

**IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

OREGON AFSCME LOCAL 1724,

and

CITY OF EUGENE.

RE: Reduced Work Hours Grievance

OPINION AND AWARD

of

**LUELLA E. NELSON,
Arbitrator**

March 9, 2010

This Arbitration arises pursuant to Agreement between OREGON AFSCME LOCAL 1724 (“Union”), and CITY OF EUGENE (“City” or “Employer”), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on December 22, 2009, in Eugene, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. The hearing was not transcribed. Both parties filed post-hearing briefs on or about January 25, 2010.

APPEARANCES

On behalf of the Union:

Jason Weyand, Esq.
Legal Counsel
Oregon AFSCME Council 75
1400 Tandem Avenue NE
Salem, Oregon 97301

On behalf of the City:

Mark P. Amberg, Esq.
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue
Eugene, OR 97401

STIPULATED ISSUE¹

Shall the grievance be sustained or denied; and, if sustained, what shall be the remedy?

RELEVANT SECTIONS OF THE AGREEMENT

Article 4 MANAGEMENT RIGHTS

- 4.1 The City shall retain the exclusive right to exercise the customary functions of management, including but not limited to, the right to direct the activities of the department; the right to determine the levels of service and methods of operation, including subcontracting and introducing of new equipment; the right to hire, layoff, transfer, and promote; the right to discipline or discharge for just cause; the right to determine work schedules and assign work; and, any other such rights not specifically referred to in this Agreement. The City shall not exercise its rights set forth above for the purpose of avoiding the terms of this Agreement. Management rights, except where abridged by specific provisions of this Agreement, are not subject to the grievance procedure.

...

Article 5 SERVICE DELIVERY AND EMPLOYEE INVOLVEMENT

- 5.1 The delivery of municipal services to the community in the most efficient and effective manner is of paramount importance to both the City and the Union. Optimizing service delivery to the community is recognized to be a mutual desire of both parties within their respective roles and responsibilities. The parties may agree to meet at mutually convenient times to discuss means of improving service effectiveness.

5.2 JOINT LABOR MANAGEMENT RELATIONS COMMITTEE

- a. Purpose: we agree to work together to create and sustain an environment that fosters a committed, passionate, and responsive workforce by using the following principles:
- Use a collaborative process;
 - Create a foundation of trust based on honesty; and
 - Understand and be guided by our common mission.
- b. We are open to redesigning our contractual processes for mutual effectiveness in order to develop a participatory workforce that is directly responsible for quality public service.
- c. To this end each party will appoint three (3) representatives to effectuate the possibilities. Additional representatives may be added by mutual agreement.

5.3 COMPETITIVE SERVICE DELIVERY

- a. Whenever the City, a department, or a division forms an internal group to address service improvement, this group should include at least one represented employee. The represented employee should be a core service employee from the functional area responsible for the affected service. For purposes of this Article, service improvement is defined as optimizing the efficiency and effectiveness of service delivery. These groups do not include ongoing operational committees, such as the Fleet Board or the Facilities Board. Service improvement activities include but are not limited to continuous process improvement, systems redesign, and systems analysis.

¹ The parties initially did not agree to a stipulated issue. I advised that, absent agreement on a statement of the issue or issues, my likely formulation of the issue would be the generic statement shown. The parties then stipulated to that generic statement of the issue. On brief, each party has suggested its own statement of the issues. The parties' respective proposed statements of the issues are subsumed within the stipulated issue.

- b. It is expected that the represented employees involved in service improvement groups will inform the Union of the process. The City will notify the Union if a service improvement group will address broad organizational issues or affect multiple work sections and the Union may request representation in the group.
- c. The City encourages employee input and involvement in efforts to improve the efficiency and effectiveness of work processes and programs. Informal verbal suggestions may be made by any employee to her or his supervisor, an appropriate manager, or the JLMRC. A specific written suggestion should receive a written response within 15 working days. Timely supervisory feedback to suggestions is necessary to support employee input.
- d. The Union and the City agree that employee involvement activities will not be used to address employee grievances, to alter the provisions of this Agreement, or to resolve any matter about which the City and the Union are legally obligated to collectively bargain, unless both parties specifically and mutually agree to do so.
- e. The parties mutually developed a Competitive Service Delivery Assessment Tool that is available to enhance the quality of service delivery.

Article 10 PROBATIONARY PERIOD

10.1 An employee who has not completed twelve (12) months of continuous employment shall not be considered to have seniority, shall not be considered a regular employee and shall have no recourse if terminated. ...

...

Article 11 WORK FORCE REDUCTIONS

11.1 WORK FORCE REDUCTIONS

- a. The City is committed to making every reasonable effort to avoid laying off employees.
- b. A layoff is defined as a separation of a non-probationary regular employee from the City due to the elimination of a position or a reduction of the regularly established hours for a position from full-time to part-time by the City. Generally, temporary and initial hire probationary employees who are doing the same or lower level work within the job family, within a department, will be terminated prior to the layoff of regular non-probationary employees unless there is an operational need that dictates otherwise. The City will notify the Union if it is proposing an exception be made to this guideline.
- c. The City recognizes the need for prompt notification to the Union regarding potential workforce reductions and the advantage of discussions with the Union to solicit their suggestions and alternatives to layoff or other service reductions in time for them to be given due consideration. Unless there are extenuating circumstances, the City will give at least two (2) weeks notice to the Union prior to giving layoff notices to any bargaining unit members.
- d. Nothing in this Article is intended to restrict the prerogative of the City to determine the financial necessity of service reductions, the form of the reductions, the elimination of positions, or the location or duration of layoffs.

11.2 TRANSITION PERIOD

- a. The City will make every reasonable effort to predict the need for workforce reductions and layoffs sufficiently in advance of the effective date to allow for transition planning, voluntary movement, placement assistance, hiring freezes, and other similar strategies which may minimize the number of layoffs. The appropriate time frame needed will be determined by the number of layoffs anticipated and the predictability and complexity of the situation precipitating the layoffs. The transition period will not exceed six (6) calendar months.

...

- c. As soon as specific positions have been identified for layoff, vacant bargaining unit positions will be filled first through voluntary transfer and demotion processes. It is understood that only the least senior employees in the classification in the work section of the position will be affected first. If eight (8) or more employees are in bargaining unit positions which are being eliminated, all vacancies will be first posted for only AFSCME employees who qualify for transfer or voluntary demotion. If less than eight (8) employees are in positions being eliminated, the background of the employees in the positions identified for layoff will be reviewed, and, if they meet the qualifications for the position and are eligible, they will be referred for transfer or voluntary demotion. If all else is equal, seniority will be the deciding factor in placement under this provision.
- d. When eight (8) or more employees are in positions which are being eliminated within the bargaining unit and a bargaining unit vacancy has not been filled by a voluntary transfer or demotion, the position will be posted internally and opened to all current, regular City employees prior to an external recruitment. Exceptions may be made to the requirement to post a position internally if the vacancy is in a classification that has unique qualifications, such as a certification or education, which is not likely to be found internally. The Union will be notified prior to any bargaining unit vacancy being posted externally during this period.

...

11.6 LAYOFF

- a. Layoffs shall be done by classification (or classifications if there are multiple classifications at the same pay range within the job family) on the basis of the inverse order of seniority, unless there is a special skill that justifies doing otherwise.

...

11.7 SEVERANCE

Employees who have completed sixty (60) months of continuous service and who are laid off will receive one (1) week of severance pay at their current rate of pay for each full year of continuous service to the City. However, those employees who volunteer for layoff will be limited to no more than eight (8) weeks of severance pay. Severance pay will be given in addition to any other pay to which the employee is entitled. If an employee is recalled to the City within a time period from the date of layoff that is fewer weeks than the weeks of compensation received for severance pay, she or he must reimburse the City for a pro-rated portion of the severance pay, based on the length of time she or he has been away from City employment and the number of weeks of severance pay she or he received. A written notice of this requirement will be provided to the employee at the time of separation.

11.8 RECALL

...

- c. Part-time employees whose hours were reduced as a result of a workforce reduction will have the right to be recalled to a position in their classification at their previous hours for a period of five (5) years.

....

Article 15 SALARIES

15.1 SALARY ADJUSTMENTS

...

- b. Effective July 1, 2009, salaries shall be adjusted to reflect the annual average of CPI-U January through December of 2008 with a minimum of two percent (2%) and a maximum of four and five tenths percent (4.5%).

...

Article 16 HOURS – OVERTIME

16.1 DEFINITIONS

- a. Work Day: The work day is a period of twenty-four (24) consecutive hours beginning at the employee's regularly scheduled start time. Full-time work days are defined as the eight (8) to ten (10) hour period beginning at the employee's regularly scheduled start time.

...

- c. Work Schedules: Work schedules are the work days, days off, and hours of work identified in a work week for each individual employee. It is understood that any change in the assigned hours of work, days off, work days, or work shift constitutes a change in the work schedule, except for overtime and flexible time as defined below.
- d. Part-Time Employees: Part-time employees are those who are scheduled to work at least half the available hours, but less than all the available hours, in a pay period or at least twenty (20) hours, but less than forty (40) hours, per week.

16.3 WORK SCHEDULES

- b. The Union recognizes the City's right to determine work schedules based on its assessment of operational requirements. The City recognizes its obligation to avoid, where practicable, work schedule changes which result in expressed undue hardship to an affected employee.

Article 34. GRIEVANCE PROCEDURE

34.5 PROCEDURES

- c. Grievances are processed in the following manner:
 - 5) If a grievance involves employees from different work sections or if the issue involves a subject that could have a broad impact across work sections, the union may request of the Human Resources Division Manager to start the grievance at step 2 or 3, as appropriate.

34.6 GRIEVANCE STEPS

- b. Step 1
 - 1) If this attempt is not successful, the employee may submit a written notice of a formal grievance to the supervisor with a copy to the Union, within twenty-one (21) days from the occurrence or reasonable knowledge thereof, including:
 - A. a statement of the grievance and relevant facts;
 - B.. the specific contract provisions in question; and,
 - C. the remedy sought.

- e. Step 4 - Resolution of Grievance

- 1) If the grievance is still not resolved, it may be submitted to grievance mediation, under Article 34.7 below, upon mutual agreement of the City and the Union or, absent such agreement, the Union may submit it within twenty-one (21) days to an arbitrator in the following manner:
 - A. The parties will attempt to negotiate a mutual statement stipulating the issue to be submitted for arbitration.
 - D. The arbitrator shall render a decision within thirty (30) days. The powers of the arbitrator shall be limited to interpreting the collective bargaining agreement and determining if it has been violated. She or he shall have no authority to alter, modify, vacate, or amend any terms of the collective bargaining agreement, or to decide on any condition which is not specifically treated in this agreement. The decision of the arbitrator shall be final and binding on both parties.

THE GRIEVANCE

The grievance, filed on September 15, 2009,² is a Class Action Grievance covering “all bargaining unit members who are impacted by the Employer’s Mandated 80-Hour Furlough.” It describes the grievance as follows:

The Employer has violated Articles 4.1 - Management Rights; 5.3-Competitive Service Delivery Model; 11.1 - Workforce Reduction; 11.2 - Transition Period; 11 - Severance; 16.3 - Work Schedules; 16 - Split Shifts;³ 34.5 - Procedures and any and all other contract Articles that may apply.

The essence of the grievance is that the Employer violated the contract by implementing mandatory furloughs in violation of the above referenced articles.

As a remedy, it seeks to “make whole any and all workers who were forced to loose [sic] hours by the Employer’s Mandated Furloughs.”

FACTS

The Union represents all of the City’s organized employees except police, fire, and theater employees. Their previous collective bargaining agreement expired on June 30, 2008. By all accounts, wages were a major issue in negotiations for the successor Agreement. Before and during those negotiations, the City was aware of potential budget shortfalls for the coming years.⁴ By the fall of 2008, the projected shortfall was \$8 million; that figure grew to \$12 million by the spring of 2009.

The parties signed the current collective bargaining agreement on October 27, 2008. The agreed-upon terms included a cost of living (COLA) adjustment of 3% retroactive to July 1, 2008; additional COLA adjustments for future years were tied to the CPI, with a minimum of 2% and a maximum of 4.5% over the

² Except as otherwise indicated, all dates refer to 2009.

³ It is undisputed that no split shifts occurred as a result of the events at issue here. The Union does not assert that this provision was violated.

⁴ Most significantly, Hynix Semiconductor, one of the major businesses in Eugene, announced in July 2008 that it was closing its facility. The direct effect of this closure included the loss of approximately \$2.5 million in property taxes; there were also collateral impacts from the loss of 1100 jobs from this closure. Other local businesses were also closing, and some federal funding was reduced.

next three years. Under the negotiated formula, the COLA for July 1, 2009, was 3.8%. The City's Labor and Employee Relations Manager at the time, the late Deb Fernandez, informed Business Representative Rick Henson in late 2008 that she wanted to have "tough conversations" about the COLA.

By early 2009, the City projected its budget deficit for the 2010 fiscal year at \$12 million. The City is required by law to have a balanced budget. To achieve this, it concluded that its spending reductions needed to include cuts in personnel costs in the amount of \$5 million. Non-represented employees received no pay increases for the year. Employees in two bargaining units – fire fighters and theater employees – were in negotiations for new collective bargaining agreements in the spring of 2009, and agreed to forego pay increases in exchange for other concessions. The police union agreed to reduce its recently-negotiated COLA in return for maintenance of benefits for an additional two years. Police and fire constitute 70% of general fund expenditures; within those two functions, only the dispatchers are represented by the Union.

By letter dated March 3, the City notified the Union of the projected 2010 budget shortfall. The City expressed a desire to avoid layoffs, mandatory furloughs, or reductions in work hours in addressing this shortfall. It suggested that "One option is to forego cost-of-living adjustments for all City employees for FY 10," and asked to meet to discuss that proposal. Foregoing the 2009 COLA would have saved approximately \$450,000 in salary costs. The City asked the Union to respond within a week.

According to Henson, the Union's Executive Board decided against reopening the Agreement, but was willing to discuss ways to work with the City to address the budget shortfall. The Union responded on March 10 by asserting that "A broader array of issues must be considered before individual workers are asked to take wage cuts," and suggesting that the parties "meet to explore a wide range of possible cost savings and general reorganization activities."

Over the next few months, the parties met to discuss possible cost savings in "ACT 1" (AFSCME Contract Taskforce 1) conversation. The City sought \$1.4 million in savings from wages and/or benefits in this bargaining unit; the Union sought to expand the areas of inquiry to include operational changes, using the Competitive Service Delivery provisions in Article 5.3 of the Agreement. Henson testified the City

dismissed suggestions for cost savings other than from wages and benefits. Gary Gillespie, who participated in the discussions as Vice President of the local, testified the City's three criteria for considering any proposal were that there would be no service reductions; there would be no layoffs; and the savings had to be "sustainable."

Some employees voluntarily took furlough days during ACT 1; of those, some worked in departments that were not funded from the general fund; their furlough days thus did not reduce the budget shortfall. On May 29, the Union e-mailed the City to advise it that the Union was withdrawing a "supposal" that had been presented in ACT 1, which would have included a mandatory 6-day furlough. Instead, it again invited the City to work through the Competitive Service Delivery model.

By letter dated June 16, the City notified the Union of its decision to implement reduced work hours for all bargaining unit employees; it also reserved the option of imposing mandatory furloughs. The Union responded on June 29 that a reduction in work hours constituted a partial layoff under Article 11 of the Agreement, and that the City was required to terminate temporary and probationary employees before laying off regular employees. The Union further demanded to bargain the decision and effects of work hours reductions and/or furloughs. It reiterated its offer to work through the "Competition [sic] Services Delivery Tool or similar models." Henson testified the Union believed the work hours reduction would be a clear contract violation, but demanded bargaining to preserve other remedies.

Fernandez, who had been the City's chief spokesperson in the 2008 negotiations, was killed in an auto accident in August. Most of the bargaining over the work hours reductions ("ACT 2") occurred in September. In ACT 2, the Union learned the City had reserves of \$55 million, most of which were not dedicated; its "rainy day" reserve fund was \$3.5 million. The City was (and remained at the time of hearing) in negotiations to purchase a building to replace the police station; it was authorized to spend up to \$16 million for this purpose, out of \$22 million in reserves carried over from the general fund over the years.

The 90-day bargaining period under PECBA ended on September 14. The Union filed this grievance on September 15. On September 18, the City notified the Union of its intention to implement a reduction

in work hours. In October, the City reduced all full-time bargaining unit employees' hours by 80 hours for the remainder of the 2010 fiscal year, or approximately 2 hours per week; part-time employees' hours were reduced pro rata. Those employees who had taken voluntary furloughs were given the option of applying those hours against their 80-hour work reduction. Full-time employees continued to accrue benefits and leave at full-time rates. A fact sheet distributed to employees informed them that "Depending on budgetary concerns, reduced work schedules may be implemented each budget year during the remainder of the union contracts." The work hours reduction generated salary savings of approximately \$453,000 for FY 2010.

At the time of the work hours reduction, the bargaining unit included approximately 680 permanent full- and part-time employees; by the time of hearing the number had dropped to 662. The City also had 21 probationary employees, of whom 18 were in this bargaining unit; 8 limited duration employees; and several hundred temporary employees, of whom all but 13 were recreational employees such as lifeguards, fitness instructors, and ballfield maintenance personnel. None of the probationary, limited duration, or temporary employees were laid off; no evidence exists regarding whether any have since left the City. The payroll cost for a fully-benefitted bargaining unit employee is approximately \$70,000. According to Central Services Executive Director Kristie Hammitt, the City wished to preserve its investment in hiring and training these employees; it also needed some recreational employees' teaching skills. Hammitt interpreted Article 11 to apply to a reduction in work hours only if the reduction was permanent; since the City hoped to end the work hours reduction at the end of the fiscal year, she did not consider it permanent. She did not consult with anyone who was involved in negotiating Article 11 in arriving at her interpretation of the language.

According to Henson, some of the contract provisions cited in the grievance addressed alternatives that were discussed in ACT 1 and 2, such as split shifts and furloughs. Because the work hours reduction had not been implemented at the time of the grievance, the Union could not predict what collateral impact there might be. The grievance therefore included a catch-all phrase to capture unanticipated impacts.

Henson testified he had experience with a Competitive Services Delivery model in an earlier position with the Service Employees Union, which used that model with Kaiser Permanente.. He testified that a

thorough systems review always found personnel savings in unexpected areas. In his view, resistance from the City's executives had blocked the City from pursuing Article 5.3 in the past. Barring use of that model, he expected the City to follow the Article 11 layoff procedure, as it had in a budget crunch in the early 1980's. He spent considerable time working with Fernandez, prior to her untimely death, developing charts to explain employees' options in the event of layoffs or displacements.

BARGAINING HISTORY OF ARTICLE 11

Prior to 1998, the Agreement defined a layoff as a "reduction in the City workforce." In 1998, the Union proposed to add a reduction of hours to the definition of a layoff, and to require the layoff of temporary and probationary employees first; it also sought to clarify the bumping process, which by all accounts was complicated and cumbersome. Lou Sinniger, the Union's spokesperson, testified a school district bargaining unit had lost a grievance over a reduction in hours because the contract defined a layoff as a loss of a position; he proposed the expansion of the definition in this contract to address that concern. In an "issues list" provided to the City, he described the concerns behind the Union's layoff proposals as follows:

- 11.1 The current definition of a layoff is a reduction in the City's work force. The current definition is arguably vague and broad. From the employees point of view a loss of regular work hours is a reduction in wages and possibly benefits. It is our understanding that if a part time employee is reduced from 25 hours of work per week to 20 hours that seniority does not apply. The position stays but it is reduced. It doesn't seem fair that for no fault of their own a senior employee may end up earning less than a less senior employee in the same classification and department.
- 11.2 Since temporary employees do bargaining unit work, and they are by definition "temporary," they have the least invested in the job. When lack of funds forces the City to reduce positions it would have least impact on maintaining stability by laying off employees who have less invested in their jobs than permanent employees. Temporary employees along with probationary employees have no seniority. By laying off these employees first may create vacancies for senior employees to move into.
- 11.3 The definition of recall should include restoring hours of work to employees who have suffered a reduction in hours.

The City counter-proposed to define full-time as 32 hours or more. The Union rejected this proposal because it would permit the City to reduce a full-time employee's hours to 32 without triggering the layoff provision,

but accepted the City's proposal to modify "established hours" in the first sentence to read "regularly established hours." Ultimately, the parties agreed to change the definition of a layoff to include a reduction in hours and a recall to include restoring hours to employees whose hours had been reduced, but did not agree that the City would lay off temporary and probationary employees first.

Former Human Relations Manager Helen Towle was the City's spokesperson in the 1998 negotiations. She testified that, although the language did not specifically say it, the reference to "regularly established hours" was intended mostly to mean a change in the budgeted FTE, and referred to employees' ongoing schedules rather than fluctuations. Her recollection was that the parties did not discuss the concept of an across-the-board reduction in hours, which she considers to be a furlough rather than a layoff.

In 2001 bargaining, the Union again proposed a requirement to look first to temporary and probationary employees before laying off employees. According to Sinniger, the City was open to the idea, but sought to include language that would preserve its ability to retain an employee with specific skills. Gillespie, who was President of the local in 2001, recalled an example of an energy consultant with expertise in using buildings in an energy-efficient way, who was retained despite her low seniority (with the Union's agreement) in a prior layoff. Towle recalled discussions about wastewater experts and building inspectors, who were difficult to recruit. The parties ultimately agreed to the current language.

POSITION OF THE UNION

The City eviscerated major provisions of the Agreement. It eliminated the negotiated wage increases, violated the layoff language, rendered meaningless the shift and work schedule provisions, ignored the requirement to use the Competitive Service Delivery Model, and violated the Management Rights Clause.

The City had buyer's remorse concerning the COLA. Immediately after signing the Agreement, it began seeking concessions from the Union to roll back the COLA. After the Union refused to waive the COLA, the City began investigating a way to save the same amount of money from the same employees. It used its right to lay off employees and set work schedules and services to achieve the same reduction in

wages. This was an end run around the negotiated COLA. The second to last sentence of Article 4.1 specifically prohibits the City from exercising its rights under the Management Rights Clause “for the purpose of avoiding the terms of this Agreement.”

The Agreement limits the available work schedules for full-time employees. It defines full-time work days as eight to ten hour periods beginning at the employee’s regularly scheduled start time. Under the City’s new hours structure, full-time employees work on average two hours less per week – either four 8-hour days and a 6-hour day or three 10-hour days and one 8-hour day. That is not consistent with the Agreement. The new schedule also impacts the overtime provisions, which provide for overtime after 40 hours in a week or after their regularly scheduled shift ends. It is unclear when an employee begins receiving overtime pay if required to work over on their reduced-hour days.

The Arbitrator should reject the City’s claim that it did not anticipate the loss of revenues from Hynix and other business closures. The City knew of the pending loss of Hynix in June 2008, several months before the Agreement was agreed to or signed. The economic downturn was not news. The de minimis general fund savings from the hours reduction, compared with the City’s reserves, demonstrates that the impact on the projected deficit was minute. The City could have dipped into reserves to fund the contracts it had agreed to with its employees.

The City failed to abide by Article 5. The Union sought to use its collaborative process to identify non-wage cost savings, but the City refused. The City’s sole desire was to force the Union to forfeit the COLA or its salary equivalent. The City violated Article 11.1.c by failing to give prompt notice of possible work force reductions to allow the parties to explore suggestions and alternatives to layoffs. It violated Article 5 by refusing to engage in the Competitive Service Delivery Model process to achieve this goal.

Assuming *arguendo* that the City had authority to reduce costs by cutting positions or hours, it could not do so without following Article 11’s layoff provisions requiring termination of temporary and probationary employees. Article 11 is a fairly comprehensive and well defined set of rules for determining what form staff reductions will take. The definition of “layoff” is not ambiguous. It contemplates two forms of layoffs:

the traditional form which results in a loss of employment, and reduction of hours from full-time to part-time. Article 16.1.b defines full-time employees; Article 16.1.d defines part-time employees. A reduction in hours to less than 40 is a layoff. All full-time employees were reduced to part-time employees. The clear language of the Agreement is not capable of any contrary interpretation.

If the Arbitrator feels an analysis of bargaining history is needed, the evidence clearly supports the Union's view of the language. The testimony of the intent and history behind the current language, as well as the development and history of the disputed language, confirms the Union's position. The 1998 change in the definition of a layoff was significant, and was intended to resolve the Union's concerns that the previous contract language did not make it clear that reductions in hours could trigger layoff protections for senior and regular status employees. Layoffs were a big issue. The proposals and issues lists confirm an intent to redefine layoffs to include a reduction or loss of hours. The City's proposal to define full-time as 32 hours per week was not agreed to.

The intent in 1998 was clear that a reduction in hours was a layoff and triggered all rights under the Agreement. Towle confirmed this intent in her testimony. The Union did not get agreement to terminate temporary and probationary employees first in the 1998 negotiations, but brought the issue up again in 2001. The Union made it clear that before any regular status employees could be laid off, either through a reduction in hours or a separation of service, all probationary and temporary employees must be terminated. The City's bargaining notes and proposals reflect that the City understood this. There was only a limited exception for special skill employees.

Hammit was not involved in bargaining the disputed language; could not point to language requiring a reduction in hours to be permanent to fall within Article 11; and could not point to language that management could avoid Article 11 by not changing a job description or budget document. No language would support any such argument. Further, the work hours reduction policy expressed no binding commitment to end the hours reduction after this fiscal year. To the contrary, it reserved unfettered discretion to reduce hours as long as there is a budget shortfall.

The City's application of "generally" and "operational needs" is not consistent with the parties' intent or the clear language. The language was added to address legitimate concerns about having a particularly qualified temporary or probationary employee that operationally it could not lose due to special skills or experience. If this provision was triggered, the City was to provide notice to the Union and the reasons for its desire to retain a special employee. There was much discussion of the process if the Union and City did not agree on the exception, but the clear intent was for this to be a special skill employee, not a way to allow the City to avoid its obligation whenever it felt like it. Further, for this exception to apply, the City was required to give notice of its intent to deviate from the requirements of Article 11.1. If the parties could not agree whether the employee should be retained, the parties would presumably handle the matter as a grievance. Here, the City never notified the Union of employees it believed were critical to the operation and needed to be kept.

The City has ignored the second half of the definition of "layoff," which includes "or" to make it clear that a reduction in hours is a layoff.

As a remedy, the Arbitrator should order the City to cease and desist from reducing work hours of employees and return them to their full, regularly scheduled shifts effective immediately; to make employees whole for the wages and benefits they would have received but for the unilateral reduction of hours, plus interest; to comply with the layoff provisions; and any further relief the Arbitrator deems appropriate.

POSITION OF THE CITY

The reference in the grievance to "any and all other Contract articles that may apply" does not comply with the requirements of Section 34.6.b of the Agreement, which requires grievances to cite "the specific contract provisions in question." No mitigating circumstances excused the failure to comply with this provision. Therefore, the Arbitrator should ignore any argument that the City has violated any contract provision not specifically cited in the grievance. The City has not violated any of those provisions, or any other contract provision. The grievance should be denied.

The Arbitrator's role is to interpret the language of the Agreement to determine whether the work hours reduction constituted a "layoff" under the terms of the Agreement. The Arbitrator is bound to the contract language and may not insert terms or requirements that are not provided in the Agreement. The Arbitrator must interpret the Agreement in the same manner and using the same rules of contract construction applied by the courts. After examining the language of the disputed provision in the context of the document as a whole, if the provision is clear and unambiguous, the analysis ends. If the language is ambiguous, extrinsic evidence will be examined. If the language remains ambiguous, the Arbitrator is to use appropriate maxims of contract construction.

Absent a showing of a different mutual understanding, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. An arbitrator cannot ignore clear-cut language or legislate new language.

"Layoff" is unambiguously defined. There was no separation of any employees from employment, so the first prong of the definition does not apply. The City only temporarily reduced work hours across the board. There has been no reduction of the regularly established hours for any position; no positions have been reclassified; and no benefits or accruals have been reduced.

The plain language of Section 11.7 establishes that "severance" only applies to layoffs where there is an actual separation from employment. If this language is ambiguous, the testimony establishes that the parties only intended to have severance apply to true layoffs involving actual separation from employment.

The Union bears the burden of proof on the asserted contract violation, by a preponderance of the evidence. The Union has not met that burden.

The temporary reduction in hours is not a layoff as defined in Section 11.1.b. Section 11.1.a requires the City to exercise all reasonable efforts to avoid a layoff. The City did everything reasonable to avoid laying off employees. No employees were separated from City employment. The operative language makes no reference to a "partial" layoff; it also does not address part-time employees.

A “position” is “a post of employment; a job; an employment for which one has been hired.” This definition refers to an employee’s specific job, not to the individual employee. There is no evidence the parties intended “position” to refer to individual employees. A temporary reduction in hours for all employees is not the same thing as a reduction in regularly established hours for a position. The City temporarily reduced work hours across the board without any reclassification or reduction of hours for any position, and without reduction of any other benefits, accruals or aspects of employment.

Even if the language is construed as ambiguous, extrinsic evidence establishes that a temporary reduction in work hours does not constitute a “layoff” as defined in Section 11.1.b. An across-the-board reduction of hours was not contemplated or addressed by the parties during bargaining. This is a temporary reduction of hours. It is not a reduction of the regularly established hours for any position; the classification of and benefits and accruals for all positions have remained the same.

Construing a temporary reduction in hours as a “layoff” would produce harsh and absurd results. Every formerly full-time employee would have to be reclassified to part-time status and treated as a part-time employee for all purposes, including benefits and accruals. Such “layoffs” also would arguably trigger bumping rights. Neither party knows how those bumping rights would apply, and implementation would be a nightmare. If bumping rights arguably were otherwise available, any such rights have been waived because no employee has invoked bumping rights or complied with the contractual requirements to invoke them.

The City’s interpretation is reasonable, plausible, coincides with the language as negotiated, and leads to a reasonable result. The Union’s interpretation does not meet these tests and sacrifices significant interests. The Union’s “make whole” remedy is inconsistent with other steps that would be necessary if the work hours reduction was a layoff. It does not want to reduce benefits or accrual, or exercise bumping rights. Its position is internally inconsistent and would sacrifice significant interests of bargaining unit employees.

The language regarding termination of temporary and probationary employees is modified by “generally” and “unless there is an operational need that dictates otherwise.” The parties clearly intended to allow the City flexibility in addressing its operational needs. There would be a great loss of investment

in training if the City were required to terminate all temporary and probationary employees, especially if the economy rebounds and the City is required to rehire and retrain employees for all these positions.

The City was not required to terminate temporary or initial hire probationary employees. Section 11.1.b does not apply if there is not a layoff. Even assuming it applies, the “requirement” to terminate such employees is modified significantly. This provision was heavily negotiated. The Union proposed language that would have unconditionally required termination of temporary and probationary employees before a layoff could be implemented. The City rejected that language because it needed a degree of flexibility in addressing operational needs. The City invests time, energy, money and other resources when it recruits, hires and trains new employees. Employees gain invaluable experience on the job. All employees, including temporary and probationary employees, possess valuable skills and experience that are lost if they are terminated. The City exercised its prerogative to retain those employees based on the need to retain a trained and qualified workforce for when, presumably, the temporary budget shortfalls will end.

Article 11.7 does not apply. The obligation to pay severance is only triggered by a separation from City employment, which did not occur. It was not intended to apply to the other form of “layoff” defined in Section 11.1.b.

Article 5 does not apply to reduced work hours. It does not address budget deficits or adverse financial impacts on bargaining unit employees. It is intended to address “improving service effectiveness,” “service improvement,” and “efficiency and effectiveness of work processes and programs.”

The parties did not contemplate or address work hours reduction on a temporary and limited basis due to budget deficits. The Agreement does not address a temporary work hours reduction. Interim bargaining allows bargaining over actions an employer intends to take which are not specifically addressed in the contract but which involve or impact a mandatory subject of bargaining. The City has never denied its obligation to bargain the intended imposition of reduced work hours or furloughs, and complied with its interim bargaining obligations. The fact that the parties did not reach agreement does not mean the City violated the Agreement or is precluded from implementing reduced work hours for the remainder of the fiscal year.

OPINION

PRELIMINARY MATTERS

The Union bears the burden of persuasion as the moving party in this contract interpretation case. The applicable standards for contract interpretation are well established. Where the language is clear and unambiguous, an arbitrator must give effect to the parties' intent. That is so even where one party finds the result unexpected or harsh. Language may be deemed clear even if the parties disagree about its meaning.

Where the contract language is unclear or ambiguous, an arbitrator may look to extrinsic evidence of the parties' intent. Bargaining history is significant where either the evolution of language or the parties' statements at the bargaining table demonstrate the intent behind particular provisions. A party's unexpressed intent in negotiating a contract is of no import in interpreting the resulting language.

An arbitrator cannot interpret disputed contract provisions in a vacuum, but must read them in the context of the rest of the Agreement. If the parties have used words in a particular manner elsewhere in the contract, the same words ordinarily mean the same thing in the disputed contract provision. Language stating broad principles is applied broadly; language of exception is applied narrowly. Words are given their ordinary and popularly accepted meaning, absent evidence they were used in a different sense. Arbitrators must avoid interpreting ambiguous language to nullify or render meaningless any part of the negotiated agreement if another reasonable interpretation gives effect to all provisions. If two plausible interpretations exist, the preferred interpretation avoids harsh, absurd, or nonsensical results. Any ambiguity not removed by other rules of interpretation may be resolved by construing the ambiguous language against its proponent.

THE MERITS

Severance

Article 11.7, read as a whole, refers to situations in which an employee has been separated from employment. The Union does not assert that employees were separated from employment, nor does it seek

severance pay as a remedy. Its reference to Article 11.7 in the grievance has thus proven unnecessary. No finding is necessary on this provision.

Competitive Service Delivery

Article 5 reflects the parties' agreement to engage in a collaborative process for the ends described in that Article. Section 5.3.d permits, but does not require, the parties to agree to engage in that process for other purposes. It may well be that other means of reducing payroll costs would have been identified had the parties engaged in this process. However, it was not a contract violation to decline to use this process.

Definition of "Layoff"

Under Article 11.1.b, a "layoff" includes not only a separation from employment, but also a reduction in "regularly established" work hours for a "position" "from full-time to part-time" by the City. There is no dispute that the event at issue was an action by the City; the remaining pieces of the definition are in dispute. This definition, on its face, does not make an exception for separations or work hour reductions that flow from a temporary budgetary shortfall.

The City's proffered definition of a layoff as a permanent event is not universal, in my experience or in dictionary definitions. For example, the *Random House Webster's New College Dictionary*, 2nd ed (1999) defines a layoff as "1. the act of dismissing employees, *esp. temporarily*. 2. a period of enforced unemployment." (emphasis added) *How Arbitration Works* notes:

Arbitrators have ruled that the term "layoff" must be interpreted to include any suspension from employment arising out of a reduction in the workforce, and that the scheduling of employees not to work or the use of the term "not scheduled" by management does not make the occurrence any less a layoff.⁵

In my experience and in normal usage, layoffs may be temporary or permanent. The parties broadened the normal usage of the term by adding a work hours reduction to the definition. Under the plain contract language, "layoff" thus refers to both temporary and permanent reductions in work hours.

⁵ Elkouri and Elkouri, *How Arbitration Works*, Sixth ed. (2003), at 782-3. It is also worthwhile to peruse the extensive list of cases cited in footnotes 803-804 at that point for the range of alternative terms that have been found to constitute a "layoff."

We next turn to the meaning of “regularly established” work hours – language that was proposed by the City in negotiations. As Towle acknowledged, the language does not refer to budgeted positions or FTE’s. The additional interpretation Towle offered, distinguishing between ongoing scheduling and fluctuations, is closer to the mark. Neither this language nor Towle’s testimony suggests that the City could establish a “new normal” by redefining work hours downward. It is unnecessary to determine how brief a fluctuation in work hours must be to avoid this language. By any standard, a reduction extending over the bulk of a fiscal year (with the possibility of extending into future fiscal years) is more than a fluctuation.

We next turn to the question of what the parties meant by a “position.” In normal parlance, a layoff occurs when an employee loses a position (also known as a job), not when an unfilled budgeted position is eliminated. Nothing on the face of the language or in its context suggests that the parties intended to refer to budgeted positions or FTE’s. In the context of a layoff provision, it is the impact on an employee, not on a budget, that determines whether a “position” has been affected.

The final disputed piece of the definition is that the reduction must be “from full-time to part-time.” Article 16.1 defines a full-time work day as either 8- or 10-hour days; it defines part-time employees as “those who are scheduled to work at least half the available hours, but less than all the available hours, in a pay period or at least twenty (20) hours, but less than forty (40) hours, per week.” Following the change at issue here, employees who had been working 40-hour weeks began working 38-hour weeks – i.e., “less than forty (40) hours, per week.” Their work hours were thus reduced from full-time to part-time.

For all the above reasons, it is concluded that the work hours reduction at issue was a “layoff” under the plain meaning of the language.

Termination of Temporary and Probationary Employees

Finally, we turn to the impact of the last two sentences of Article 11.1.b, regarding termination of temporary and probationary employees. No evidence exists that, prior to this layoff, the City identified qualifications of any of its probationary or temporary employees that prompted their retention. Instead, the City based its across-the-board reduction in hours on a generalized preference against laying off employees.

The City agreed in 2001 that it would “generally” terminate temporary and probationary employees doing “the same or lower level work within the job family, within a department,” before laying off regular non-probationary employees. The only negotiated exception to that general rule was where an “operational need ... dictates otherwise.” The burden of proving the “operational need” exception rests with the City.

“Operational need,” on its face, requires more than the anticipated loss of the City’s investment in recruitment, hiring, or training. Such costs are involved in hiring any employee, no matter how brief the anticipated or actual duration of the employment.⁶ If those costs constituted an operational need, the exception would swallow the rule.

Had it made an in-depth inquiry, the City might have identified some temporary or probationary employees whose skills were so rare or specialized that there was an operational need to retain them. However, it has not shown that it made any such inquiry, nor has it articulated or proven that it had an operational need to retain all 18 probationary bargaining unit employees, 8 limited duration employees, and up to 13 temporary employees (excluding temporary recreation employees⁷). The City was required to comply with all of Article 11.1.b, including the provisions which expressed a preferred alternative to laying off full-time non-probationary employees. On this record, it did not satisfy the negotiated obligation in those provisions.

The general obligation under Article 11.1.a to make “every reasonable effort” to avoid layoffs is modified by the more specific obligations in the remainder of Article 11, mostly notably in Article 11.1.b. A step which violates a clear contractual commitment is not “reasonable,” even if it is understandable. The City’s witnesses expressed legitimate concerns about terminating employees, including the impact on the

⁶ Temporary employees, by definition, are not intended to be retained permanently. When their term of employment ends, any investment in their recruitment, hiring, or training is lost in any event. Probationary employees have the hope of being retained permanently; however, Article 10.1 permits the City to terminate them without recourse within the first 12 months of their employment. In short, other interests counter-balance the up-front investment in employees. Those interests include commitments made in a collective bargaining agreement.

⁷ There is a hint in the record that at least some recreational employees may not have been doing “the same or lower level work within the job family, within a department,” of regular non-probationary employees. No such evidence exists regarding the remaining temporary employees.

local economy from such an action. Those legitimate concerns, however, do not trump clear contract language.

For all the above reasons, it is concluded that the City violated Article 11.1 of the Agreement when it laid off non-probationary full-time employees, by reducing their regularly established hours from full-time to part-time, without first terminating temporary and initial hire probationary employees who were doing the same or lower level work within the job family, within a department. Any arguable violation of any of the other contractual provisions cited in the grievance is subsumed within this finding.

THE REMEDY

As a remedy, the City shall make non-probationary full-time employees whole by payment of the compensation they would have received if they had worked their regularly established work hours during the 2010 fiscal year. It shall also restore any such employees who remain in the City's employ to full-time work hours.

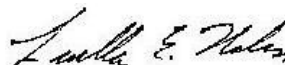
The Union seeks interest as part of the make-whole remedy. Historically, except in very unusual cases, most labor arbitrators' practice was not to award interest routinely as part of a make-whole remedy. This practice may well have been based on the former policy of the National Labor Relations Board, which has long since been abandoned in favor of awarding interest on back pay. However, unlike parties to cases before the NLRB, parties to collective bargaining agreements have at all times had the power to provide by contract for the payment of interest on back pay. Arbitral reluctance to award interest has been so widespread and so long-standing that the parties must be presumed to have been aware of it. I therefore have not joined the recent minority of arbitrators who routinely award interest absent contractual language providing for it. In my view, interest on back pay is unwarranted except where either the parties have agreed to it or it is abundantly clear that an employer knew its position had no merit but persisted in it in bad faith.

In this case, the Agreement does not provide for the payment of interest on monetary awards. The City was mistaken in its view of the contractual requirements, but the evidence does not establish that this mistake rose to the level of bad faith. Accordingly, no interest is awarded on the make whole remedy.

The matter is remanded to the parties for calculation and implementation of the remedy. As agreed by the parties, I will retain jurisdiction over the remedy and any disputes arising therefrom.

AWARD

1. The grievance is sustained. The City violated Article 11.1 of the Agreement when it laid off non-probationary full-time employees, by reducing their regularly established hours from full-time to part-time, without first terminating temporary and initial hire probationary employees who were doing the same or lower level work within the job family, within a department.
2. As a remedy, the City shall make non-probationary full-time employees whole by payment of the compensation they would have received but for the reduction in their work hours during fiscal year 2010. It shall also restore any such employees who remain in the City's employ to full-time work hours.
3. The matter is remanded to the parties for calculation and implementation of the remedy. As agreed by the parties, the Arbitrator retains jurisdiction over the remedy portion of this Award and any disputes arising therefrom.



LUELLA E. NELSON - Arbitrator