agreement pursuant to RCW Chapter 41.80 does not put the State in
6 the same position as in *Architectural Woods*, where it entered into a contract for services and
7 its contractual position was indistinguishable from that of any similarly situated private party.
8 The Teamsters have not cited any authority allowing an arbitrator to award interest against the
9 State as a result of a labor arbitration. For these reasons, interest cannot be awarded here.

10 III. CONCLUSION

11 For the reasons discussed above, the Arbitrator should clarify the Opinion and Award
12 in this case to state that, notwithstanding DOC's contract violation, no Teamsters-represented
13 employees are entitled to compensation as a result of the ESSB 6503-mandated temporary
14 layoffs. The union's position—that all employees who were laid off pursuant to the statute are
15 entitled to be reimbursed—cannot be harmonized with the clear statutory language requiring
16 the temporary layoffs at issue here. Conducting those temporary layoffs in accordance with
17 seniority would have had no impact on which employees were subject to layoffs. The
18 Arbitrator should also clarify his Opinion and Award to state that the Teamsters are not entitled
19 to interest.

20 DATED this 22nd day of March, 2012.

21 ROBERT M. MCKENNA
22 Attorney General

23 

24 KARI HANSON
25 WSBA No. 24206
26 Attorneys for Respondent