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NO. 42506-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KING COUNTY,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,
AMALGAMATED TRANSIT UNION, LOCAL 587, and TECHNICAL
EMPLOYEES ASSOCIATION,

Respondents.

APPELLANT KING COUNTY'S REPLY BRIEF

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I. INTRODUCTION

The essential question before this Court is whether King County was required to bargain with the Technical Employees Association (“TEA”) and Amalgamated Transit Union (“ATU”) before making the decision to curtail certain operations in order to retain other services, when the consequence was employee furloughs. The Public Employment Relations Commission (“Commission” or “PERC”) missed the forest for the trees in evaluating this question. While focusing on the undisputed impact of the closures on affected employees, the larger context was lost. As a result, the County’s duty to provide services to the public has been made unnecessarily subservient to the County’s obligation to its employees.

Despite the underlying theme of both TEA and ATU, the issue before this Court is not whether the impact of the closure decision must be bargained. King County does not dispute that the effects of the closures on employee wages, hours and working conditions must be negotiated. The significance of the Commission’s decision below is the timing and precise subject of that bargaining. Must the decision to implement closures be bargained in advance, tying the County’s hands and preventing any nimble response, or must the impact of those decisions be bargained after the decision is made, allowing the County to serve the public while remaining accountable to its employees as well? The County respectfully submits that it is the latter obligation that applies here. Accordingly, the

County asks the Court to find that the County's obligation was effects, not decisional, bargaining.

II. ARGUMENT

The Commission erroneously decided that the operational closures implemented by King County were a mandatory subject of bargaining. The Commission's stated reasons for this threshold determination were (a) its conclusion that the closures were primarily a labor cost saving measure and (b) that the decision to close buildings was not a "programmatic" decision. *See*, ATU CR 1080-81; TEA CR 3544-45. Both prongs of the Commission's decision are wrong.

A. King County Clearly and Consistently Expressed the Program-Based Reasons for the Closure and Furlough Decision

In order to determine whether a decision that has effects on employees is a mandatory subject of bargaining, the Supreme Court has instructed the Commission to engage in a balancing test, as follows:

On one side of the balance is the relationship the subject bears to 'wages, hours and working conditions'. On the other side is the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative. Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of the inquiry is to determine which of these characteristics predominates.

Int'l Ass'n of Fire Fighters, Local 1052 vs. PERC, 113 Wn.2d 197, 203, 778 P.2d 32 (1989) (internal citations omitted).

The Commission and Respondents ignored the fundamental nature of the decision made by King County as a decision at its "core of

entrepreneurial control.” In order to disregard the County’s prerogative, TEA and ATU insist that King County’s decision to close operations on ten days in 2009 was merely a reduction in pay without any relationship to the services offered to the public. Evidence in the record demonstrates that this is a dramatic oversimplification of the issue, to which the Commission fell victim. Instead, the substantial record amply demonstrates that the County’s decision to close certain operations for ten days was made to save other programs and services. *See, e.g.*, TEA CR 1206 (Tr.); TEA CR 1210 (Tr.); ATU CR 136-39 (Tr.); ATU CR 255 (Tr.); ATU CR 673-74; ATU CR 677-80; ATU CR 736-37.¹

In support of the unions’ shared position that King County merely cut employee wages through furloughs and then attempted to “recast” the action as a programmatic decision, ATU cites early communications from then-County Executive Ron Sims as evidence that the County intended to achieve only labor savings by implementing the closures. However, a review of these communications as a whole and in context demonstrates the very real programmatic and service issues that King County addressed in reaching its decision to close buildings. For example, ATU quotes from Executive Sims’ October 3rd letter to the King County Coalition of Labor Unions, “I have directed the budget office to find the final 15 million in

¹ References to Clerk’s Papers will be designated “CP,” references to documents contained in the Certified Record from PERC in the Amalgamated Transit Union matter below will be designated as “ATU CR,” documents contained in the Certified Record from PERC in the Technical Employees Association matter below will be designated as “TEA CR.” References to transcript excerpts will be designated “Tr.”

reductions from the wages of both represented and non-represented employees.” ATU CR 685. ATU, however, does not reveal the context Executive Sims provided earlier in that same correspondence. Specifically, Executive Sims explained, “We have been forced to make significant reductions in all areas of the General Fund. These cuts will have a substantial impact on King County’s critical public safety, public health and human services programs. Regrettably, the cuts will also have a significant impact on our employees; there will be hundreds of layoffs associated with my proposed budget beginning January 1, 2009.” ATU 684. In the same correspondence, Executive Sims stated, “Now I need you to help me go further. It was not possible to find over \$90 million in program and service reductions in one year without drastically compromising King County’s first rate criminal justice system or dismantling King County’s public health and human services safety net.” ATU 685. There is no merit to the assertion that King County was simply looking to reduce its labor costs. From the very first communication from Executive Sims on October 3, 2008, it was clear that the County was acting to preserve its criminal justice system and its public health and human services safety net.

ATU additionally cites Executive Sims’ announcement of the Coalition Agreement to all King County employees dated October 28, 2008 as evidence that King County was merely seeking to reduce labor costs. ATU quotes “[t]he essence of the [Coalition] agreement is a cost-

of-living adjustment.”² ATU 673. ATU does not mention the fact that Executive Sims began his correspondence with the following lines which outline the essence of the need to make an agreement, “First, I want to thank you for your dedication and hard work. These are difficult times for local and state governments across the nation and *the result here in King County is program cuts and layoffs. In order to prevent further layoffs and service cuts beyond those already announced*, I am pleased to share the news of an historic tentative agreement with the King County Union Coalition that includes sacrifice from all of us.” ATU 673 (emphasis added).

Accordingly, in utilizing the balancing test to determine whether a decision is a mandatory subject, it is the County’s balancing of priorities of services to its citizens that must be considered. Inasmuch as it is well settled that an employer has the right to determine the kind and quantity of services offered to the public,³ the County’s decision to prefer some services over others must fall within its management prerogative. The Commission’s decision that the closures were simply used to obtain labor cost savings completely ignored the half of the balancing test that

² The quotation contained in ATU’s brief is a misstatement of the context of Executive Sims communication which actually read as follows: “The essence of the agreement is a 4.88 percent Cost of Living Adjustment and step increases called for in employee union agreements.” Contrary to ATU’s implication, this comment was not about reducing pay, but was rather Executive Sims commenting on the Agreement’s “advantage of *preserving* the cumulative effect of COLA increases.” ATU 673 (emphasis added).

³ See, e.g., *Federal Way School District No. 210*, Decision 232-A (PECB, 1977); *Skagit County*, Decision 8746-A (PECB, 2006); *Spokane Education Ass’n v. Barnes*, 83 Wn.2d 366, 517 P.2d 1362 (1974); *Tacoma-Pierce County Health Dep’t*, Decision 6929-A (PECB, 2001).

considers the County's legitimate programmatic decision to close operations on 10 days in order to save other programs and services and to avoid further employee layoffs and, accordingly, must be vacated.

B. Authority Cited in Support of the Commission's Decision Are Distinguishable

TEA and ATU cite a number of cases in support of the principle that simply re-labeling a decision to change the wages, hours or working conditions of employees as a "service change" does not remove the bargaining obligation. Notably, none of the cases cited by the unions addresses the issue presented here and are distinguished as follows:

TEA cites *City of Centralia*, Decision 5282-A (PECB, 1996), as persuasive authority. In *City of Centralia*, the City reduced crew staffing and equipment levels on a shift-basis. The Union raised safety concerns as a result of the unilaterally reduced staffing levels. The PERC Examiner found that the combined employee interests in "safety, workload and pay" outweighed the employer's attempts to reduce costs. In the same decision, the Examiner noted that "the employer has pointed to no other reasons for its actions but to reduce labor costs," which made the employer's decision "clearly suitable for collective bargaining." These facts are clearly distinguishable from the facts here, where King County has repeatedly demonstrated and expressed that the purpose of the closures was to save other services and programs offered to the public and to avoid the necessity of further layoffs.

TEA also relies on *City of Kelso*, Decision 2633-A (PECB, 1988), and *South Kitsap School District*, Decision 472 (PECB, 1978), to contrast decisions to change wages, hours and working conditions with the managerial prerogative to make unilateral decisions affecting services offered. However, neither the facts nor precedent created in *City of Kelso* or *South Kitsap School District* are instructive here. In *City of Kelso*, the City retaliated against two firefighters for their union activity, citing budget cuts as the motivating factor behind their layoff. There are no analogous facts in the instant case. King County's stated reasons for the closures and employee furloughs have been consistently communicated from the start – to avoid further cuts to public programs and services and to avoid further employee layoffs. There is no evidence or even any allegation that the County's decision was the result of union animus. Moreover, the underlying unfair labor practice charges involved in this appeal do not contain any allegations concerning layoffs whatsoever.

In *South Kitsap School District*, the employer claimed economic motivation for its decision to terminate the district's teaching aide program, resulting in the layoff of the aides. Through the hearing, the Examiner discovered that the duties previously performed by the aides had been transferred to employees outside the bargaining unit. Here, King County neither transferred work away from affected employees, nor laid-off affected employees. There is no dispute that employees who were furloughed for 10 days in 2009 remained employed throughout the

furloughs and there is no allegation or evidence in the record to suggest that King County transferred the work to employees outside the relevant bargaining units.

TEA devotes a significant portion of its brief to analogizing King County's closures and resulting furloughs to layoffs in an effort to apply legal principles that are specific to layoffs. This approach must be rejected because furloughs are not layoffs. A "layoff" is:

A temporary or indefinite *separation from employment* initiated by the employer without prejudice to the worker for reasons such as lack of orders, model changeover, termination of seasonal or temporary employment, inventory taking, introduction of labor-saving devices, plant breakdown, or shortage of materials.

Robert's Dictionary of Industrial Relations (BNA 4th Ed. 1994)(emphasis added). It is undisputed that the County did not separate the employment of any employee in relation to the furlough days. Accordingly, furloughed employees did not lose health benefits, seniority, vacation, sick leave or other hallmark benefits of County employment as the result of the furloughs. In two separate labor arbitrations arising from the 2009 furloughs, including an arbitration filed by ATU, the arbitrators confirmed that King County's furloughs did not constitute "layoffs." *See, Amalgamated Transit Union, Local 587 v. King County*, Opinion and Award of Arbitrator Janet L. Gaunt (February 16, 2010) pp. 34-38, attached as Exhibit A; *see also, Service Employees Int'l Union, Local 925 v. King County*, Decision and Award of Arbitrator Joe H. Henderson (December 18, 2009), pp. 23-24, attached as Exhibit B.

ATU relies on *Griffin School District*, Decision 10489 (PECB, 2009), as controlling precedent and to distinguish *Wenatchee School District*, Decision 3240-A (PECB, 1990). In *Griffin School District*, the Commission was called upon to decide whether the school district breached its bargaining obligation when it unilaterally reduced the school work year calendar, reducing the number of work days by 20 days for certain bargaining unit members. The Commission held, “[w]here an employer seeks to reduce its operating costs without making a programmatic change to its operation, any decision that reduces employee wages or hours is a mandatory subject of bargaining.”

In finding that the Griffin School District’s action was a mandatory subject of bargaining, the Commission relied on the fact that all of the closure dates were scheduled on non-student days when there would be absolutely no impact on student services or educational programs. There is no analogous fact pattern in the instant case and, as such, *Griffin School District* is distinguishable on that critical point.

Equally important is the fact that *Griffin School District* is one in a trilogy of cases decided erroneously by the Commission, along with the two consolidated cases on appeal before this Court. While the facts of *Griffin School District* provide a separate reason to find its holding inapplicable here, the Commission engaged in the same faulty analysis and application of the balancing test present here and, accordingly, *Griffin*

School District should not be relied upon because it is inconsistent with prior PERC precedent.

The controlling PERC authority here is *Wenatchee School District*, Decision 3240-A (PECB, 1990). ATU points to *Griffin School District* because the Commission distinguished the result in *Wenatchee School District* based on its finding that Griffin School District “is not reducing its services,” while, in contrast, Wenatchee School District changed the kindergarten program from a half day to a full day.⁴ Despite ATU and TEA’s assertions to the contrary, King County’s decision to close buildings and operations on certain days when it was otherwise scheduled to be open and accessible to the public is more analogous to Wenatchee School District’s programmatic schedule change than Griffin School District’s decision to close schools on days that were already established as non-student days. In *Griffin School District*, there is nothing to suggest that the school district indicated any impact on the students whatsoever. It is undisputed here that buildings and services generally open to the public were closed on ten days in 2009. It is undisputed that citizens who approached the doors of County licensing offices, bus pass sales, customer service centers housed in those buildings were met by signs announcing the closure dates and apologizing for the inconvenience.

⁴ Notably, a review of the Commission’s decision and the Hearing Examiner’s decision below shows that there was no change in the curriculum or amount of education offered to students, only a change in the class schedule allowing the school district to eliminate mid-day bus runs. See, *Wenatchee School District*, Decision 3240-A (PECB, 1990); see also, Hearing Examiner’s decision below, *Wenatchee School District*, Decision 3240 (PECB, 1989).

ATU notes that many of the in-person services denied to the public on closure days are still available to citizens online or, in the case of bus pass sales, at satellite locations. That is true. However, the fact remains that services to the public were curtailed; citizens who wished to purchase bus passes, obtain customer service, pay property taxes, buy pet licenses, schedule building inspections or lodge code enforcement complaints in person were unable to do so at buildings subject to the closures. Just as Wenatchee School District parents were no longer offered the option to enroll their children in either morning or afternoon kindergarten, King County residents could not choose in-person services during the closures. Neither ATU nor TEA alleges otherwise, nor can they truthfully do so.

C. The Proper Bargaining Standard Is Effects Bargaining

King County does not deny that it achieved labor savings through the closures and associated furloughs. However, this fact does not change the nature of its decision which falls squarely within the employer's managerial control. The Commission acknowledged this principle in *Wenatchee School District* when it stated, "The decision to convert to a full-day kindergarten program was clearly motivated, at least in major part, by a desire to reduce costs, *but that fact alone does not transform the program decision into a mandatory subject of bargaining.*" (Emphasis added.)

Unlike those cases cited by either TEA or ATU, King County made no attempt to evade its duty to bargain with the unions regarding the

impact of its decision to close buildings and furlough employees. There are numerous admissions and evidence in the record demonstrating the County's good faith efforts to meet with TEA and ATU for the purpose of accomplishing effects bargaining – the proper bargaining standard in this case.

As outlined in King County's Opening Brief, an employer need only provide reasonable notice and the opportunity to bargain to satisfy an effects bargaining obligation. *See, e.g., Val Vue Sewer Dist.*, Decision 8963 (PECB, 2005). The employer may implement its decision even before effects bargaining is complete. *See, City of Bellevue*, Decision 3343-A (PECB, 1990); *Wenatchee School District*, Decision 3240-A (PECB, 1990).

King County provided notice of the closures to ATU on or about October 26, 2008 and provided notice to TEA no later than October 30, 2008. *See*, Opening Brief of Respondent ATU, p. 6; ATU CR 45 (Tr.); Opening Brief of Respondent TEA, p. 5. Upon providing notice, King County invited each of the unions to engage in bargaining and the parties actually began bargaining prior to implementation of the first closure day on January 2, 2009. *See*, ATU CR 682-83; ATU CR 833-34; ATU CR 996-97; ATU CR 1077-78; TEA CR 1492 (Tr.); TEA CR 1495-96 (Tr.); TEA CR 1498 (Tr.); TEA CR 1501-02 (Tr.); TEA CR 1634 (Tr.); TEA CR 2044-45; TEA CR 3427, TEA CR 3438-39; TEA CR 3538-40. Even after TEA and ATU filed unfair labor practice charges, King County

remained willing to bargain the effects of the closures, as evidenced most clearly by the fact that the County and TEA's Wastewater Staff unit reached agreement on the effects. *See*, TEA CR 3493. The County made no attempt to evade its bargaining obligation and has satisfied its effects bargaining obligation.

D. The Interest Arbitration Statute Is Inapplicable

The interest arbitration statute applies only to mandatory subjects of bargaining that are required under RCW 41.56. Because the County's 2009 closures were a permissive subject of bargaining, and the statute does not bar changes in permissive subjects, the statute is not applicable to the facts of these consolidated cases. *See*, RCW 41.56.492.

III. CONCLUSION

King County asks this Court to decide that a decision to save some programs at the expense of others is a not a mandatory subject of bargaining but a decision reserved as a managerial prerogative that enables King County to act as required for the fulfillment of its public duties.

For the reasons stated in its Opening Brief and as further discussed herein, King County asks this Court to vacate the Public Employment Relations Commission's decisions and orders set forth in Decision No. 10547-A and consolidated Decision No. 10576-A-PECB.

RESPECTFULLY SUBMITTED this 21st day of February, 2012.

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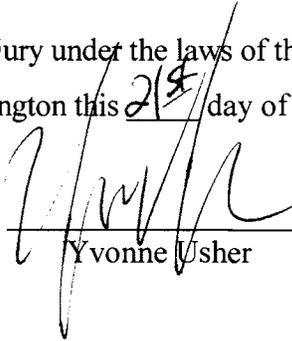
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Yvonne Usher

EXHIBIT A

IN THE MATTER OF THE ARBITRATION
BETWEEN

AMALGAMATED TRANSIT UNION,
LOCAL 587

and

KING COUNTY

OPINION
AND
AWARD

Grievance: Mandatory Furloughs

THE ARBITRATION BOARD

Janet L. Gaunt, Neutral Member
Neal Safrin, Union Partisan Member
Laurie Brown, County Partisan Member

February 16, 2010

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EXHIBIT LIST

1. Agreement between Amalgamated Transit Union Local 587 and King County Metro Transit (November 1, 2007 through October 31, 2010).
2. Letter from King County Executive Ron Sims to King County Council (October 13, 2008)
3. 2009 Budget Executive Summary
4. Letter from King County Executive Ron Sims to King County Coalition of Labor Unions (October 3, 2008)
5. King County email to all County employees (October 28, 2008)
6. Agreement between King County and King County Coalition of Labor
7. Email from Labor Negotiator David Levin to ATU President Lance Norton (November 3, 2008) w/attached letters
8. Email from David Levin to Lance Norton (November 6, 2008) with attached spreadsheet
9. Email from David Levin to Lance Norton (November 12, 2008) with attached spreadsheet
10. Email from David Levin to Lance Norton (November 14, 2008)
11. General Manager Kevin Desmond letter to all Metro Transit employees (December 18, 2008)
12. Employer's Consolidated Response to ATU Local 587's Grievances related to Operational Closures (March 12, 2008)
13. Grievance of George Williams (1/15/09)
14. Excerpts from hearing transcript, SEIU v. King County Water Department, FMCS #090319-0973-8 (July 15, 2009)
15. King County's Workforce Management Manual (August 27, 2008)
16. King County's 2009 Emergency Budget Furlough Guidance Document (March 20, 2009)
17. King County Ordinance implementing furloughs (December 16, 2008)
18. Excerpts from hearing transcript, ATU Local 587 vs. King County, PERC Case No. 22254-U-09-5679 (May 28, 2009)

PROCEEDINGS

The Amalgamated Transit Union, Local 587 initiated this arbitration pursuant to the terms of a collective bargaining agreement with King County Metro Transit. At issue is the County's implementation of operational and building closures with related employee furloughs in 2009.

The neutral Arbitrator was selected by mutual consent, and a hearing was held in Seattle, Washington on November 3, 2009. The Union was represented by Clifford Freed of Frank Freed Subit & Thomas LLP. The County was represented by Henry E. Farber and Kelsey M. Sheldon of Davis Wright Tremaine LLP. Both sides stipulated that the Arbitration Board ("Board") had jurisdiction to render a final and binding decision regarding the issues presented.

At the hearing, the parties presented stipulated facts, issues, and exhibits in lieu of offering testimony. They then submitted closing argument in the form of posthearing briefs. The hearing was closed upon receipt of the last of those briefs. Pursuant to the parties' agreement, this decision is issued by the Neutral Arbitrator to resolve a deadlock between the Partisan Board members.

STIPULATED STATEMENT OF THE ISSUES

The parties agreed the Board should resolve the following issues:

1. Whether King County violated Article 21 of the CBA for George Williams and Eric Butler when it did not pay them for January 2 and other furlough days when their department was closed?
2. Whether King County violated Article 23 for the ten grievants who are Senior Schedule Planners when it did not pay them for January 2 and other furlough days when their department was closed?
 - a. This excludes any Senior Schedule Planners who were on call during a furlough day.
3. Did King County's actions on the furlough days constitute a layoff under Article 7 of the CBA?
 - a. If so, did King County violate the layoff provisions of the CBA when it implemented the furloughs?
4. Were King County's actions on the furlough days within its rights under Article 1.5 of the CBA (Management Rights)?

The parties further agreed that if the Arbitrator determines that a breach of the CBA occurred, the Arbitrator may retain jurisdiction to resolve any dispute about remedy.

STIPULATED FACTS

The parties stipulated facts are as follows:

1. King County Metro Transit ("the County" or "Metro") and Amalgamated Transit Union Local 587 ("ATU" or "the Union") are parties to a collective bargaining agreement ("CBA") that was effective November 1, 2007 and expires October 31, 2010. Ex. 1.
2. Metro provides public transportation services within King County. Ron Sims was King County Executive during the time period relevant to all decisions pertaining to this arbitration.
3. ATU is a labor organization, representing approximately 3,700 employees of Metro Transit. Lance Norton was the Union President until June 30, 2009. Paul Bachtel became Union President on July 1, 2009.

THE BUDGET PROCESS

4. Each year, the County Executive submits a proposed budget to the King County Council. Prior to 2009, the budget submission was made during the second week of October. The Council would then review, modify the submitted budget, and approve a budget by the Monday before Thanksgiving.
5. The County Office of Management and Budget ("OMB") reviews, compiles, analyzes, and prepares the budget submission. During all relevant times, Bob Cowan was the Director of OMB and Beth Goldberg was the Deputy Director.
6. King County and each of its funds, including Metro Transit, are required to maintain balanced budgets.
7. The Metro Transit Fund is the largest fund in King County's budget. Sales tax revenues fund approximately 70% of Transit operations. The remainder of the fund's revenue comes from fares, advertising and miscellaneous revenues.
8. In 2008, the County faced critical deficits in both its General Fund and its Metro Transit Fund. In October 2008, Metro Transit's projected deficit was \$107 million, an amount comprised of an anticipated \$64 million reduction to projected sales tax revenues, \$28 million increase in fuel prices, and \$15 million increase in cost of living adjustment costs.

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9. In response to the anticipated deficits in both its General Fund and in the Metro Transit Fund, the County considered options to achieve a balanced budget including program reductions, program eliminations, and layoffs. Metro Transit explored a series of proposals involving fare increases, operating cuts, capital program cuts and the use of reserves.

10. In the fall of 2008, King County Executive Sims directed that Metro Transit not reduce service on the road. Thus, Metro Transit was left evaluating costs not associated with bus or other road services to address its widening budget gap.

11. On October 13, 2008, the Executive transmitted his proposed 2009 budget for King County government to the King County Council. The Executive's transmittal letter indicated that "King County's General Fund faces the largest single-year deficit in county history as a result of the structural imbalance between the growth rate of revenues and the growth rate of expenditures. This structural imbalance is exacerbated by the turmoil in world financial markets and the impacts of that turmoil on county revenues and expenditures. Since the adoption of the 2008 budget which forecast a 2009 General Fund budget deficit of \$24.7 million, the projected deficit has grown to \$93.4 million as the deepening global financial crisis deepened. This dramatic downturn in the economy magnified the General Fund structural problem as forecast sales tax and interest earnings deteriorated and the costs of providing services increased due to rising inflation." Exs. 2, 3.

12. The Executive's October 13, 2008 budget submission expected to achieve savings from labor costs that had not yet been defined. The exact method of achieving these savings had not yet been determined.

13. During the month of October, King County was engaged in discussions with the King County Coalition of Labor Unions ("Coalition") about the need for savings. ATU was not expressly invited by the Coalition to participate, and did not participate, in these discussions. On October 3, 2008, the Executive sent to the Coalition a letter describing the nature of the budget problem and considerations in addressing the deficit. Ex. 4.

14. On October 28, 2008, the County notified all County employees via e-mail that it had reached an agreement with the Coalition, including a discussion of select terms from the Agreement. Exs. 5, 6.

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15. Building closures and associated furloughs were scheduled on the following 10 days in 2009: January 2, February 13, April 10, May 22, June 19, July 6, September 4, October 12, November 25, and December 24.

16. Buildings closed in downtown Seattle on closure days include the King Street Center, the Administration Building, and the Chinook Building.

17. When the buildings were closed, the affected operations do not provide service to the public, and the County's citizens cannot enter these buildings to access services. For example, the citizenry cannot pay property taxes, purchase pet licenses, schedule building inspections, or lodge code enforcement complaints. On those closure/furlough days when Metro Transit's Pass sales office was open, as described in paragraph 31 below, citizens were able to purchase passes.

18. The furloughs and closure of operations on these 10 days provided the savings needed for the Executive's budget. OMB estimated the closures would provide savings of \$8,500,000 for the General Fund and \$14,300,000 for non-General Fund agencies.

19. The King County Council adopted the 2009 Annual Budget on November 24, 2008.

20. The approved budget for Metro Transit included an unprecedented two-step fare increase of two 25-cent increments, \$80 million in capital budget reductions, provision for spending down of reserves, and \$32 million in operating expense reductions. The operating expense reductions included layoffs, a partial hiring freeze, the elimination of vacant positions, and savings from building closures and the associated labor savings.

21. As contemplated by Article 7.1 of the parties' CBA, King County experienced a "lack of funds" at all times relevant to this grievance.

BUILDING CLOSURES AND THE ATU

22. Approximately 66 Metro Transit employees represented by ATU were affected by the proposed furloughs. Twelve ultimately filed grievances. Two of them, including George Williams, are Customer Information Specialists. Ten are Senior Schedule Planners ("SSPs"). All 12 work principally in the King Street Center, where Metro Transit's offices are located.

23. On November 3, 2008, by way of an email and attached letters from Labor Negotiator David Levin to ATU President Lance Norton, King County formally

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notified ATU that the County would be partially shutting down its operations on ten dates in 2009 and that affected ATU members would be furloughed. King County provided notice to the Union that it would be closing the King Street Center and the Yesler Building and the Metro Transit employees who work in these buildings would be furloughed. Ex. 7.

24. The parties engaged in discussions regarding the effects of the closures and furloughs, but no agreement was reached.

25. On November 6, 2008, David Levin sent an email and attached spreadsheet to Lance Norton regarding employees affected by the closures/furloughs. Ex. 8.

26. On November 12, 2008, David Levin sent an email and attached spreadsheets to Lance Norton showing furlough-eligible job classifications within Transit. Ex. 9.

27. On November 14, 2008, David Levin sent an email to Lance Norton identifying an additional six ATU members from the Finance and Business Operations Division who would be furlough eligible. Ex. 10.

28. On December 18, 2008, Kevin Desmond, General Manager-Metro Transit, issued a letter to all Metro Transit employees affected by the closures. Ex. 11.

29. Metro Transit implemented the building closures and furloughs effective January 2, 2009, as set out in the schedule in Paragraph 15. As of the arbitration, there have been eight (8) days of furlough and building closure.

30. Employees assigned to closed buildings are not permitted to perform work on closure days and are therefore furloughed for the FTE equivalent of 80 hours over the course of the year.

31. The Pass Sales Office, from which bus passes are sold directly to the public, and which also processes and mails out on-line bus pass sales, operates from an first-floor section of King Street Center. The Pass Sales Office was not closed down on some of the furlough days, and ATU employees worked in the Pass Sales office on those days. The Pass Sales office was closed on other closure/furlough days. An undetermined number of non-grievant employees deemed to be providing essential services were also permitted to work in the buildings on various closure/furlough days. Two of the grievants, Monique Allen and Steve Masumoto, are "on-call" on some of the closure/furlough days. Ms. Allen and Mr.

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Masumoto have performed work on some of the furlough days and Mr. Masumoto performed work in the King Street Center.

32. The County has testified that the furloughs and building closures have saved it a projected \$22.8 million, of which \$1.7 million came from Metro Transit. The County acknowledges that the savings come predominantly from labor costs.

33. The County has acknowledged that it had other sources of savings it could have chosen to balance the Metro Transit fund, including reducing bus service, laying off employees, and not increasing the salaries of Metro Transit nonrepresented employees. The County provided a 4.88% increase to nearly 2000 nonrepresented employees throughout all funds of the County budget, including Metro Transit employees. Those nonrepresented employees throughout the County, including those at Metro Transit, who received the 4.88% pay increase participated in the closures and associated furloughs. The Metro Transit employees represented by ATU also received a 4.88% increase in 2009. One of the reasons the County chose building closures and furloughs was to provide parity between different groups of employees.

34. SSPs do not work 100% of their time in the King Street Center. Although it will vary on an individual basis, somewhere between 20-35% of their time is spent in the field or at bus bases performing other duties relating to their classification, including meeting with transit operators at buses; riding buses to help plan routes and routing options; riding buses to check running times and passenger counts; meeting with Service Quality staff; planning special events; and working on their computers from remote locations.

35. Eight of the ten SSP grievants were promoted from the ranks of First-Line Supervisors, and in the event of layoffs among SSPs, those SSPs have the right to bump back to First Line Supervisors. First-Line Supervisors were not affected by the furloughs.

36. SSPs are FLSA exempt pursuant to Article 23, Section 2(A) of the CBA. On furlough weeks, their status was converted to non-exempt hourly.

37. In the event of layoffs, none of the grievants employed as Customer Information Specialists had displacement or bumping rights as outlined in Article 7.2.B.

38. None of the 12 grievants requested displacement or bumping of another employee as outlined in Article 7.2.B. Rather, in the first two weeks of January, the instant grievances were filed.

THE GRIEVANCES

39. The parties agreed to consolidate and limit grievances related to the closure/furloughs as outlined in the Employer's Consolidated Response to ATU Local 587's Grievances Relating to Operational Closures letter dated March 12, 2009. Ex. 12. George Williams became the representative grievance. Ex. 13.

40. On March 4, 2008, the parties held a single-step grievance hearing.

41. On March 12, 2009, King County denied the consolidated grievance as set forth in the Employer's Consolidated Response to ATU Local 587's Grievances Relating to Operational Closures letter dated March 12, 2009.

42. The parties stipulated to the admissibility of testimony and exhibits formerly presented by Kerry Delaney at an arbitration hearing on July 15, 2009. The relevant portion of the hearing transcript is Exhibit 14. A copy of King County's Workforce Management Manual is Exhibit 15. A copy of King County's 2009 Emergency Budget Furlough Guidance Document is Exhibit 16. A copy of the King County Ordinance implementing furloughs is Exhibit 17.

43. The parties stipulate to the admissibility of testimony formerly presented by Kevin Desmond at an arbitration hearing on May 28, 2009. The relevant portion of the hearing transcript is Exhibit 18.

44. The parties do not agree about the terms used to describe the County's actions. ATU uses the terms "furloughs" or "layoffs" to describe the actions taken. The County uses the terms "building closures" or "operational closures" to describe its actions with "furloughs" being the consequence of those actions. The use of these terms in this stipulation shall not be construed as agreement by one party with the other's terms.

RELEVANT CONTRACT LANGUAGE

ARTICLE 1: UNION/MANAGEMENT RELATIONS

* * * *

SECTION 5 - MANAGEMENT RIGHTS

The management and direction of the workforce, including work assignments, the determination of duties, the setting of performance standards and the development of work rules to ensure the quality and efficiency of its operations and safety of Employees and the public, shall be vested exclusively in METRO, except as limited by the express language of this AGREEMENT and by any practice mutually established by METRO and the UNION.

ARTICLE 5: GRIEVANCE AND ARBITRATION

* * * *

SECTION 2 - ARBITRATION PROCEDURE

* * * *

- E. The power and authority of the Arbitration Board shall be to hear and decide each grievance and shall be limited strictly to determining the meaning and interpretation of the terms of this AGREEMENT.
1. The Arbitration Board shall not have the authority to add to, subtract from, or modify this AGREEMENT, nor to limit or impair any common law right of METRO or the UNION. The Arbitration Board's decision, including upholding, modifying or setting aside any disciplinary action or the award of lost wages and benefits, shall be in accordance with federal and state laws, and shall be final and binding on all parties.
 2. The decision of the Arbitration Board shall be based solely on the evidence and arguments presented by the parties in the presence of each other.
- F. The parties agree that the power and jurisdiction of any arbitrator who is chosen shall be limited to deciding whether there has been a violation of a provision of this AGREEMENT.

* * * *

ARTICLE 7: LAYOFF AND RECALL

SECTION 1 - REASON FOR LAYOFF

METRO will not lay off any Employee except due to reduction in service, lack of work, lack of funds or improvement in efficiency. METRO will inform the UNION of potential layoffs 45 days or more in advance in order to allow METRO and the UNION to investigate whether Employees scheduled for layoff may continue to be employed by METRO. If a reduction in the work force should prove unavoidable and provisions cannot be made to retain affected Employees at different job classifications within METRO, then METRO and the UNION will form a relocation task force to seek alternate gainful employment for affected Employees.

SECTION 2 - METHOD OF REDUCTION

- A. METRO shall determine the positions to be eliminated. Layoffs shall occur by inverse seniority, within the affected job classification, within the division.
- B. A laid-off Employee who has attained regular status in another job classification may displace a less senior Employee in said classification. A position in the highest paying classification, in which there is a less senior Employee and in which the Employee previously has attained regular status, will be offered, except that an Employee shall not be placed into a classification from which the Employee has demoted or failed to complete the probationary period. For such purpose, seniority shall be calculated to include all time spent in the classification in which the Employee is placed, plus any continuous time spent in other Bargaining Unit classifications with higher pay top step wage rates, in which the Employee had attained regular status.

SECTION 3 - RECALLING LAID-OFF EMPLOYEES

- A. An Employee shall be eligible for reinstatement for 24 months following layoff and shall be recalled to service in the order of his/her seniority within a division, and by job classification. To be eligible for reinstatement, a laid-off Employee must keep METRO informed of his/her current address. METRO's obligation to offer reinstatement shall be fulfilled by mailing a notice by registered mail to the most recent address supplied by the laid-off Employee. A laid-off Employee must notify METRO within 15 days after

such reinstatement offer has been mailed by METRO and report for work at the time and place stipulated in the notice.

- B. An Employee, who fails to respond to the reinstatement offer or who fails to report when and where notified, shall be deleted from the recall list.

ARTICLE 21: CUSTOMER INFORMATION SPECIALISTS (CIS)

* * * *

SECTION 2 - GENERAL CONDITIONS

* * * *

- B. Senior Customer Information Specialists, Customer Information Specialists and Assigned Customer Information Specialists shall be considered as one classification for the purposes of layoff.

* * * *

SECTION 3 - WORK ASSIGNMENTS

* * * *

- B. The workweek shall consist of five consecutive days, except when a Customer Information Employee's pick makes this impossible. Each Customer Information Employee will be guaranteed eight hours pay for each regular workday. Each shift will be completed within a continuous eight and one-half hour period and will include an unpaid one-half hour lunch and two paid 15-minute breaks. Exceptions to this rule are:
- Graveyard shift, which shall be completed within a continuous eight-hour period, so long as it is staffed by only one Customer Information Employee.
 - Shifts with one hour lunches shall be completed within a continuous nine hour period and will include an unpaid one-hour lunch break and two paid 15-minute rest breaks. No more than 50% of all full-time shifts shall have one-hour lunch breaks.
 - Assigned Weekday shifts on Thursday or Friday shall be completed within a continuous eleven-hour period and will include an unpaid one-hour lunch break and two paid 15-minute rest breaks.

- Assigned Weekend shifts on Saturday or Sunday shall be completed within a continuous 10-1/2 hour period and will include an unpaid one half-hour lunch break and two paid 15-minute rest breaks.

A Customer Information Employee who picks a regular weekly schedule consisting of four ten-hour shifts will be governed by the provisions in Article 13.

- C. Shifts and RDOs shall be arranged so that each Customer Information Employee shall have at least eight hours off between shifts and at least 60 hours off for RDOs; except that Customer Information Specialists, who select extra positions, and Assigned Customer Information Specialists shall have at least 54 hours off for RDOs.
- D. No more than 20% of all full-time Customer Information Specialist assignments shall be extra positions. A Customer Information Specialist who selects an extra position shall be guaranteed eight hours pay each day.
- E. Work schedules for extra person and Assigned Specialist positions shall be posted on Tuesday of the week prior to the effective date of the assignment.
- F. No regular, full-time continuous shift in the Customer Information Office shall be split during the life of this AGREEMENT. No full-time Customer Information Specialist will be required to accept assigned status. No Assigned Customer Information Specialist will be required to accept a split shift without mutual agreement between METRO and the UNION.
- G. METRO may create Telecommuting Shifts, which will be assigned and administered according to guidelines mutually developed and agreed to by METRO and the UNION.

ARTICLE 23: SCHEDULE SECTION AND OSS COORDINATORS

SECTION 2 - GENERAL CONDITIONS

- A. Senior Schedule Planners, Transit Information Planners and OSS Coordinators will be Fair Labor Standards Act (FLSA) exempt Employees who may work flexible schedules. An Employee may work an alternative work

schedule, which may include but is not limited to: 4/40, flexible work hours, compressed work week, telecommuting and/or job share arrangements upon approval of his/her supervisor. FLSA-exempt Employees may be granted up to a maximum of ten days executive leave annually, to be administered according to King County policy.

* * * *

CONTENTIONS OF THE PARTIES

The parties' respective arguments, although presented in much more detail, can be summarized as follows:

Union

1. When the County did not pay Grievants George Williams and Eric Butler for January 2nd and other furlough days, it violated Article 21 of the CBA, which defines a regular workweek as consisting of five consecutive days with a "guaranteed" eight paid hours each day. The County similarly violated Article 23 when it altered the regular work schedules and failed to pay Senior Schedule Planners for January 2nd and other furlough days.
2. The parties are in agreement that Grievants Williams and Butler, who both work in the Pass Sales Office, are covered by Article 21 of the CBA. Article 21.3(B) contains forceful language specifying that each Customer Information Employee "shall" have a workweek consisting of five consecutive work days, and will be "guaranteed" eight (8 hours pay for each regular work day. Arbitrators have ruled that when CBA provisions provide for guaranteed hours or work or workweeks, an employer may not change them, even in exigent circumstances. Contractual limitations on an employer's right to reduce workweek hours have been upheld by arbitrators even when hours are reduced due to economic difficulties. Contrary arbitral precedent should not be followed.
3. The County's right to determine the days it is open for business is limited by Article 21. Pursuant to Article 21.3(B), the County must schedule mandatory furloughs in such a way that they do not violate the right of furloughed employees to their regular workweek. Claims that the County's action is justified by financial emergency or the impossibility of allowing work when a facility has been closed

should be rejected. The Pass Sales Office was not closed on all the days that the Grievants were furloughed. Characterization of events as a "building closure" in reality was no such thing. In addition, the County had alternatives to furlough. For example, it was under no obligation to provide a 4.88% pay increase for its nonrepresented workforce, but chose to do so.

4. A Hearing Examiner in a parallel case before the Washington Public Employment Relations Commission ("PERC") concluded there is no evidence that non-labor savings from closing operations played an important role in the County's decision. Decision No. 10547 at 7 (PECB, September 29, 2009). The County had reserves well in excess of a reasonable amount that it could have used to address the budget shortfall. In the fleet replacement fund alone, an independent auditor determined approximately \$105 million was excessive, and thus could have been drawn upon for operations. In the Union's view, no facts justify deviation from the contractual guarantees set forth in Article 21 of the CBA. In any event, deviation was not justified by the facts of this case.

5. Article 23 specifies that SSPs are "Fair Labor Standards Act ("FLSA") exempt employees," who may work flexible schedules. The SSPs spent 20-35% of their time in the field or at bus bases, so performance of their jobs was not necessarily dependent upon the King Street Center being open. The language of Article 23 places the onus of defining a schedule on the employee. The "normal" or "regular" workweek is thus whatever the SSPs and their supervisors agree upon. Mandatory furloughs had the effect of converting SSPs from FLSA-exempt employees to non-exempt hourly employees. The County does not have the right to unilaterally alter the regular workweek or unilaterally convert SSPs to hourly employees.

6. The furloughs at issue mandated that employees take ten unpaid days off. Regardless of how the County tries to characterize its action, arbitrators have found that any reduction in work hours constitutes a layoff, and compliance with contractual layoff provisions is required. There is no indication in Article 7 that the terms "layoff" or "furlough" have any specific definition. Use of those terms therefore must be considered in light of other arbitrations. Many arbitrators find the two terms are synonymous, and used interchangeably. In a particularly analogous case involving the City of Oakland, Arbitrator McKay found a contract violation arose when a municipal employer, facing extreme budget limitations, reduced the number of days on which employees worked in order to make up some of the City's budget shortfall.

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7. A layoff by any other name is still a layoff. King County's mandatory furlough constituted a layoff because it involved a suspension from employment for 80 hours. At the very least it was a type of layoff within the scope of Article 7.1 and 7.2 of the CBA. Difficulty in effecting one-day mini-layoffs is not a basis for avoiding the contractual language. Even if engaging in contractually permissible workweek reductions, employers are obligated to honor the seniority and layoff provisions of a CBA. In a particularly analogous case, Ace Hardware Corporation chose to lay off the same eight employees every Friday in response to slowing business. In that circumstance, an arbitrator ruled that under seniority provisions of the CBA, senior employees had the right to remain on the job if work was available and cutbacks had to be affected by placing junior employees on layoff. 88 LA 594 (Thornell, 1986).

8. Article 7.2 of ATU's CBA provides that "layoffs shall occur by inverse seniority, within the affected job classification, within the division" and that a "laid-off Employee who has attained regular status in another job classification may displace a less senior Employee in said classification." Eight of the ten SSP grievants were promoted from the ranks of First-Line Supervisors. First-Line Supervisors were unaffected by the County furloughs. Pursuant to Article 7.2, the SSPs who had previously attained regular status as First-Line Supervisors had the right to bump back into that position in the event of layoffs. None of the SSPs were provided this option. Instead, the County violated Article 7.2 when it furloughed the SSPs in lieu of allowing them to fill First-Line Supervisor positions that were not subject to furlough.

9. A recent arbitration ruling involving King County's collective bargaining agreement with SEIU 925 regarding the 2009 mandatory furloughs should have no persuasive effect. That ruling was predicated on a different CBA with different terms. The only commonality is the SEIU grieved the same furlough. Arbitrator Joe Henderson found the term "furlough" differed from "layoff," but "furlough" is not the term at issue in ATU's case. Unlike the SEIU case, there is also no evidence that ATU attorneys had concluded the County's actions were legal.

10. The only relevant consideration is whether the County's actions meet the definition of "layoff" that would trigger application of the layoff provisions of Articles 7.1 and 7.2 of the CBA. Other arbitrators have found definitions that are more useful to consider here. Better reasoned arbitral authority has found that furloughs constitute a layoff. Consistent with that authority, King County's actions are easily subsumed within the common meaning of "layoff."

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11. Applying Article 7.1's layoff restrictions to the furlough enacted by King County does not create a new and unbargained guarantee of employment. It would merely require the County to comply with contractual seniority provisions when it does lay people off. A finding that the County engaged in a layoff would not create any new guarantees or circumvent the County's right to bargain contract terms.

12. The County's actions in implementing the furloughs are not within the County's management rights recognized by Article 1.5 of the CBA. Those management rights are restricted by limitations set forth elsewhere in the CBA. The County is free to control "work assignments" and the "determination of duties" but it must do so without violating Articles 7, 21, and 23 of the CBA. For all of the foregoing reasons, the Board should determine that a breach of the CBA occurred. When wages are improperly reduced through the imposition of mandatory unpaid days, make-whole remedial awards are appropriate and commonly ordered. The Arbitrator should order King County to cease and desist from implementing mandatory furloughs on ATU employees; make each grievant whole for any loss of pay or other contractual benefits suffered, and order any other remedy the Arbitrator deems just.

County

1. In a contract interpretation case, the Union bears the burden of proving any alleged violation of the parties' CBA. That burden was not met. The furloughs implemented by King County were not layoffs. Even if equivalent to layoffs, they did not violate any portion of the contractual layoff provisions. Article 7 of the CBA does not define either "layoff" or "furlough." It makes no mention of emergency budget furloughs. The provisions as a whole demonstrate an intent to impose limitations on just layoffs that involve the separation or termination of affected employees' employment or the elimination of positions.

2. Metro Transit employees were furloughed for the equivalent of 80 hours spread throughout the course of 2009. They were not paid for those hours, but suffered no termination of their employment status. The furloughed employees continued to accrue vacation, sick leave, and retirement benefits during the furlough. The County's action thus did not constitute a layoff. Arbitrators considering similar situations have reached the same conclusion. The better reasoned cases have all required a severance of employment status.

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3. In a case involving the Wenatchee School District, the Washington State Public Employment Relations Commission found that a reduction in work schedule to reduce costs did not constitute a layoff, implicating layoff provisions in a CBA. Wenatchee School District, Decision 3240 (July 1989, PECB). An arbitrator's ruling involving UConn Health Center is also directly on point. In upholding the Health Center's right to implement a "no work/no pay" furlough, the arbitrator found it persuasive that the furloughs did not follow the usual pattern of layoffs in that the sick and vacation accruals of furloughed employees were not affected. 98 LA 553 (Lieberman, 1992).

4. Comparison of King County guidelines regarding layoffs to the 2009 Emergency Budget Furlough Guidance Document shows the different nature of the two actions. When an employee is laid off, they are provided with an exit guide explaining the County's recall program and unemployment benefits. County-sponsored health benefits end on the last day of the month in which the employee is laid off. Any accrued but unused vacation time is cashed out and unused sick leave benefits simply vanish. Upon being laid off, the employee must return all County-property. In a furlough situation, the employee maintains all rights, including vacation accruals, sick leave accruals, and their FTE status remains the same. This is consistent with legislation governing the availability of unemployment benefits for laid-off workers. The County's furloughs did not constitute "layoffs" for the purpose of qualifying for unemployment benefits. There is no evidence the parties agreed that furloughs should be treated the same as layoffs for purposes of contract interpretation.

5. Even if the furloughs at issue are found to fall within the scope of Article 7, the conditions of Article 7.1 were met. The parties have stipulated that the County experienced a lack of funds, and the County gave more notice of the furloughs than required by the CBA. Eight of the twelve grievants had previously been employed as first-line supervisors and would have been permitted to exercise bumping rights over less senior supervisors in the event of an actual layoff. The impracticality of applying this bumping right demonstrates the unlikelihood that the layoff provision was intended to apply to the single day furloughs implemented in 2009. The County would have been required to replace eight existing supervisors with eight SSPs on ten scattered days throughout the year. This is an unreasonable result, particularly in light of the fact that the operational closures and furloughs were implemented to save money and resources, not squander them. Pursuant to established rules of contract interpretation, an interpretation leading to a reasonable result is preferred to one that produces an

unreasonable, harsh, absurd or nonsensical result. The Union's claim that the furloughs violated the parties' layoff provisions should accordingly be denied.

6. Article 21 guarantees only the minimum length of each workday. It does not guarantee 40 hours of work per week, the number of days to be designated "regular workdays" within each work week, or 2080 hours of work per year for CIS employees. There is no express guarantee and none should be implied. Stating that the workweek "shall consist of five consecutive days" is designed to avoid split work week, not guarantee five days of work. Arbitral authority holds that specifications of a normal work week do not automatically guarantee a specific amount of work or employment for any specific days per week. Such guarantees cannot be implied, they must be specifically stated. The parties knew how to draft language that would create a guarantee of hours. They expressly guaranteed eight hour pay for each work day. There is no equivalent guarantee with respect to the number of work days in the work week, and furloughs affected only the number of days worked in the week.

7. Article 23 contains no guarantee of work whatsoever for SSPs. It simply states they will be Fair Labor Standards Act (FLSA) exempt employees who may work flexible schedules. The CBA's reference to the FLSA must be read as incorporating the full scope of the FLSA exempt status, and the FLSA permits the action taken by the County. Use of "budget-required furloughs" is specifically addressed by Department of Labor regulations at 29 CFR 541.710(b), which states that a budget-required furlough does not disqualify an employee from being paid on a salary basis except in the workweek in which the furlough occurs. Salary deductions during furlough weeks does not jeopardize the employee's exempt status. Consistent with the Department of Labor's FLSA regulation, the County converted salaried SSP employees to hourly employees during the ten designated furlough weeks. It would be unreasonable to find that compliance with FLSA regulations constitutes a violation of the parties CBA where it defines SSP employees as FLSA exempt employees.

8. The CBA's management rights clause allows implementation of furloughs at the County's discretion. The County has the authority to determine which days it will open for business. Nothing in the CBA explicitly prohibits furloughs. Neither Article 21 or Article 23 guarantee a particular number of days or hours per week that the County must schedule CIS or SSP employees to work. The addition of any such guarantee or prohibition would therefore exceed the Arbitration Board's power and authority. Pursuant to Article 5.2.E.1 of the CBA,

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the Board is specifically precluded from adding to, subtracting from, or modifying the CBA.

9. Policy considerations should also persuade the Board to avoid a harsh, absurd, or nonsensical result. The King County Council and King County Executive acted to fulfill their oaths of office to establish sound fiscal policy, and create a balanced budget. The CBA does not explicitly prohibit the use of furloughs, nor require the County to resort to layoffs before implementing operational closures and resulting furloughs. A prohibition on furloughs can only be read into the CBA through creation of a new guarantee of work hours or broadened meaning of the word "layoff." Doing so would remove one of the few options available to the County Council when faced with a fiscal emergency, and raise the likelihood of more drastic action, such as termination of the employment status of some employees.

10. A recent arbitration ruling involving King County's collective bargaining agreement with SEIU 925 supports the County's argument that the implemented furloughs were not layoffs and the CBA's management rights provision permits the County's actions. Furloughs challenged in the SEIU case were identical to those imposed on the ATU bargaining unit. The contractual layoff provisions and management rights clauses in the SEIU contract are sufficiently similar to those in the ATU contract to make Arbitrator Henderson's conclusions relevant. Neither contract defines the term "furlough," or "layoff," and both contracts contain broad management rights clauses. Faced with contractual silence, Arbitrator Henderson concluded that the furloughs were not layoffs. In doing so, he noted that furloughed employees continued to accrue benefits and maintain their positions with the County. Consistent with the ruling in the SEIU case, the County's furlough of ATU-represented employees should be found to be distinct from layoffs and permissible under the terms of the ATU CBA. When the legal context and factual picture are the same, the County should not face conflicting results.

11. The SEIU ruling is also instructive in its evaluation of the parties' management rights clause. The absence of CBA provisions prohibiting furloughs left that decision within the County's authority. The ATU labor contract is likewise silent on furloughs, so the Arbitration Board should echo the conclusion of Arbitrator Henderson. Sustaining the ATU grievance would amount to creating a new and unbargained employment guarantee in violation of contractual limitations on the Board authority. For all of the foregoing reasons, the grievance should be denied.

OPINION

There is no dispute that for 2009, King County faced a very serious budget deficit. The issue presented is whether one of the steps chosen to address that deficit violated certain provisions of the County's labor contract with the ATU. We refer herein to the action at issue as a "furlough" because that is how the County itself characterized the mandated days off without pay in correspondence with the ATU and the King County Coalition of Labor Unions. Exs. 5, 7-11.

Ideally, the negotiation of a collective bargaining agreement will resolve all potential issues in a way that avoids later disputes. As anyone who ever sat at the bargaining table knows, that ideal is rarely achieved. The negotiation of collective bargaining agreements is a complex undertaking. With hindsight, one can always draft text that more clearly resolves an issue. When juggling the myriad tasks and issues that arise during collective bargaining, potential problems are much harder to spot. The nature of collective bargaining is such that misunderstandings and disagreements inevitably occur, no matter how skilled the bargainers.

I. THE COUNTY FURLOUGHES DID NOT VIOLATE ARTICLE 21 OF THE CBA.

The first issue this Board has been asked to address involves Article 21 of the CBA, which addresses the bargaining unit job classification of Customer

Information Specialists (CIS). The CIS "workweek" is described in Article 21.3.B, which reads in relevant part:

The workweek shall consist of five consecutive days, except when a Customer Information Employee's pick makes this impossible. Each Customer Information Employee will be guaranteed eight hours pay for each regular workday. Each shift will be completed within a continuous eight and one-half hour period and will include an unpaid one-half hour lunch and two paid 15-minute breaks.

The Union reads the first two sentences of this text as indicating that CISs are guaranteed forty (40) hours of work each week. The County contends Article 21.3.B guarantees only the minimum length of each workday. The County reads the first sentence as protecting against split workweeks; not as providing a guarantee that every workweek will necessarily consist of five work days.

A. AN AMBIGUITY EXISTS THAT REQUIRES INTERPRETATION.

An arbitrator's failure to follow clear and unambiguous language in a collective bargaining agreement is one of the limited grounds upon which an arbitration decision may be overturned by the courts. My first consideration is thus whether an ambiguity exists. Courts and arbitrators once considered only the express terms of a contract to decide whether an ambiguity exists (the "plain meaning rule"). The "context rule" now seems the preferred approach; one which this Arbitrator has adopted. The context rule holds that determination of meaning or ambiguity should be made *after* considering relevant evidence of the situation and relations of the parties, the subject matter of the transaction,

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preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. Berg v. Hudesman, 115 Wn.2d 657 (1990).

The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)(emphasis added), *cert. denied*, 465 U.S. 1007 (1984).

Sometimes this kind of extrinsic evidence will make contractual language seem ambiguous, when on its face two plausible ways of applying contractual language did not initially appear. It is important to note, however, that evidence of context is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. Berg v. Hudesman, 115 Wn.2d at 669; In re Marriage of Schweitzer, 132 Wn.2d 318, 327 (1997).

Language does not become ambiguous merely because parties disagree over the meaning of a phrase or contract provision. An arbitrator must decide whether, judged in context, a single, obvious and reasonable meaning appears on the face of disputed language. Ultimately, a party's offered interpretation may not be found to best reflect the negotiated intent of contract language, but if plausible

contentions can be made for conflicting interpretations, then an ambiguity will be said to exist.¹

In the instant case, the Union's offered interpretation is certainly plausible. The first sentence of Article 21.3(B) says the workweek "shall" consist of five consecutive days, and the second sentence says eight hours pay is "guaranteed" for each regular workday. In combination, that would amount to forty (40) hours of work each workweek. The Union correctly notes that some reported arbitral cases hold that when specific contract provisions describe hours of work or workweeks, an employer may not unilaterally change them. *See, e.g., G.C. Murphy*, 68 LA 1072 (Sembower, 1977). It is equally true that there is a split in arbitral views, with some arbitrators finding that contractual provisions describing the hours per day and days of a workweek do not automatically constitute a guaranteed number of hours for every workweek.

There is a division of opinion and viewpoint among arbitrators on this question of management's right unilaterally to change the regularly scheduled contractually specified workweek for an indefinite future period of time.

Motch & Merryweather Machinery, 32 LA 492, 496 (Kates, 1959). Arbitrators recognize that work week descriptions can be intended instead to describe a norm, rather than an intended guarantee of specific hours.

¹ Sometimes ambiguity is readily apparent on the face of a contract ("patent ambiguity"). Ambiguity may also arise from language which appears on its face to be clear but which becomes unclear when applied to a specific situation ("latent ambiguity").

Definitions of standard or regular work weeks are quite common in contracts, and it is usually held by arbitrators that they do not as such crystallize the work days or the work week. Such defining of the work week is usually there to provide a frame of reference for the computation of overtime. Usually there is no ban on variations from the basic work week as long as proper compensation is paid.

Ace Hardware, 88 LA 594, 596 (Thornell, 1986). This arbitral recognition lends plausibility to the County's proffered interpretation, especially since the word "guarantee" is used only in the second sentence of Article 21.3(B) regarding the minimum workday. Failure to use that same word in the first sentence with regard to workweeks does support an inference that no guarantee was intended. Since each side has offered a plausible way to read the language at issue, an ambiguity exists that requires interpretation.

B. THE COUNTY'S INTERPRETATION IS MORE REASONABLE TO ADOPT.

When an ambiguity is found to exist, it becomes an arbitrator's task to provide a reasonable interpretation. Various rules of construction are utilized in this endeavor, but they are not inflexibly applied. They are merely tools to search out the parties' likely intent. Principles that guide arbitrators in their endeavor have been described as follows in a treatise produced by the National Academy of Arbitrators:

Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are (1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle

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of reasonableness. Such interpretive guidelines are frequently used in conjunction with each other.

The Common Law of the Workplace, 65 (BNA 1998). Specific considerations have also been described by our Washington state courts:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.

See, e.g., Stendor v. Twin City Foods, Inc., 82 Wn.2d 250, 510 P.2d 221 (1973);

Jones Associates v. Eastside Properties, 41 Wn.App. 462, 704 P.2d 681 (1985).

The goal of this Arbitrator is to enforce the reasonable expectations of the parties.

In the instant case, neither side has offered any evidence of the bargaining history that resulted in adoption of the language at issue; nor any evidence of an established past practice. Instead, we have nothing but the language on its face from which to draw conclusions. This Arbitrator recognizes that a guaranteed forty hour workweek could be implied from use of the word "shall" in the first sentence of Article 21.3.B, but other considerations leave me reluctant to do so.

First, I do find it significant that eight hours pay per regular workday was "guaranteed," and no such word was used in the preceding sentence for workweek. The fact that the sentence refers to five "consecutive" days also lends

support to the County's claimed belief that the purpose of this sentence was focused on preventing the scheduling of split workweeks.

Language similar to the first two sentences of Article 21.3(B) appears in other contract sections that address the work assignments of numerous bargaining unit classifications. Ex. 1, Article 17.3.A (Vehicle Maintenance Employees), Article 18.4.A (Facilities Maintenance Employees), Article 19.2.B (Revenue Coordinators), Article 20.2.A (Special Classifications), and Article 25.3.A (Pass Sales Office Employees). Thus, adopting the ATU's interpretation does not just impact a small segment of the bargaining unit. It could be relied upon by the Union to impose a similar workweek guarantee beyond the CIS classification, and thus have a broad impact on the County's ability to adjust work assignments. It seems unreasonable to adopt an interpretation having this broad a potential impact in a case with such a limited evidentiary record.

When the language at issue was first incorporated into the labor contract, ATU negotiators may well have construed it as providing a guaranteed forty-hour work week that the County could not unilaterally reduce. There is no evidence, however, that this intent was ever communicated to the County negotiators. The County acknowledges it understood there was a commitment to ensure a minimum work day of eight hours, but not to ensure a minimum work week.

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There is no evidence that the County's past method of applying the contract language has been inconsistent with its avowed intent.

In a dispute involving the interpretation of contract language, the Union has the burden of proving its interpretation is correct. *See, e.g., SMG-Van Andel Arena*, 111 LA 185, 190 (Brodsky, 1998). The Arbitrator feels that burden was not met. On the limited evidentiary record presented, the most reasonable interpretation is to regard the first sentence as describing a normal, but not guaranteed, workweek, and a requirement that scheduled work days be consecutive. There is no assertion that the CIS grievants received less than eight hours pay for each scheduled work day in the furlough weeks, or that they did not work consecutive days those weeks. Accordingly, a violation of Article 21 in the case of CIS Grievants George Williams and Eric Butler was not established.

II. THE FURLOUGHS OF SENIOR SCHEDULE PLANNERS DID VIOLATE ARTICLE 23.

Ten grievants are Senior Schedule Planners (SSPs) to whom the provisions of Article 23 apply. Section 2.A of Article 23 reads as follows:

A. Senior Schedule Planners, Transit Information Planners and OSS Coordinators *will be Fair Labor Standards Act (FLSA) exempt Employees who may work flexible schedules*. An Employee may work an alternative work schedule, which may include but is not limited to: 4/40, flexible work hours, compressed work week, telecommuting and/or job share arrangements upon approval of his/her supervisor. FLSA-exempt Employees may be granted up to a maximum of ten

days executive leave annually, to be administered according to King County policy.

Ex. 1 (emphasis added by italics). Unlike Article 21, a regular schedule is not described for SSPs. Instead, Article 23 indicates they will work a “flexible” schedule. In the Union’s view, the “normal” or “regular” workweek thus becomes whatever the SSPs and their supervisors agree upon. Since SSPs did not agree to the mandatory 2009 furloughs, the Union contends the County could not unilaterally impose them. The ATU contends Article 23 was also violated because the furloughs had the effect of converting SSPs from FLSA-exempt employees to non-exempt hourly employees.

The County contends Article 23 contains no guarantee of work whatsoever for SSP’s so institution of 2009 furlough days does not constitute a violation. The County acknowledges it converted salaried SSP employees to hourly employees during the ten designated furlough weeks. Stipulation #36. It did so consistent with FLSA regulations governing the treatment of FLSA exempt public employees during furloughs. The County contends it would be unreasonable to treat compliance with applicable DOL regulations as a violation of the labor contract.

There is no evidence of how the sentence at issue came to be added to the labor contract, or of any prior dispute regarding its application. We have only the contractual text from which to draw conclusions. There is no express description of work week parameters, just reference to working “flexible schedules.” As a

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practical matter, the "normal" or "regular" workweek may be whatever SSPs and their supervisors agree upon. That does not mean the County cannot direct changes from the norm. Pursuant to Article 1.5, the County retains the right to direct its workforce, including the right to make "work assignments." However, it must do so in a way that does not violate express language in Article 23.

Article 23.2.A expressly and unambiguously states that SSPs "will be . . . FLSA exempt." This appears to be the only bargaining unit job classification for which that flat assertion is made. The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record-keeping, and youth employment standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay. Exempt employees are not. Reference to SSPs as "FLSA exempt" indicates they meet statutory requirements for exemption, are paid on a salaried basis, and will not be entitled to overtime pay.

A memo to furlough eligible Metro Transit employees described what would occur with FLSA-exempt employees as follows:

If you are usually an FLSA-exempt employee (salaried), you will be converted to hourly status during each week that includes a furlough day. [Work week chart omitted.]

precluded from doing by Article Art. 5.2.E.1 of the CBA, which declares: "The Arbitration Board shall not have the authority to add to, subtract from, or modify this AGREEMENT, . . ."

There is no evidence that a right to convert SSP's to hourly status during certain weeks of the year was ever discussed or must have been evident to Union negotiators. With adoption of the language at issue, the ATU had a reasonable expectation that SSPs would remain FLSA exempt each workweek. Because the status of SSPs as "FLSA exempt" is so clearly set forth in Article 23, the County was not free to make changes to the workweek that caused exempt status to be lost, even if temporarily. For the foregoing reasons, the Arbitrator concludes the County's failure to pay SSPs for January 2 and other furlough days in 2009 constituted a violation of Article 23. Pursuant to the parties' stipulated issue, this ruling excludes any SSPs on call during a furlough day.

III. THE COUNTY'S FURLOUGH ACTION DID NOT CONSTITUTE A LAYOFF UNDER ARTICLE 7 OF THE CBA.

The most significant issue presented by this case is whether the furloughs implemented in 2009 constitute "layoffs" within the meaning of Article 7 of the CBA, and thus required compliance with layoff and recall rights set forth therein. Article 7 applies when a "layoff" occurs, but that term has not been defined in the labor contract. The Union contends there is no indication that the terms "layoff"

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or "furlough" have any specific definition. It therefore urges this Board to follow arbitral precedent holding that layoffs and furloughs are interchangeable terms and occur with any reduction of work hours. The County contends the better reasoned cases are those finding a reduction in hours worked does not constitute a layoff unless accompanied by a temporary or permanent termination of employment. Due to the absence of any express definition, an ambiguity requiring interpretation clearly exists.

A. THE SEIU ARBITRATION RULING IS DISTINGUISHABLE.

In a ruling involving a collective bargaining agreement between the County and SEIU Local 925, involving employees in the County's Wastewater Treatment Division, Arbitrator Joseph Henderson concluded that furloughs implemented by King County were not layoffs and were permitted by the SEIU contract's management rights provision. Service Employees International Union, Local 925 v. King County, FMCS Case No. 090319-09783-8 (December 18, 2009) ("SEIU case"). The furloughs at issue in the SEIU case were identical to those at issue before this Board. Since neither the SEIU or ATU labor contracts define the term "layoff," the County contends the Board should echo the conclusion of Arbitrator Henderson, and should not subject the County to a conflicting result.

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As a matter of law, arbitrators are not required to treat a prior arbitration decision as controlling precedent in a subsequent arbitration case. Hill & Sinicropi, Evidence in Arbitration, 386 (2d Ed. 1987). Arbitrators are free to attach to prior awards whatever precedential value they deem appropriate. Prior arbitration decisions are not binding precedent, but arbitrators do not readily depart from prior interpretations of the same contract language negotiated by the same parties.

The SEIU ruling involved a different labor union and different labor contract. The applicable contract provisions also differed in their wording. I have considered the general reasoning of Arbitrator Henderson, along with the rationale of arbitrators in other cases cited by both sides in support of their respective positions. A careful reading of reported cases reveals the outcome frequently depends on facts or language peculiar to each bargaining relationship. There is clearly no uniformity of arbitral view. The following observation remains true today.

Many . . . cases present fact situations, findings of custom and practice, or contract language which can be distinguished from the instant case and limit their usefulness. In others, . . . no unanimity of opinion is to be found.

Triangle Conduit, 33 LA 610, 612 (Gamser, 1959)

. . . in the absence of a specific contractual provision on management's right to reduce the workweek rather than apply the layoff provisions, arbitrators have not been unanimous.

California Offset Printers, 96 LA 117, 119 (Kaufman,1990). The persuasive consideration for this Arbitrator has been evidence of contractual intent that appears in terms the County and ATU chose to use throughout Article 7.

B. LAYOFFS TRIGGERING APPLICATION OF ARTICLE 7 REQUIRE SEPARATION FROM ONE'S POSITION.

When words are not defined in a collective bargaining agreement, arbitrators generally rely upon the customary and ordinary meaning. That is true unless there is evidence that parties had a contrary intent or were using a term in accordance with something other than its dictionary definition. *See, e.g., T. St.Antoine (ed.), The Common Law of the Workplace: The Views of Arbitrators, §2.5, p.69 (1998).* In the instant case, the word "layoff" might not be expressly defined, but read as a whole, Article 7 indicates that separation from one's existing position is the kind of personnel action contemplated.

In its entirety, Article 7 reads:

ARTICLE 7: LAYOFF AND RECALL

SECTION 1 - REASON FOR LAYOFF

METRO will not lay off any Employee except due to reduction in service, lack of work, lack of funds or improvement in efficiency. METRO will inform the UNION of potential layoffs 45 days or more in advance in order to allow METRO and the UNION to *investigate whether Employees scheduled for layoff may continue to be employed* by METRO. If a *reduction in the work force* should prove unavoidable and provisions cannot be made to *retain affected Employees at*

different job classifications within METRO, then METRO and the UNION will form a relocation task force to seek alternate gainful employment for affected Employees.

SECTION 2 - METHOD OF REDUCTION

- A. METRO shall determine the *positions to be eliminated*. Layoffs shall occur by inverse seniority, within the affected job classification, within the division.
- B. A laid-off Employee who has attained regular status in another job classification may *displace a less senior Employee* in said classification. A position in the highest paying classification, in which there is a less senior Employee and in which the Employee previously has attained regular status, will be offered, except that an Employee shall not be placed into a classification from which the Employee has demoted or failed to complete the probationary period. For such purpose, seniority shall be calculated to include all time spent in the classification in which the Employee is placed, plus any continuous time spent in other Bargaining Unit classifications with higher pay top step wage rates, in which the Employee had attained regular status.

SECTION 3 - RECALLING LAID-OFF EMPLOYEES

- A. An Employee shall be *eligible for reinstatement* for 24 months following layoff and shall be recalled to service in the order of his/her seniority within a division, and by job classification. *To be eligible for reinstatement*, a laid-off Employee must keep METRO informed of his/her current address. METRO's obligation to offer reinstatement shall be fulfilled by mailing a notice by registered mail to the most recent address supplied by the laid-off Employee. A laid-off Employee must notify METRO within 15 days after such reinstatement offer has been mailed by METRO and report for work at the time and place stipulated in the notice.
- B. An Employee, who fails to respond to the reinstatement offer or who fails to report when and where notified, shall be deleted from the recall list.

Ex. J-1 (emphasis added by italics). The phrases I have marked by italics all seem to indicate that when discussing “layoff,” separation from one’s existing position was contemplated.

None of the furloughed ATU bargaining unit members was removed from their County position. None of them was subjected to the County’s normal process that accompanies layoffs. That process was described in stipulated testimony by Kerry Delaney, HR Senior Manager for the County’s Human Resources Division. Ex. 14. As administered by the County, a layoff involves a separation from employment with the loss of County-sponsored benefits and rights.

County sponsored health benefits end on the last day of the month in which an employee is laid off, so laid-off employees are provided with information on their COBRA rights. A laid-off employee receives a check for accrued and unused vacation time. Accrued but unused sick leave benefits are lost. A laid-off employee must return all County-property, and he/she loses access to County e-mail and systems. If there is no other job the laid-off employee can move into, then employment with the County ceases and the individual becomes eligible for unemployment compensation. Ex. 14 at 291-295. Furloughed members of the ATU bargaining unit suffered none of these described impacts. They maintained all accrued vacation, sick leave FMLA rights, and designated FTE positions.

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Requiring removal from one's position in order for a layoff to arise under Article 7, is consistent with a distinction adopted by the Washington Public Employment Commission ("PERC"). In Public School Employees of Wenatchee, Decision 3240 (July 1989, PECB), a PERC Hearing Examiner noted:

Robert's Dictionary of Industrial Relations, BNA Books, 1971, defines "layoff", as "a term generally applied to a temporary or indefinite separation from employment." While there was a reduction in hours of work for the bus drivers as a class, the evidence does not disclose the separation of any of them from employment. Reduction of hours and layoff are not regarded as synonymous, and "layoff" is not an accurate description of the matter under consideration in the instant case.

Decision 3240 at 5 (emphasis added by italics). It is also consistent with the fact that the Washington Employment Security Department does not consider "furloughs" to be "layoffs" for purposes of qualifying for unemployment benefits. Ex. 14 at 295. Even without the kind of phrases that appear in Article 7, requiring separation from one's position is a distinction drawn by many arbitrators in reported cases. See, e.g., UConn Health Center, 98 LA 553 (Lieberman, 1992); Oscar Mayer & Co., Inc., 75 LA 555 (Eischen, 1980); O'Neal Steel, Inc., 66 LA 118 (Grooms, 1976).

There is no evidence the parties drafted Article 7 with a specific intent to have just a reduction in work hours trigger that Article's seniority provisions and recall procedures. Given the phrases used in Article 7, the County had a reasonable basis to believe the negotiated intent was otherwise. The Union may

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have had a different belief, but one commonly applied arbitral rule holds that an undisclosed intent does not prevail over intent manifested some way at the bargaining table. *See, e.g., Kahn's and Company*, 83 LA 1225, 1230 (Murphy, 1984); *Tri-County Metro*, 68 LA 1369 (Tilbury, 1977). Washington courts also follow this objective theory of contracts; focusing on evidence of intent that was manifested during negotiations as compared to unexpressed subjective intent.

The proponent of a contract need only prove the existence of a contract and the other party's objective manifestation of intent to be bound thereby; the unexpressed subjective intent of either party is irrelevant.

Retail Clerks v. Shopland Supermarket, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982); *Sherman v. Lunsford*, 44 Wn.App. 858, 861, 723 P.2d 1176 (1986).

Article 7's references to whether employees scheduled for layoff would "continue to be employed," "reduction in the work force," retaining affected employees in "different job classifications," forming a task force to seek "alternate gainful employment," determining "positions to be eliminated," "displacing" a less senior employee, and being "eligible for reinstatement," all evidence an intent to cover personnel actions involving separation from an existing position. That did not occur with the County furloughs implemented by the County in 2009. For all of the foregoing reasons, I find Article 7 was not applicable, and therefore no violation occurred.

IV. COUNTY ACTIONS ON THE FURLOUGH DAYS WERE CONSISTENT WITH ITS MANAGEMENT RIGHTS UNDER ARTICLE 1.5 OF THE CBA, EXCEPT AS TO SENIOR SCHEDULE PLANNERS.

The ATU labor contract has a management rights provision which reads in its entirety:

The management and direction of the workforce, including work assignments, the determination of duties, the setting of performance standards and the development of work rules to ensure the quality and efficiency of its operations and safety of Employees and the public, shall be vested exclusively in METRO, except as limited by the express language of this AGREEMENT and by any practice mutually established by METRO and the UNION.

As this language of Article 1.5 specifies, the retained rights of management are reserved exclusively to the County unless limited by "express" language appearing elsewhere in the CBA.

The labor contract addresses "layoffs" in Article 7 but a reduction of hours without separation from one's position is not encompassed within the scope of that term and Article 7. There is no evidence the topic of "furloughs" was ever specifically discussed during bargaining, and the CBA is silent regarding that term.² Absent any *express* limitation set forth elsewhere in the CBA, the County

² The Board's task is limited to interpretation and application of certain contract provisions. We have no authority to decide the broader question of whether unilateral implementation of the County furloughs violated any statutory bargaining obligation. A PERC Hearing Examiner has ruled that the County committed an unfair labor practice by failing to bargain the furlough decision and its effects with the ATU. Amalgamated Transit Union, Local 587 v. King County, Decision 10547 (PECB, 2009). The County's appeal of that decision remains pending before the full Commission.

retained the right to close buildings for budgetary reasons, and reduce employee work hours. The Union did not convincingly establish that express limitations on the exercise of this right arose from Articles 7 or 21. In the case of SSPs, a declaration in Article 23 that they will be FLSA exempt does represent a constraint on County action.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the foregoing Opinion, it is awarded that:

1. King County did not violate Article 21 of the CBA for George Williams and Eric Butler when it did not pay them for January 2 and other furlough days when their department was closed.
2. King County did violate Article 23 for the ten grievants who are Senior Schedule Planners when it did not pay them for January 2 and other furlough days when their department was closed.
3. King County's actions on the furlough days did not constitute a layoff under Article 7 of the CBA.
4. Except as to the SSPs, King County's actions on the furlough days were within its rights under Article 1.5 of the CBA (Management Rights).
5. As an appropriate remedy for violation of Article 23, the County is directed to cease implementing mandatory furloughs in a way that causes SSPs to become non-exempt under the FLSA, and make the SSP grievants whole for any wages or benefits lost because of the furlough days at issue.

EXHIBIT B

IN THE ARBITRATION PROCEEDINGS BETWEEN
THE PARTIES BEFORE JOE H. HENDERSON

In the Matter of the Arbitration Between

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 925,

Union,
and

KING COUNTY,

Employer.

DECISION AND AWARD

FMCS 090319-09783-8

Dates of Hearing:
7/14, 7/15 and 8/24/09

Grievance: Furlough/Layoff Grievance

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The above proceeding was heard on July 14, July 15, and August 24, 2009, in Seattle, Washington. The parties stipulated that the issue was properly before the Arbitrator and that there were no procedural arbitrability issues.

At the hearing, the parties were given an opportunity to present oral and documentary evidence, to examine and cross-examine witnesses, and to argue its case. Post-hearing briefs were submitted by the parties on or about October 9, 2009. All oral and documentary evidence having been considered, this Arbitrator now makes his findings, decision and award.

ISSUE

The parties were unable to agree on the issue. The parties agreed that the Arbitrator should select either or answer both of the issues or reframe an issue based upon the evidence presented.

Union Statement of the Issue

Did the Employer violate the CBA in implementing a furlough/layoff of SEIU bargaining unit members; and, if so, what is the appropriate remedy?

Employer Statement of the Issue

Whether King County violated its collective bargaining agreement with SEIU Local 925 for the Wastewater unit when it furloughed employees for 80 hours throughout 2009? If so, what would be the appropriate remedy?

RELEVANT PROVISIONS OF THE CBA

Preamble

Article 6: Management Rights and Responsibilities

Article 7: Productivity Initiative

Article 10: Personnel Actions
 10.10 Layoffs
Article 12: Conflict Resolution and Grievance Procedure
Article 17: Hours of Work and Overtime
 17.1 Hours of Work
 17.6 Work Schedule Changes
Article 24: Special Conditions
Article 26: Contracting Out

BACKGROUND

The Union filed a grievance on December 22, 2008, for violation of the terms of the collective bargaining agreement (CBA) in effect at that time. The remedy requested the County to rescind the furloughs to all SEIU 925 Wastewater Treatment Division (WTD) members. A one step grievance process was agreed to by the parties and the single grievance meeting was held on March 3, 2009. The County denied the Union's grievance and it proceeded to this arbitration.

KING COUNTY WASTEWATER TREATMENT DIVISION

The Wastewater Treatment Division (WTD) is the County run utility. WTD provides sewage treatment for the County and does not operate out of or from the General Fund of the County. The revenue of the WTD is derived from fees collected from the customers served, "We are not funded by general fund revenues, we are funded by sewer charges and rates." The budget is independent of the general governmental fund used for operations of the County.

Extensive efforts are made by the WTD to operate as though they were a private utility. The County and the WTD's union negotiated an agreement that established a "productivity incentive fund." The fund is designed to encourage the employees to

actively “engage in a competitiveness and productivity initiative for the benefit of the employees of the Division, and the ratepayers of King County, our ‘customers’.” A joint Labor/Management committee determines what operational savings have been made. The “saved funds” are placed in the “productivity incentive fund” which is distributed “twenty-five percent (25%) of the funds assigned to the productivity incentive fund shall be paid out in cash to all employees participating in the productivity initiative, with the remaining seventy-five percent (75%) to be distributed in accordance with Article 8.5” (Production Incentive Oversight Committee).

In negotiating the incentive program, the Union was concerned that layoffs would not be used to affect savings. The following language became part of Article 7 of the Collective Bargaining Agreement, “There will be no involuntary layoffs during the period of the Productivity Pilot Program is in effect ...”

POSITION OF THE UNION

The case arose from a grievance dated December 22, 2008, filed by the SEIU 925 bargaining unit members of the Wastewater Treatment Division.

Article 7.1 of the CBA unambiguously guarantees that there will be no involuntary layoffs during the Productivity Pilot Program. Since the Productivity Pilot Program was initiated in 2000, there have been no layoffs in the wastewater bargaining until this dispute.

In the fall of 2008, Kathy Oglesby, the County’s Executive Labor Liaison, visited a Coalition meeting indicating that the County was planning to distribute a letter to all County employees the following day that outlined funding problems within the County

and stated that there would be a two week furlough imposed on County employees. In response to the letter, the Coalition demanded to bargain over it.

On October 27, 2008, the County and the Coalition reached a tentative agreement regarding the furloughs. On October 29, 2008, the County sent via email to the Coalition representatives a spread sheet showing bargaining units, classifications with the bargaining units, and the number of workers eligible and ineligible for furlough. It included most, but not all, of the Wastewater bargaining unit.

In December 2008, the Wastewater Division Director True held meetings at various wastewater treatment plants and answered questions from the floor. She told employees that the County intended to furlough all Wastewater employees. A handout stated that the County Council had passed a budget that included savings from the proposed furloughs and that the Wastewater Division had clear direction from the King County Council to implement the furlough. The membership voiced opposition to the furloughs and brought up that the contract prohibited layoffs, which they argue includes the proposed furloughs, during the life of the Productivity Initiative, which was ongoing.

The County's plan for implementing the furloughs had to be tailored to fit several of the bargaining units involved, including the Wastewater Division, which had an alternative work schedule. John McMillin, SEIU 925 Chapter President, wanted language in the Wastewater plan that made it clear that salary savings from the furloughs would go to the Productivity Incentive Fund Committee. They agreed to a document titled Guidelines for SEIU 925 Furlough Implementation, which included a statement that salary savings would become part of that fund.

The Wastewater membership rejected the tentative agreement, and SEIU 925 did not sign a Memorandum of Agreement concerning the furlough proposed. Despite the refusal of the Wastewater bargaining unit to ratify the tentative agreement on the furlough proposal, the County carried out the furloughs. The first furlough day for Wastewater employees was January 2, 2009.

Contrary to the County's list provided in late October 2008, all Wastewater bargaining unit members, except those who stated that they would retire within two years, were subjected to the furlough. As of the arbitration hearing date, the number of furlough days required by the County would have been five, but because of the various shifts in WTD, the members could have taken from three to five days. The tentative agreement with the Coalition on furloughs and the guidelines developed for SEIU 925 WTD make it clear that employees who work more than 8 hour shifts must take a total of 80 hours in 2009. McMillin testified that he works 10 hour days and has taken a total of 50 hours of unpaid furlough time. He further testified that each day he takes off without pay is worth approximately \$330 and that he is a little on the low side of average for his bargaining unit. In addition to regular pay, he also loses approximately \$1.60 per hour as a grandfathered portion of the old gainsharing program that was replaced by the PIP.

The Union argues that the Employer violated the CBA that prohibits involuntary layoffs during the term of the Productivity Initiative Program. The plain contract language mandates no layoffs during the term of the Productivity Initiative. When contract language is clear and unambiguous, "arbitrators will apply its plain meaning and will not look outside the four corners of the document to ascertain the intentions of the

parties.” Ray J. Schoonhoven, *Fairweather’s Practice and Procedure in Labor Arbitration* 243 (4th Ed. 1999). If contract words are plain and clear, conveying a distinct idea, their meaning is to be derived entirely from the language used. [cites omitted]

Article 7.1 of the CBA provides: “There will be no involuntary layoffs during the period the Productivity Pilot Program is in effect between Wastewater Treatment Division of DNRP and King County government. Any reductions in force necessary to help meet productivity goals will be accomplished through attrition.” The language unequivocally stated that there will be no layoffs while the PIP is ongoing, which it undisputedly is.

The County apparently will argue that the no layoff guarantee applies only to productivity driven decisions to lay-off because of lack of work for all employees. It will apparently rely on the second sentence of Article 7.1 above to bolster that argument. This interpretation misconstrues both the purpose and the effect of Article 7.1.

The County may further argue that Article 10.10 of the CBA, establishing layoff provisions and tying layoffs to seniority, means that the County has the right to impose layoffs notwithstanding Article 7.1. Reading the contract as a whole, the County’s argument is entirely without merit. The Arbitrator must give effect to all words in the agreement and avoid an interpretation of a CBA that nullifies or renders meaningless any provision of the contract.

Under Article 7.1, if the Productivity Pilot Program is in effect, then the no-layoff guarantee applies. The specific no-layoff language, operable during the Productivity Program, controls the more general provisions of Article 10.10, which are not contingent.

The County may argue that as a management right it may implement layoffs in circumstances of natural or economic disasters, or other emergency circumstances beyond its control. There is no contract language reserving the County's right to disregard express contract language prohibiting layoffs during the term of the Productivity Initiative. To the contrary, the inclusion of language providing for circumstances beyond the Employer's control elsewhere in the contract demonstrates that the parties considered such contingencies and could have included similar language in Article 7.1 if the parties intended the no layoff guarantee to be similarly limited.

The bargaining history demonstrates that the plain meaning of the no layoff provision is what the parties intended in their negotiation. The Union put on extensive evidence of the negotiation of the language that is now found in Article 7.1, which shows that the no layoff commitment was made early and unqualifiedly. The County failed to adduce any evidence to the contrary. The bargaining unit members are entitled to protection from layoff because they bargained for that protection for as long as they continued to participate in the Productivity Initiative.

The County introduced several documents extrinsic to the CBA and to the negotiation of the no-layoff provision in 2000. The Furlough Guidance and Workforce Management Manual are inoperative insofar as they permit what the collective bargaining prohibits – layoffs during the term of the Productivity Program. County personnel policies, rules and regulations apply to WTD employees only to the extent they do not conflict with the CBA. Any reliance by the County on these external documents should be disregarded, as they are of no relevance to the contract question being adjudicated in

this case. The hearsay statements, not subject to cross-examination, made in the Productivity Pipeline by various persons who did not testify at hearing, are similarly lacking in evidentiary value.

King County violated the no-layoff provision of the CBA when it implemented a mandatory 10-day furlough. The “furlough” is a layoff for purposes of the CBA that does not define layoff to exclude reductions in hours. When King County unilaterally mandated the WTD employees cease work for 10 days in 2009, the employees experienced an involuntary layoff in fact, even if not in name, within the meaning of Article 7.1.

A number of arbitration decisions find the distinction between furloughs and layoffs as merely semantic and use the two terms interchangeably.

The CBA does not define “layoff” to exclude reductions in hours, whether entitled “furlough” or not, and interpreting the term layoff to cover the “furloughs” at issue is required to enforce the bargain struck in Article 7.1. The CBA does not provide for “furloughs” and does not define the term and neither does it define “layoffs.” However, under the extensive arbitral authority cited in the Union’s post-hearing brief, the mandatory furlough being implemented constitutes a layoff because it is a “suspension from employment arising out of a reduction in the workforce” requiring workers to take 10 days (or 80 hours) of unpaid furlough time. King County cannot avoid its obligations under Article 7.1 by characterizing the mandatory cessation of work as a furlough rather than a layoff. Mandating employees to cease work for 10 non-consecutive days violates the no-layoff provision.

The County violated the CBA by implementing changes in employees' work hours without obtaining agreement from the Union. In Article 17, the CBA establishes regular hours of work for all employees and permits changes to those work hours only upon agreement with the Union.

Implementation of the furloughs is an unconstitutional impairment of the CBA. Although aware that SEIU 925 opposed the furloughs as applied to Wastewater employees, and that the employees were opposed, and that those employees still had a say in the matter through the ratification vote on the furlough proposal, the County Council passed a budget that assumed that the furloughs would be implemented.

When the membership voted down the Union's tentative agreement with the County to modify the CBA to allow the furloughs, the County was required to find different means to achieve the cost savings. Given that the rest of the coalition voluntarily agreed to implementation of the furloughs, much of the financial benefit the County sought had been achieved. The Arbitrator should follow the Washington and out-of-state cases cited in the Union's post-hearing brief to find that the County's implementation of the mandatory furloughs impaired its contract with SEIU 925.

As to remedy, the Union requests that the Arbitrator (1) order King County to cease and desist from implementing mandatory furloughs on SEIU 925 employees; (2) make each employee whole for any loss of pay or other contractual benefits, which he/she has suffered as a result of King County's implementation of the mandatory furloughs; and (3) order any other remedy the Arbitrator deems just.

POSITION OF THE EMPLOYER/COUNTY

The County's position is that the Collective Bargaining Agreement's limited obligation to avoid layoffs arising out of the WTD's Productivity Initiative Program cannot be stretched to prohibit the furlough actions taken by the County.

The Union has failed to meet its burden of proof and failed to present any evidence to establish that the furloughs are layoffs. Even if a furlough were equivalent to a layoff, the Union has failed to demonstrate that the parties' CBA contains a prohibition on the use of furloughs as implemented in 2009. An examination of the relevant contract language, the parties' bargaining history, and contemporaneous Productivity Initiative documents demonstrate that the CBA does not contain the absolute prohibition of furloughs or layoffs that the Union asserts in its grievance.

The threshold question in this case is whether a furlough, as implemented by King County, is equivalent to a layoff. The plain language of Article 7 limits the County's right to impose certain *layoffs*, making no mention whatsoever of County-imposed *furloughs*.

While the CBA contains a separate provision governing layoffs (Article 10.10), the contract does not define either the term "layoff" or "furlough." Yet, the provisions of Article 10.10 demonstrate the parties' expectations in the event of a layoff and each of these provisions makes a common assumption – that the affected employee is separated from County employment. This basic assumption is not consistent with the furloughs implemented in WTD which do not involve the separation or termination of affected employees' employment.

Furlough-eligible WTD employees are required to schedule 80 hours of furlough time throughout the year. These 80 hours are spread throughout the year, in most cases on ten pre-established days adjoining observed holidays. During those 80 hours, the employee does not report to work and is not paid. Yet, the employee remains in his/her job and suffers no separation or termination of employment. Further, the furlough program was carefully structured by the County and its labor partners so that the furlough days would not impact accrual of vacation or sick leave benefits, retirement benefits, or any other hallmark indicator of County employment. This critical distinction defines the separate nature and treatment of layoffs and furloughs within the County.

The same provision of Article 7 uses the term “reduction in force” synonymously with “layoffs.” A reduction in force contemplates the elimination of positions and the separation of persons from employment, neither of which occurred through furloughs. Arbitrators considering similar circumstances have reached the same conclusion.

The County maintains and follows specific and separate guidelines governing layoffs and furloughs. A comparison of the two processes highlights the different nature of the two actions.

As described by Kerry Delaney, HR Senior Manager for the HR Division, a layoff involves a long and detailed process beginning with the creation of a project team to evaluate and approve plans for the layoff. This project team follows the guidelines contained in the Workforce Management Manual and each implicated collective bargaining agreement to ensure that the proper individuals are identified for layoff and any unit-specific procedures are followed.

The process and impact of a layoff are clearly distinguishable from those associated with a furlough. In a furlough situation, the employee maintains all of their rights.

As further evidence of the distinction between the County's layoffs and furlough processes, Washington's Employment Security Department and the corresponding legislation governing the availability of unemployment benefits for laid-off workers do not consider the County's furlough to be "layoffs" for purposes of qualifying for unemployment benefits.

In the face of the County's substantial evidence that layoffs and furloughs are defined and treated differently, the Union presented no contrary evidence to establish similarities between layoffs and furloughs or any agreement between the parties that furloughs should be treated the same as layoffs for purposes of contract interpretation. Both the Union and the County agree that furloughs were never discussed or contemplated during negotiations regarding the Productivity Initiative and associated CBA provisions. The uncontroverted evidence demonstrates that the employment status of furloughed employees was not affected, nor was vacation or sick leave accruals, eligibility for holiday pay or leaves of absences, nor any other hallmark of County employment.

The standard principles of contract interpretation demonstrate that King County's furloughs were permissible under the terms of the CBA. Even assuming *arguendo* that the County's furloughs fall within the scope of the term "layoffs," the Union still fails to point to any contract provision that prevents the use of furloughs as implemented by the

County within the WTD unit. The Union bases its grievance solely on the layoff restrictions in Article 7, yet Article 7 does not mention furloughs or even provide an absolute ban on layoffs. It only bars layoffs that are caused by efficiencies and savings developed through the Productivity Initiative Program.

When a contract is silent or ambiguous on a particular issue, arbitrators may look to bargaining history and assume that the provision had the same meaning that it was given during the negotiations leading up to the contract. The testimony provided by the County and Union witnesses alike confirm the context in which the Productivity Initiative was developed. Nationwide, public utilities were experiencing a trend toward privatization. King County and those unions representing employees in the WTD agreed that they would work together to identify cost savings and efficiencies that would allow them to remain competitive in the industry and act more like a private company. It is undisputed that the Productivity Initiative development team focused on defining what was inside WTD's control and what was outside its control in determining what factors would fall within the realm of the Productivity Initiative. Where a factor was inside the control of WTD, those employees would reap the benefits of enacted cost saving measures. Where it was outside the control of WTD, employees would neither receive windfalls nor be penalized for that factor's impact on their ability to meet annual targeted savings.

It was within this context that the Union asked for assurances regarding job security. Management and labor agreed that employees could not be expected to participate full-heartedly if they were also afraid that identifying savings would result in

the loss of their jobs. Consistent with this objective, the County agreed to the language in Article 7.

While the Union will undoubtedly argue that the language of the first sentence stands on its own and promises no involuntary layoffs, this interpretation is inconsistent within the context in which the language was negotiated. The basic premise of the Productivity Initiative was the identification and control factors within WTD's control and the assurance that control of those factors would not result in the loss of jobs. Layoffs resulting from events outside the control of WTD employees were not envisioned as part of the Productivity Initiative's layoff restrictions.

The second sentence of Article 7.1, spells out the narrow application of the first statement, explaining the parties' agreement that "any reduction in force necessary to help meet productivity goals will be accomplished through attrition." Article 7 cannot reasonably be read to provide that any and all reductions in force will be accomplished through attrition, but only those reductions necessary to meet the Productivity Initiative's productivity goals.

The undisputed fact remains that the County's 2009 furloughs had nothing to do with savings or efficiencies generated through the Productivity Initiative. The furloughs were approved by the King County Council and implemented County-wide.

The CBA must be considered as a whole and all provisions must be given effect. This must be applied in considering the two sentences appearing side-by-side in Article 7. If the first sentence were to be given application as an absolute ban on layoffs during the Productivity Initiative, the second sentence establishing the parameters of the no-layoff

language as applying only to layoffs “necessary to help meet productivity goals” would be rendered meaningless. It would also render Article 10.10 Layoffs meaningless.

The only evidence presented by the Union in support of its position that the “no layoff” commitment was intended to be absolute comes from the internally inconsistent testimony of Irene Eldridge, SEIU’s contract negotiator in 2000. After being asked what management said about “no layoffs” during negotiations, Ms. Eldridge responded, “It was just the idea that there would no layoffs, which was the theme throughout bargaining.” Yet, when asked about a “Job Security” notation on a handout used by Mr. Isaacson during a bargaining session, Ms. Eldridge demonstrated her understanding of the actual theme throughout bargaining when she explained the notation “Relates again to the fact that people would – employees would not lose their jobs as a result of the initiative.”

Ms. Welch and Mr. Isaacson, both participants in the 2000 successor contract bargaining process, clearly and unequivocally testified that the County did not promise an absolute ban on layoffs, that this message was conveyed to the Union at the bargaining table, and that the County did not change its position with respect to this limited layoff restrictions throughout the course of bargaining. The “no layoff” language was intended to apply only to those layoffs generated as a result of factors within the control of WTD and within the scope of the Productivity Initiative.

The contract at issue here specifically limits the Arbitrator’s power “to interpreting the Agreement between the Employer and the Union as it applies to the dispute before the arbitrator.” The addition of a new, absolute prohibition on layoffs

would be outside the scope of the Arbitrator's authority and would disregard the parties' intent with respect to the Arbitrator's role in the arbitration proceedings.

The CBA's Management Rights clause reserves the right to implement furloughs in the County's discretion. In the absence of a prohibition on the implementation of furloughs, the County may act. The CBA contains a savings management rights clause (Article 6) that provides that the Employer shall have exclusive authority and responsibility to administer all matters that are not covered by this Agreement.

The Arbitrator must also consider the policy implications of his decision to ensure the avoidance of a harsh, absurd or nonsensical result. It is undisputed that the CBA does not explicitly prohibit the use of furloughs and the word "furlough" is never used. A prohibition on furloughs can only be read into the document through a broadening of the term "layoff" not contemplated by the parties, nor supported by the weight of arbitration authority or contract interpretation principles. Additionally, reading this new guarantee into the terms of the contract would remove one of the few options available to the County Council when faced with a fiscal emergency. The use of furloughs in 2009 allowed the Council to maintain essential services to the public while protecting the jobs of incumbent employees. Should furloughs be deemed a layoff prohibited by contract, the County will be left with one less option to avoid more drastic action, including a true reduction in force and layoffs. Such a harsh result should not be contemplated in light of the flimsy evidence presented in support of the Union's assertion that furloughs are prohibited by the parties CBA.

In conclusion, King County did not violate the CBA when it implemented 80 furlough hours without pay in response to budgetary crisis. Simply stated, furloughs are not layoffs. The Union failed to provide convincing evidence of either a clear contract provision or persuasive testimony of the parties' bargaining history to meet its burden of demonstrating a contract violation. Accordingly, the Union's grievance should be denied.

ARBITRATOR'S COMMENTS, FINDINGS, AND DECISION

The case arose from a grievance dated December 22, 2008, filed by the SEIU 925 bargaining unit members of the Wastewater Treatment Division. This is a contract interpretation case and the Union bears the burden of proof.

The Union argues that the Employer violated the CBA that prohibits involuntary layoffs during the term of the Productivity Initiative Program. The Union relies on Article 7.1 which reads:

There will be no involuntary layoffs during the period the Productivity Pilot Program is in effect between Wastewater Treatment Division of DNRP and King County government. Any reductions in force necessary to help meet productivity goals will be accomplished through attrition.

Since the PIP is ongoing, the Union asserts that this language unequivocally states that there will be no layoffs. Further, during the life of the Productivity Program, participating workers can never be "affected employees" or "employees subject to layoff" under Article 10.10 Layoffs. The Union states that the contract language mandating no layoffs

during the term of the Productivity Initiative is absolute and none of the other CBA provisions are to the contrary.

The County asserts that the only argument made by the Union is that the furloughs violate Article 7 of the CBA, which prohibits involuntary layoffs in order to meet the goals of the Productivity Initiative. Thus, the Union must prove (1) that furloughs are the same as layoffs, and (2) that, if they are layoffs, the furloughs violate the CBA. Legal precedent establishes that the Union's argument fails on the threshold issue because furloughs are not layoffs. Although the contract is silent on the issue of "furloughs," the parties' contractual language and bargaining history establish that furloughs, as implemented here, do not fail within the Productivity Initiative's "no layoff" assurances as contemplated and agreed upon by the parties. To sustain the Union's grievance would be to create a new and unbargained for employment guarantee, contrary to the explicit layoff and management rights provisions contained in the agreement.

The Union put on extensive evidence of the negotiation of the language in Article 7.1. Ilene Eldridge, chief spokesperson of the Union negotiating team, testified as follows:

What was said about it was that if language wound up in the contract that said there will be no layoffs, that could have further implications that perhaps everybody wasn't thinking about; in other words, there could – something could happen in the future when the Productivity Initiative Program was in effect that could mean layoffs were necessary. And we, the body as a whole, needed to be very aware of that, that we were committing to no layoffs, that's what it meant, it meant no layoffs. (RT 98-99)

She further testified that never during the negotiation for the 2000-2003 CBA did anyone from the County state that the County intended that the no layoffs guarantee was meant to mean no layoffs caused by increased productivity. Nor did the County state any limit to the proposed no layoff language during those negotiations. (RT 99-100) The Union would not have agreed to any limit on the no-layoff commitment. (RT 100)

The parties agree that during negotiations the word “furlough” was never mentioned. Are “furloughs” the same as “layoffs”? Both parties cited cases to support their position with regard to the meaning of the words. The Arbitrator has read and interpreted the cases cited and notes the following.

The Union argues employees experience an involuntary layoff -- a “reduction in force” within the meaning of 7.1. -- and cites cases where “reduction in force” and “layoff” is for three days or changing workweek to 32 hours. The cases cited, absent contract language to the contrary, define layoff as any period away from work, short or long in duration, and apply to a reduction in work hours.

In *UConn Health Center*, 98 Lab. Arb. (BNA) 553 (Lieberman 1992), Arbitrator Lieberman determined that the contract’s layoff provisions did not prohibit furloughs of the type ordered. The Union stated that was unlike the CBA here which does prohibit layoffs. The *UConn Health Center* case also affirmed the Governor’s right to impose a furlough for emergency financial reasons. Both parties cited *UConn Health Center*, 98 LA 553. (Lieberman, 1992). Arbitrator Lieberman also stated “furlough – unlike normal layoff—resulted in no adverse impact on affected employees’ holiday pay entitlement or vacation or sick-leave accrual.”

The County cites *Oscar Mayer & Co., Inc.*, 75 Lab. Arb. (BNA) 555 (Eischen 1980) -- reduction in hours does not constitute a layoff. Layoff is a termination of employment either temporary or permanent.

The County also cites *Public School Employees of Wenatchee*, Decision 3240 (July 1989, PECB) where the Hearing Examiner found that layoffs and reduction in work are not regarded as synonymous.

The Union argued that the implementation of a furlough was an unconstitutional impairment of the Collective Bargaining Agreement. However, in an "Urgent Notice to all SEIU 925 members" the Union stated, "SEIU's attorney told us that King County can legally impose such a furlough." The parties had negotiated to an impasse. The membership had rejected the County proposal by 83% no vote. The Arbitrator agrees with the SEIU attorneys that the County can legally impose the furlough after the parties have negotiated to impasse.

"Residual Rights" Construction Principle Often called "Management Rights" (Schoonhoven, *Fairweather's Practice and Procedure in Labor Arbitration*, 4th Ed., p.299): "When an arbitrator construes a labor agreement provision under the residual rights doctrine ... he or she will hold that, if there is no negotiated written provision restricting management's rights to take specific action, then there is no restriction on management's action."

In *Powermatic/Houdaille, Inc.*, 63 LA 1 (Andrews, 1974):

It is now well established generalization that employers, except to the extent limited by contract or statute, retain all powers to manage a plant, make rules, and set working hours. This is so even if the agreement does not list all of the rights that have been retained by management or has no management rights clause at all. The collective bargaining agreement operates as a limitation upon the right of the employer to establish working conditions only to the extent that such conditions of employment are covered by the agreement. The pre-existing rights of the employer still continue as to matters not covered in the agreement. If the agreement is completely silent about a matter, then the employer is free to make unilateral changes if such changes are not inconsistent with the provisions of the current agreement...

The Collective Bargaining Agreement between the parties, Article 6: Management Rights and Responsibilities, states:

The employer shall have exclusive authority and responsibility to administer all matters that are not covered by this Agreement.

Based on the above, the County was not restricted by the Collective Bargaining Agreement and therefore has the right to impose the changes.

Does a unilateral reduction in work hours violate the CBA? There are no provisions in the Collective Bargaining Agreement that address work hour or salary reduction. Absent some mention of a limitation of reductions and the County having the right to implement a furlough, which reduced the hours and pay of the Bargaining Unit members, the Arbitrator is absent any authority to hold otherwise.

The Union argues that Article 7.1 is clear there were to be no layoffs during the incentive program existence. This language uses “layoff” as opposed to “furlough.”

The Employer states that the Union cannot claim that the Productivity Initiative provision bans the use of furloughs when the layoff restrictions in Article 7 are explicitly tied to reductions related to achieving productivity goals. It was undisputed that the 2009 furloughs had nothing to do with savings or efficiencies generated through the Productivity Initiative. Further, the contract does not prohibit furloughs and furloughs were not contemplated nor included in the parties' understanding of the term "layoff" for purposes of interpreting Article 7.

The definition of the two words then becomes critical to the determination of the outcome.

Black's Law Dictionary 6th Edition defines it thusly:

Furlough. A leave of absence; *e.g.*, a temporary leave of absence to one in the armed service of the country; an employee placed in a temporary status without duties and pay because of a lack of work or funds or for other non-disciplinary reasons. 5 USCA § 7511(A)(5). Also the document granting leave of absence.

Robert's Dictionary of Industrial Relations states:

A leave of absence from work or other duties usually initiated by an employer to meet some special problem. It is temporary in nature since the employee plans to return as soon as the furlough is over. Also applied to situations where technological changes necessitate curtailment of the work force and employees who are laid off are permitted the privilege of accepting either furlough or dismissal pay or transfer to another plant of the company.

The Civil Service Reform Act defines furlough as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons." *Source references: BNA, White Collars Layoffs and Cutbacks*

(Washington: 1982); U.S. Dept. of Labor, LBS, *Union Agreement Provisions* (Washington: Bull. 686, 1942).

This Arbitrator believes that there are critical distinctions between the two words. “Furlough” in this instance is a reduction in the hours or days of work for a specified term, hours or days. The employee is still a member of the work force whose benefits and privileges are continuing during the absence from work. A “layoff” is the permanent removal from the workforce with loss of all benefits and privileges of the position previously occupied.

The standard principles of contract interpretation demonstrate that King County’s furloughs were permissible under the terms of the CBA. The County took this action because it was deemed vital to preserve essential services to the public.

DECISION

The County did not violate the Collective Bargaining Agreement by implementing the furlough program of SEIU 925 bargaining unit members for 80 hours in 2009.

DATED: December 18, 2009

Respectfully submitted,

JOE H. HENDERSON
Arbitrator