AMERICAN ARBITRATION ASSOCIATION

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **Washington Federation of State Employees,** and **State of Washington**, on behalf of its **Employment Security Department.**	AAA Case No. 75 390 00369 07 Dual Language Pay Grievance

DECISION

PRELIMINARY STATEMENT

Julie L. Kamerrer, Younglove, Lyman & Coker, P.L.L.C., appeared on behalf of the Washington Federation of State Employees.

Cathleen A. Carpenter, Assistant Attorney General, Labor & Personnel Division of the Attorney General of the State of Washington appeared on behalf of the State of Washington.

The State of Washington, hereinafter the "State", and the Washington Federation of State Employees, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance in the instant matter was processed as specified in the Agreement to arbitration by the Union's web filing on September 25, 2007[2] with the American Arbitration Association. The parties agreed at the hearing[3] that James M. Paulson was selected to arbitrate the matter and his decision would be final and binding as described in the Agreement.

[1] Joint Exhibit No. 5.
[2] Joint Exhibit No. 4.
[3] Tr. 5.

On February 7, 2008, a hearing was held at an office of the Attorney General of the State of Washington, 7141 Cleanwater Drive, S.W., Olympia, Washington. At the hearing the parties were each permitted to present testimony and documentary evidence. The Union called as its witnesses: Juan Martinez, grievant and Job Training Counselor; Sally Farrar, Union Classification Director; and Monica Garza-Acevedo, grievant and Job Training Counselor. The State called as its witnesses: Erin Mundinger, Administrator; Colleen Blake, Position Control Manager; and Steve McLain, current Operation Manager in the Speciality Compliance Division and former Director of the Labor Relations Office.

At the close of the hearing and with the agreement of the parties, the Arbitrator ruled that briefs were to be electronically sent to the American Arbitration Association on or before March 21, 2008. By direction of the AAA, the Arbitrator has until April 28, 2008 to render his Decision and Award.

STATEMENT OF THE ISSUES

In pre-hearing conferences, the parties were unable to reach agreement on the statement of the issues in this matter. Accordingly, they agreed that the Arbitrator should frame the issues after hearing the presentation of the case at the hearing.[4]

By his Interim Decision dated February 8, 2008, the Arbitrator framed the following statement of the issues:

> "Is the grievance[5] of the Union on behalf of Shannon Mendoza, Juan Martinez and Monica Garza-Acevedo filed on June 11, 2007, not arbitrable, in whole or in part, as being untimely filed for arbitration under Article 29 of the Agreement?"
>
> "To the extent the grievance is arbitrable; did the State violate the Agreement by not granting grievants Mendoza, Martinez and Garza-Acevedo full time dual language assignment pay since on or about April 11, 2007?"
>
> "If so, what shall the remedy be?"

[4] Tr. 5.
[5] Joint Exhibit No. 2.

RELEVANT CONTRACT PROVISIONS

ARTICLE 42
COMPENSATION

* * *

42.25 Assignment Pay Provisions

Assignment pay is a premium added to the base salary and is intended to be used only as long as the skills, duties, or circumstances it is based on are in effect.

A. The Employer may grant assignment pay to a position to recognize specialized skills, assigned duties, and/or unique circumstances that exceed the ordinary. The Employer determines which positions qualify for the premium.

B. Classes approved for assignment pay have the letters "AP" appearing after their title in the compensation plan. All Assignment Pay rates and Special Pay Ranges and Notes are attached as Appendices K and L to this Agreement.

APPENDIX K
ASSIGNMENT PAY

REFERENCE # 18: Employees in any position whose current, assigned job responsibilities include proficient use of written and oral English and proficiency in speaking and/or writing one or more foreign languages, American Sign Language, or Braille, provided that proficiency or formal training in such additional languages is not required in the specifications for the job class. Basic salary plus two additional ranges.

STATEMENT OF FACTS[6]

This matter involves three employees of the State of Washington who work in the Department of Employment Security in Okanogan County. Employees Shannon Mendoza, Juan Martinez and Monica Garza-Acevedo are members of the bargaining unit represented by the Union and each have the class title WorkSource Specialist 4 (WSS 4). They are assigned to the Workforce Investment Act Unit (WIA). Their working title is Counselor. The majority of their time is spent:

> "providing intensive services, determining eligibility for programs, administering and/or interpreting skill, interest, and aptitude tests, identifying and analyzing employment barriers with job seekers, developing individual written employment plans designated to resolve barriers to employment, and guiding, monitoring & motivating clients to follow through with approved plans."[7]

In the course of performing their duties the three employees come in contact with individuals (clients and parents of clients) who either prefer to or are only able to speak Spanish. All three employees are fluent in Spanish and, when appropriate, communicate with such Spanish speaking individuals in Spanish.[8]

On March 6, 2007 the three employees sent a letter to their Supervisor, Mary Hinger stating, in part, that they "deserve compensation from the agency" for utilizing their fluency in Spanish in performing their job duties.[9] The next day Ms. Hinger met with the employees to clarify what they wanted. She made notes of the meeting. Essentially, the employees wanted their positions to be re-evaluated and to be compensated for using Spanish in the performance of their jobs.[10]

In mid to late March, 2007 Administrator Erin Mundinger reviewed the work duties of the three employees and their job descriptions were revised. After checking "with her boss and then HR" she concluded that the employees were entitled to occasional use but not full time dual language pay. She made this decision because she did not believe that they were required to

---

[6] This Statement of Facts is an overview discussion and does not attempt to resolve factual disputes.

[7] Exhibit Nos. R-3, R-4 and R-5.

[8] *Ibid*.

[9] Joint Exhibit No. 1.

[10] *Ibid.*

speak Spanish 50% or more of the time when performing their job duties.[11]

On April 11, 2007 each of the three employees received and signed revised job descriptions.[12] The official request to change the status of the employees to be entitled to part time pay for occasional dual language was forwarded to Human Resources on or around April 11, 2007.[13] Also around this time the employees were informed of the decision and then asked to keep track of the time they actually spoke Spanish in performing their job duties.[14]

On June 12, 2007 the Union filed a grievance on behalf of employees Mendoza, Martinez and Garza-Acevedo alleging that the dual language pay treatment of the grievants[15] was in violation of the Agreement in that they were being compensated for dual language at a rate "less than their basic salary plus two ranges."[16]

On July 12, 2007 the grievance was heard at the Commissioner Level under Article 29.3 of the Agreement. The Union contended that the grievants were entitled to full time dual language compensation and not occasional use dual language compensation. Management contended that the circumstances of the grievants' use of Spanish was carefully examined with the updated Position Description Forms and that "Spanish speaking skills were not noted as selectives for the positions, and compensation was determined to be paid on an occasional basis. WorkSource Area Director Mertes concluded that the "allegation that the Employment Security Department violated Article 42 could not be substantiated" and refused the requested remedy as related to the grievants.[17]

On September 25, 2007 the Union filed a Demand for Arbitration of the grievance with the American Arbitration Association alleging, in part:

> "The Employer has offered payment for the amount of time the employees use the foreign language, forcing them to track their time. The intent of the negotiated contract language was to compensate employees for their dual language skill, not the amount of time they use it."

---

[11] Tr. 131-132.

[12] Exhibit Nos. R-2, R-3 and R-4.

[13] Exhibit No. R-1.

[14] Tr. 136.

[15] The grievance initially requested relief for all affected employees in ESD; however, at the hearing the Union reduced its request for relief to the three named grievants. Tr. 120.

[16] Joint Exhibit No. 2.

[17] Joint Exhibit No. 3.

CONTENTIONS OF THE PARTIES

Union's Contentions

Arbitrability

With respect to the issue of arbitrability, the Union contends that the grievance is one involving a "continuing violation" and is, therefore, timely. The Union points out that failure to pay an employee at a contractually required rate of pay is a separate act/violation every time the employer does not do so. As this is a grievance regarding the alleged failure of the State to properly pay the grievants, a grievance could be filed at any time and be timely.

Alleged Contract Violation

The Union first notes that the grievants are expected, if not required, to use Spanish every day in performing their job duties as may be appropriate. Indeed, the employees could not perform their job duties without communicating from time to time with Spanish speaking clients or their parents in Spanish.

The Union then argues that the plain and unambiguous contract language requires that once the State determines[18] that use of Spanish is needed when appropriate, the employees must be paid full time dual language pay. The Union reads the Agreement as giving the State only two options: either the employees are not required to use Spanish and they get no additional pay or if they are required to use Spanish they get full time dual language pay. The Union emphasizes that the Agreement make no provision for part time or occasional pay for dual language usage.

In anticipation of the State's argument, the Union also argues that all of the State's evidence as to a past practice of paying for occasional use dual language on an hourly basis and the intention of the State in contract negotiations is immaterial. The Union reasons that the language of the Agreement supersedes both past practice and the unexpressed intention of the State in negotiations to maintain the past practice.

State Contentions

Motion for Dismissal

The State first argues that the Union has the burden of proof in this case and that in its case in chief the Union failed to demonstrate a violation of the Agreement. More specifically, the State claims that the Union presented no evidence that the Agreement restricts agencies to

[18] Exhibit Nos. R-3, R-4 and R-5.

"*only* pay full-time dual language assignment pay."[19] Additionally, the State contends the Union has failed to show that the State exercised the discretion it has under the Agreement in deciding which jobs should get time dual language pay in an arbitrary or capricious manner.

Arbitrability

As to arbitrability, the State first notes that the June 12, 2007 grievance is untimely on its face as the grievants knew on or before April 16, 2007 that they were not getting full time dual language pay. With the twenty-one day time limit in the Agreement, the grievance should have been filed well before the June 12th filing date. Secondarily, the State points out that if the grievance is considered as one appropriately analyzed under the continuing violation theory, any remedy should at least be restricted to a period twenty-one days before the filing date of the grievance.

Alleged Contract Violation

The State first points out that the applicable language under the Agreement is such that it clearly allows for the interpretation given it by the Employment Security Department. Accordingly, the argument goes, where the language of the Agreement is susceptible of different interpretations, the Arbitrator should look to bargaining history, past practice and other rules of contract interpretation in determining the meaning of the applicable contract provisions.

The State next reviews the evidence it presented as to "the intent of the parties" to allow the State to maintain the *status quo ante* as to compensation practices by the language agreed to in Article 42. The State notes that the Union tried unsuccessfully to gain different language than that finally agreed to. Additionally, the State points out that the unrebutted testimony of the lead negotiator for the State established that some of the language was taken directly from the old Merit System Rule which allowed for occasional use dual language pay. The State further notes that there was a long standing practice in ESD of part time pay for dual language use.

Finally, the State argues that the exercise of its discretion in deciding when to pay part time as opposed to full time dual language pay was not arbitrary or capricious. First, the State observes that the Union has presented no evidence that the management's decision was arbitrary or capricious. Moreover, the parties' discussions in negotiations virtually amount to an agreement by the Union that the concept of paying some employees for occasional dual language use is not arbitrary. The State concludes by contending that in applying the "50 percent" test for determining whether a employee gets part time or full time dual language use pay, ESD carefully analyzed the facts, including other positions, and was not arbitrary.[20]

[19] Post Hearing Brief of Employment Security Department, p. 6.
[20] *Ibid*, p. 8.

FINDINGS

Arbitrability

1. Burden of Proof as to Arbitrability

As the moving party, the employer assumes the burden of proof when it challenges the arbitrability of all or part of the grievance.[21] Additionally, there is overwhelming arbitral support for resolving doubts as to compliance with time limits in favor of arbitrability.[22] However, where the language and facts are clear, an arbitrator is compelled to uphold an arbitrability challenge on timeliness. On its face, the grievance is late filed under the language of Article 29.3 of the Agreement. There is no question that the grievants knew of the alleged violation by April 17, 2007 and the grievance was not filed until June 12, 2007. The State has met its *prima facie* burden of proving that the grievance was not timely filed.

2. Continuing Violation Argument

The Union, however, has properly contended that the alleged improper conduct of the State did constitute a "continuing violation". The "continuing violation" analysis of the timeliness of the filing of grievances has been well recognized in appropriate cases.[23] In this matter, each time the grievants received a pay check with less than the claimed amount of pay a separate violation allegedly occurred. On the other hand, as the State argues, any potential damage remedy is limited in time to twenty-one days prior to the filing of the grievance.[24] Accordingly, the Arbitrator finds that the grievance is arbitrable but that any potential remedy is limited to twenty-one days prior to the filing of the grievance.

Motion for Dismissal

In this case the State moved for dismissal of the grievance at the close of the Union's case. While this is an unusual motion in a labor arbitration proceeding, it is the equivalent of a motion for a directed verdict in a court proceeding in which such a motion is usually advanced, *inter alia*, to preserve appeal rights.[25] The Arbitrator deferred ruling on this motion during the

---

[21] Elkouri & Elkouri, *How Arbitration Works* (BNA 6th Ed. 2003), p. 217, n. 95, citing *Phillips 66 Co.*, 92 LA 1037 (Neas, 1989).

[22] *Ibid.*

[23] *Ibid*, pp. 218-219. The continuing violation theory has also achieved acceptance in the employment discrimination field. This is particularly so when salary claims are involved. *Bazemore v. Friday*, 478 U.S, 385 (1986).

[24] *Ibid*, p. 219.

[25] The standard for review of a trial court's decision and that of an arbitrator are significantly different.

hearing. In considering a motion for a directed verdict, all reasonable factual inferences are drawn against the moving party.[26]

At the time of the motion,[27] the State had put in no evidence and not even made its opening statement. Since the meaning of the language of the Agreement is a question of fact, the Arbitrator finds that the Union put forward sufficient evidence and argument to establish that there was substantial evidence and reasonable inferences to support a finding in its favor *at the time the motion was made*. Accordingly, the State's motion to dismiss is denied.

Alleged Contract Violation

1. Burden of Proof and Material Facts

The State correctly points out, as the moving party in a contract interpretation case, the Union normally has the burden of proof.[28] This means that the Union must prove both what happened (the facts giving rise to the grievance) and what the contract means.

In the instant case the Arbitrator finds that there is no material dispute as to what happened.[29] Here the essential dispute is over what the Agreement means as applied to those facts.

2. Meaning of the Language on Its Face

While the Arbitrator agrees with the proposition advanced by the Union that where contract language is clear and unambiguous there is no need to refer to extrinsic evidence to determine its meaning[30], that is not the case with the language in question. Here the language is susceptible of different interpretations. Specifically, the first sentence of §42.25 states that

---

[26] *Peterson's v. TransAmerica Ins.*, 83 Wn. App. 432, 437 (1996). "A directed verdict . . . is appropriate if, when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party . . .." Citing *Peterson v. Littlejohn*, 565 Wn App. 1, 8 (1989).

[27] Tr. 121.

[28] "In non-discipline cases, the initiating party (almost always the union) bears both the burden of proof and the burden of going forward." Dennis R. Nolan, *Labor and Employment Arbitration*, (West 1998), p. 45.

[29] Even though the Union may argue that there is a dispute as to whether or not the use of Spanish by the grievants constitutes an "essential function" of their jobs, this is not material. The dispute in this case not how essential the fluency in Spanish is to the grievants' jobs, but rather whether the State may pay part time or occasional use pay to the grievants. The question goes to whether, once the grievants are deemed qualified for assignment pay, is the State precluded from paying them for occasional use.

[30] *How Arbitration Works, supra*, pp. 434-439.

"[a]ssignment pay . . . is intended to be used *only so long as the skills*, duties, or circumstances *it is based on are in effect*." (emphasis supplied) The apparent meaning is that when the "skills, duties, or circumstances it is based on are [not] in effect", assignment pay is not to be "used" or paid. Effectively, this language assumes that there will be times when an employee gets assignment pay and times when he/she does not. The Union makes no attempt to explain away this language.

Under the Union's interpretation of the language, assignment pay for employees using their fluency in Spanish *must* be paid even when they are not exercising the skill.[31] The problem with this interpretation is that it does not account for the words "only so long as the skills . . . are in effect." How can the skill be "in effect" if it is not being exercised? Indeed, it could be argued that an employee can not get assignment pay under §42.25 on a full time basis unless he exercises the "skill" (here fluency in Spanish) 100% of the time. By the foregoing analysis, the Arbitrator is not attempting to conclude what the language means as applied to this case--only that it is susceptible of an interpretation different from that urged by the Union.[32]

The Union focuses its analysis on Appendix K, Reference #18--which describes the pay for the assignment pay applicable to dual language situations as: "Basic salary plus two additional ranges." The Union then concludes that since no provision is made for hourly pay, the pay must be for all time worked whether exercising the skill or not. There are at least two problems with this analysis.

First, the Union analysis does not account for the language referenced above in the first sentence of §42.25. It is a basic principle of contract interpretation that meaning and compatibility must be given to all relevant provisions of the contract.[33] Second, the language in §42.25 B. references "Assignment Pay *rates*". (Emphasis supplied). The description in Reference #18 to "[b]asic salary plus two additional ranges" is merely a reference to a rate of

---

[31] Of the three qualifying situations for assignment pay, fluency in Spanish appears to come under the category of a "skill" as opposed to a "duty" or "circumstance."

[32]The Union's argument is based on the theory that merely *having* as opposed to *exercising* the skill is all that is required to get assignment pay. Indeed, Union witness Farrar used the example of a police officer who is paid for the skill to use a firearm even though he may rarely use it. Tr. 87. The problem with this analogy is that the speaking of Spanish for the grievants is not as critical to their jobs as is the need for a police officer to occasionally use his firearm. Indeed, the State put in evidence through Administrator Mundinger that if one of the grievants left their position, she would not recruit for a Spanish speaking person to replace the incumbent. Tr. 156. The Union did not directly challenge this testimony.

[33]*How Arbitration Works*, *supra*, pp. 462-464; *The Common Law of the Workplace* §2.7, (St. Antoine ed., BNA, 2nd Ed. 2005), p. 78 ("Arbitrators apply a presumption that parties intended their words to have effect and not to be interpreted in a way that causes a provision to perish or be superfluous."); *Labor and Employment Arbitration*, *supra*, p. 310 ("[T]he arbitrator should interpret each clause to make it compatible with the rest of the agreement.)

pay. A *rate of pay* can be hourly, weekly, monthly or even annually. The rate of pay of salaried employees can be and often is converted to an hourly rate. Many salaried employees are eligible for overtime pay. In order for a salaried employee to be paid for overtime hours worked an hourly rate of pay is calculated. Although there was no evidence as to exactly how it was done, here the State converted the grievants' "basic salary plus two additional ranges" to an hourly rate. This is consistent with the language in §42.25 B. referring to assignment pay *rates*. The language of the Agreement does not compel the conclusion that assignment pay must be for a period greater than an hour. The Union has the burden of proving that hourly pay for assignment pay is prohibited by the language. It has not done so.

Based on the foregoing analysis, it is appropriate to examine extrinsic evidence to determine the meaning of §42.25 and Appendix K – Reference #18 of the Agreement.

3. Extrinsic Evidence

The State's primary witness on extrinsic evidence, Steve McLain, was a co-spokesperson for the State in the negotiations resulting in the language appearing in the Agreement as §42.25 and Appendix K – Reference #18.

Essentially, Mr. McLain testified that the language resulting in §42.25 and Appendix K – Reference #18 was drafted by the State to incorporate pre-contract practices regarding assignment pay by the several state agencies.[34] Mr. McLain further testified in response to a question as to the conduct of the parties at negotiations that: "[w]e explained our intent was to continue existing practices, not to make any significant changes in the way we handle assignment pay."[35]

In its post hearing Brief[36], the Union argues that Mr. McLain failed to describe at negotiations the State's intent of bringing forward its past practice in handling assignment pay and, therefore, the Union was unaware of the State's purpose in proposing the language that it did.[37] The above quoted and unrebutted[38] testimony of Mr. McLain is to the contrary however. While there is no evidence of whether or not the Union was aware of exactly what the State's practice was, there was also no evidence to rebut Mr. McLain's testimony that by agreeing to the State's proposal the Union accepted the State's practice regarding the method of granting assignment pay--whatever it was.

---

[34] Tr. 205.

[35] Tr. 207.

[36] Grievants' Post Hearing Brief, pp. 7-8.

[37] The Union also observes that there was no evidence that it could have anticipated the "50 percent" rule during negotiations; however, it was incumbent on the Union to put on evidence to that effect since the Union has the burden of proof. *Ibid.*

[38] The Union elected to present no evidence of its version of the history of negotiations resulting in the language in question. Tr. 97.

As discussed above, the evidence established that the intent of the parties in agreeing to the language in negotiations was to bring forward under the Agreement the practice of the various State agencies regarding assignment pay. This intent is to be used in conjunction with the actual language of the Agreement to determine whether the Union has met its burden of proof in establishing a contract violation.

4. The State's Practice and Exercise of Discretion

A good deal of testimony was presented as to how the State decided to grant the grievants occasional use dual language pay rather than full time. The State's primary witness on its practice and the application of the assignment pay language to the grievants was Position Control Manager Colleen Blake. She gave this description:

> "The criteria is a measure of how much time the position is using the skill, but also whether it's a business requirement of the position or not. Full-time dual language is 50 percent or more of the time, there's a business need for the position or an expectation of business need for the position to use the skill. If it's less than 50 percent, it's considered occasional use and, therefore, would be part time dual language."[39]

There is no dispute that the grievants did not meet the State's 50 percent rule. The Union has not contended otherwise. Accordingly and keeping in mind that the Arbitrator has concluded that the language did not prohibit an hourly rate of pay for assignment pay, the next question is whether what the State actually did was in violation of the Agreement. In other words, was the "50 percent" rule itself either contrary to the actual language of the Agreement or did it violate the implied contractual limitation that management may not exercise its discretion in an arbitrary or capricious manner.

While the "50 percent" rule is not compelled by the language of the Agreement, it is not prohibited. The second sentence in §42.25 A states: "The Employer determines which positions qualify for the premium." Since the Arbitrator has determined that the language allows for the payment of hourly assignment pay, it follows that the Agreement grants the State the discretion to use the "50 percent" rule in determining "which positions qualify for the premium." Additionally, the first sentence of §42.25 itself appears to limit assignment pay to "only as long as the skills are in effect." Accordingly, the "50 percent" rule which allows the State to grant part time dual language pay is permitted by the language of the Agreement.

The State has acknowledged[40] that it must exercise its discretion in good faith and not in

---

[39] Tr. 164-165.

[40] Post Hearing Brief of the Employment Security Department, p. 7. Citing *State of Wisconsin*, 124 LA 135, 140 (Vernon, 2007).

an arbitrary or capricious manner. Based on the testimony of Ms. Mundinger[41] and Ms. Blake[42], the Arbitrator concludes that the State acted in good faith in deciding to grant part time dual language pay status rather than full time. Both witnesses testified with obvious sincerity and concern for being fair to the grievants as well as being consistent with the way other employees were treated.

The Arbitrator does have some concern about the propriety of using a certain percentage of time an employee must exercise foreign language fluency to qualify for full time dual language pay.[43] While other tests[44] may be easier to apply or even more realistic, it can not be said that the "50 percent" rule is arbitrary or capricious. Accordingly, the State's creation and application of the "50 percent" rule did not violate its implied obligation to refrain from exercising its discretion in an arbitrary or capricious manner.

[41] Tr. 128-161.

[42] Tr. 162-199.

[43] See the testimony of Ms. Mundinger (Tr. 153-155) and Ms. Blake (Tr. 195-199).

[44] The "essential function" test may be one.

CONCLUSION

For the reasons set forth above, the Arbitrator finds:

> The grievance of the Union on behalf of Shannon Mendoza, Juan Martinez and Monica Garza-Acevedo filed on June11, 2007 is arbitrable with the limitation that no remedy may be awarded for the State's conduct for more that twenty-one days prior to the filing of the grievance.
>
> The State did not violate the Agreement by refusing to grant the grievants full time dual language assignment pay.

_____

James M. Paulson, Arbitrator

April 6, 2008