

## **FINDINGS, ANALYSIS, AND AWARD**

In the matter of arbitration between:

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503,  
OREGON PUBLIC EMPLOYEES UNION**

And

**STATE OF OREGON, DEPARTMENT OF REVENUE**

Grievants:           Anthony King  
                          April McNeil  
                          Lois Williams

Arbitrator:           Ronald L. Miller

Award date:          January 11, 2013

Witnesses:

Union:               April McNeil, Revenue Agent 1, Department of Revenue  
                          Lois Williams, Operations and Policy Analyst 3 (OPA3), Department  
                          of Revenue

State:                Michael Baird, Classification and Compensation Analyst, Department  
                          of Administrative Services  
                          Kim Dettwyler, Manager, Human Resources, Department of Revenue  
                          JoAnn Martin, Personal Tax and Compliance Administrator, Department  
                          of Revenue  
                          Nettie Pye, Manager, Labor Relations, Department of Administrative  
                          Services

## **INTRODUCTION**

The arbitration hearing in this matter was held at the offices of the Service Employees International Union (SEIU), Local 503, Oregon Public Employees Union (OPEU), Salem, Oregon, on October 2, 2012. Ronald L. Miller served as Arbitrator by agreement of the parties. Christy Te, Staff Attorney, represented SEIU Local 503, OPEU (Union). Lisa M. Umscheid, Senior Assistant Attorney General, represented the State of Oregon, Department of Revenue (State or Employer).

The parties agreed that the matter was properly before the Arbitrator on its merits, with the exception that the State contended that April McNeil did not file her grievance in a timely

manner, and therefore should not be part of the consolidated grievance. The Arbitrator received evidence pertaining to Ms. McNeil's grievance, and reserved a decision on timeliness for the Award. Following the conclusion of the hearing, the parties continued to discuss the issue of timeliness; subsequently, the State withdrew its challenge on this point (Employer's Closing Brief, p. 22).

The parties agreed that there was no issue having to do with the availability of witnesses, and no issue having to do with the availability of documents requested but not provided. The hearing proceeded in an orderly manner. The parties were given opportunities to make an opening statement, submit evidence, and examine and cross-examine witnesses. Witnesses testified under oath as administered by the Arbitrator. A transcript of the hearing was not made. The Arbitrator tape-recorded the hearing to supplement his notes.

The parties submitted the matter to the Arbitrator on the basis of evidence presented at the hearing and post-hearing briefs. Post-hearing briefs were submitted in a timely manner. The Arbitrator closed the record on December 18, 2012.

### STATEMENT OF THE ISSUE

Did the Department of Revenue violate Article 26, Section 10 of the parties' collective bargaining agreement when it did not pay a work out-of-classification pay differential to the Grievants for the following temporary work assignments?

1. Lois Williams, for her temporary work assignment as an Operations and Policy Analyst 3, a position she held from August 16, 2010, to June 11, 2012 [date in June specified in Williams' testimony and Union's Closing Brief, p. 6];
2. April McNeil, for her temporary work assignment as an Executive Support Specialist 1, a position she held from September 16, 2011, through February 1, 2012 [dates agreed to by the parties following the hearing, Employer's Closing Brief, p. 10, footnote #22];
3. Anthony King, for his temporary work assignment as a Principal Executive Manager C, a position he held from February 9, 2011, to April 2, 2012.

If so, what shall be the remedy?

## PERTINENT CONTRACT PROVISIONS

2011-2013 Specials Coalition Collective Bargaining Agreement, SEIU Local 503, OPEU and State of Oregon, Department of Administrative Services.

### ARTICLE 26 - - DIFFERENTIAL PAY

#### Section 10. Work Out-of-Classification (Ex. U #1, p. 19)

- (a) When an employee is assigned for a limited period to perform the duties of a position at a higher level classification for more than ten (10) consecutive calendar days, the employee shall be paid five percent (5%) above the employee's base rate of pay or the first step of the higher salary range, whichever is greater.

When assignments are made to work out-of-classification for more than ten (10) consecutive calendar days, the employee shall be compensated for all hours worked beginning from the first day of the assignment for the full period of the assignment.

\* \* \* \* \*

### FINDINGS OF FACT

- 1) The Service Employees International Union (SEIU), Local 503, Oregon Public Employees Union (OPEU) (Union) represents employees at various agencies of the State of Oregon (State or Employer).
  
- 2) The 2011-2013 Collective Bargaining Agreement (Agreement), at Article 26, Section 10, Subsection (a), states in part:
 

"When an employee is assigned for a limited period to perform the duties of a position at a higher level classification for more than ten (10) consecutive calendar days ..." [Emphasis added]

The Agreement does not define "higher level."
  
- 3) ORS 240.190(1) requires the State to "employ a neutral and objective method of determining the comparability of the value of work." OAR 105-020-0001 requires the Department of Administrative Services (DAS) to use the Hay system of job evaluation for this purpose (Ex. E #7).

- 4) The Hay system carries out the mandate in OAR 105-020-0001 to “measure the know-how, problem solving, accountability and working conditions required to perform the duties within a classification of work” (Ex. E #7). State Classification and Compensation Analysts determine a position’s value of work based on relevant neutral factors and point factor methodology. Groups or categories of positions are systematically arranged into classifications based on the value of work. In turn, a classification is assigned to a salary range based on the value of work in that classification.
- 5) The Hay system’s point factor methodology does not use a position’s “salary level” in assessing the value of work; factors, such as nature and variety of work, complexity of work, supervision received or exercised, etc., are considered (Ex. E #8, p. 5).
- 6) In addition to a numbered salary range, a classification may be assigned a pay option letter prefix, including: “I” for information technology; “M” for management service; and “X” for Principal Executive Manager. Michael Baird, Classification and Compensation Analyst, testified that pay option prefixes are used to denote salary ranges where pay for a position may be enhanced to aid in recruiting and retention (for example, the information technology series), or because the position is outside a bargaining unit and pay is not negotiated between the Union and the State (for example, the management service and Principal Executive Manager series).
- 7) A numbered salary range may contain Union-represented positions and unrepresented positions. In Table 1, Tax Auditor 2 is Union represented, and Principal Executive Manager C (PEM C) is not represented (Ex. E #15, p. 2). For Union-represented positions, pay at each step of the salary range is determined through negotiations between the Union and State. For unrepresented positions, pay at each step of a salary range is determined unilaterally by the State. Therefore, at each step of a salary range, pay for Union-represented positions and pay for unrepresented positions in the same salary range may differ.

Table 1  
DEPARTMENT OF REVENUE  
Example of Four Classifications with Salary Range 28 Designation

Classification Title	Salary Range	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9
INFO SYSTEMS SPEC 5	I 28	4006	4197	4391	4598	4816	5043	5279	5527	5786
PRIN EXEC/MANAGER C	X 28	4100	4302	4515	4740	4980	5228	5487	5756	6046
APPRAISER ANALYST 3	28	3962	4150	4350	4562	4787	5025	5265	5524	5789
TAX AUDITOR 2	28	3962	4150	4350	4562	4787	5025	5265	5524	5789

- 8) Anthony King's permanent position is a Tax Auditor 2, salary range 28; this position is represented by the Union.
- 9) Mr. King applied for and accepted a temporary work assignment as a Principal Executive Manager C (PEM C), salary range 28. The PEM C position is a management service position, and carries the prefix "X" in the Department of Revenue's compensation plan (Ex. E #15, p. 2; Table 1). This PEM C position is not part of the bargaining unit represented by the Union. Mr. King worked in this temporary position from February 9, 2011, to April 2, 2012. Mr. King was not paid a work out-of-classification pay differential during this temporary work assignment.
- 10) Mr. King did not testify at the hearing. Mr. King notified the Union and the State that he was not interested in filing a grievance in this matter, and did not do so (Ex. E #16, p. 1). The Union, exercising its right to enforce the Agreement, included Mr. King as a named grievant. Evidence pertaining to Mr. King was received from witnesses and exhibits.
- 11) April McNeil's permanent position is a Revenue Agent 1, salary range 17; this position is represented by the Union.
- 12) Ms. McNeil applied for and accepted a temporary work assignment as an Executive Support Specialist 1 (ESS1), salary range 17. This ESS1 position is a management service position and is denoted by "M 17" in the Department of Revenue's compensation plan (Ex. E #27, p. 1). This ESS1 position is not part of the bargaining unit represented by the Union. Ms. McNeil worked in this temporary position from September 16, 2011, through February 1, 2012. Ms. McNeil was not paid a work out-of-classification pay differential during this temporary work assignment.
- 13) Lois Williams' permanent position is an Operations and Policy Analyst 3 (OPA 3), salary range 30; this position is represented by the Union.
- 14) Ms. Williams applied for and accepted a temporary work assignment as an OPA 3 in a different work area. Ms. Williams worked in this temporary position from August 16, 2010, to June 11, 2012. Based on an inquiry initiated by Ms. Williams, the State adjusted the designation of the temporary position held by Ms. Williams to be a management service OPA 3 position, denoted as "M 30" in the Department of Revenue's compensation plan (Ex. E #20,

p. 2). An interoffice memo, dated January 3, 2012, from Kim Dettwyler, Manager, Human Resources, Department of Revenue, to Ms. Williams states in part (Ex. E #21):

Following your inquiry, it has been determined that the work assigned to you is similar to that of another employee also in a temporary work assignment as an Operations and Policy Analyst 3 (X0872), designated at the management service level. Based on this information, we will update your Temporary Work Assignment Agreement to reflect this assignment is at the management service level, although as we discussed, based on the SEIU Contract Article 26, Section 10(a) covering work out of class pay, you are not eligible for additional pay since the work is the same salary range as your permanent position.

This management service OPA 3 position is not represented by the Union. As noted in the memo, Ms. Williams was not paid a work out-of-classification pay differential during this temporary work assignment.

15) Table 2 shows that Ms. Williams, Mr. King, and Ms. McNeil each did received higher pay during their temporary work assignment than in their permanent position. Each Grievant's temporary work assignment was in the same salary range as his or her permanent position (Ex. E #20 pp.1 and 2).

Table 2  
COMPARATIVE PAY: TEMPORARY AND PERMANENT POSITIONS

Classification Title	Salary Range	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9
<b>Lois Williams</b>										
OPS & POLICY ANALYST 3	M 30	4740	4980	5228	5487	5756	6046	6343	6663	0
OPS & POLICY ANALYST 3	30	4350	4562	4787	5025	5265	5524	5789	6075	6371
<b>Anthony King</b>										
PRIN EXEC/MANAGER C	X 28	4100	4302	4515	4740	4980	5228	5487	5756	6046
TAX AUDITOR 2	28	3962	4150	4350	4562	4787	5025	5265	5524	5789
<b>April McNeil</b>										
EXEC SUPPORT SPEC 1	M 17	2554	2669	2790	2925	3068	3227	3377	3539	0
REVENUE AGENT 1	17	2416	2510	2624	2735	2858	2989	3132	3284	3434

16) Ms. Williams filed a grievance on January 10, 2012 (Ex. U #2). Ms. Williams' grievance states in part:

Grievant has been performing work of a higher level classification and higher salary range from August 2010 to present with no pay differential.

As a remedy, Ms. Williams requests:

Make Grievant whole in every way including, but not limited to, providing a 5% work-out-of-class pay differential retroactive to August 2010.

17) Ms. McNeil and the Union [on behalf of Mr. King and similarly situated Department of Revenue employees] filed a grievance on February 24, 2012 (Ex. U #16). The grievance states in part:

Both of the named grievants, April McNeil and Anthony King, accepted temporary work assignments (TWA) and were assigned management service duties in a higher classification and higher pay range than their permanent bargaining unit positions. Neither grievant received a pay differential during these assignments.

As a remedy, the grievance requests:

Make the two named grievants and all similarly situated Revenue employees whole in every way including but not limited to providing a 5% work-out-of-class pay differential retroactive to the date the higher classification duties were assigned.

18) By agreement of the parties, the grievances were consolidated. The consolidated grievance was not resolved; arbitration was invoked by the Union.

### ANALYSIS AND CONCLUSION

The burden of persuasion in this matter rests with the Union. For the reasons set forth below, the Arbitrator is not persuaded that the Union met its burden with a preponderance of the evidence.

#### Article 26, Section 10, Work Out-of-Classification

Article 26.10.(a) states in pertinent part:

When an employee is assigned for a limited period to perform the duties of a position at a higher level classification for more than ten (10) consecutive calendar days, the employee shall be paid five percent (5%) above the employee's base rate of pay or the first step of the higher salary range, whichever is greater. [Emphasis added]

The phrase "higher level" is not defined in the Agreement. The parties give this phrase plausible but conflicting interpretations; the phrase is ambiguous.

Building on the generally accepted premise that duties of higher value warrant higher pay, the Union argues that, because the Grievants temporarily worked in higher paying positions, shown in Table 2, those positions entailed duties of higher value and therefore were at a "higher level." Thus, the Union argues, the Grievants were entitled to receive a pay differential.

The State argues that “to perform the duties of a position at a higher level” means the Grievants would have had to move from a position in a lower salary range to a position in a higher salary range, such as moving from salary range 28 to 30. Instead, each Grievant moved laterally within the salary range of his or her permanent position to a temporary position in that same salary range (Table 2).

The language of Article 26.10 has been the same since the parties’ collective bargaining agreement of 2001-2003. The phrase “to perform the duties of a position at a higher level classification” has been used in Article 26.10 since the 1985-1987 agreement (Ex. E #4).

#### Value of Duties and “higher level”

The Department of Revenue’s compensation plan consists of a hierarchy of numbered salary ranges. Based on the Hay system’s point factor methodology, a classification is assigned to a specific salary range; the higher a point factor “score,” that is, the higher the value of work, the higher the salary range. Table 1 shows that four classifications, each with very different duties, are assigned to the same salary range, 28. Although duties differ, the total value of each classification’s duties is similar. The Hay system’s point factor methodology does not use a position’s “salary level” in determining the value of work (Ex. E #8, p. 5). Factors, such as nature and variety of work, complexity of work, supervision received or exercised, etc., are considered.

The Union contends that the higher salaries paid to the Grievants in their temporary positions reflect the higher value work performed by the Grievants. Ms. McNeil and Ms. Williams testified that the duties they performed in the temporary positions evolved and entailed increasing responsibilities and job knowledge. Ms. McNeil and Ms. Williams testified that although their temporary positions were in the same salary range as their permanent positions, the value of duties actually performed in their temporary positions was greater than the value of duties in their permanent positions, and therefore of a “higher level.” Ms. Williams worked in her temporary position for almost two years; there was no position description for that position.

It may well be that the duties performed by the Grievants during their temporary work assignments evolved to encompass higher value work than denoted by their respective salary

range. However, the testimony of Ms. McNeil and Ms. Williams is not sufficient for the Arbitrator to reach such a conclusion. At a minimum, the record should include job evaluation data from desk audits of each temporary position. Mr. Baird testified that an employee might request a desk audit; desk audits of the temporary positions were not performed.

Based on the Hay job evaluation system, "higher level" as used in Article 26.10.(a) means higher or greater value of work determined by relevant, neutral factors and point factor methodology. Therefore, "to perform the duties of a position at a higher level classification," would entail moving from a position in a lower level salary range to a position in a higher level salary range, that is, moving to a salary range that denotes greater value of work. In the instant matter, moving between classifications within a salary range, even when there is a higher salary, is a lateral change.

#### Represented and Unrepresented Positions

As indicated in Table 2, each Grievant accepted a temporary position in a classification with a letter prefix; the temporary positions were in the same salary range as his or her permanent position. The prefixes "M" and "X" are pay options that indicate the State may unilaterally determine salaries, such as for purposes of recruitment and retention. The three temporary positions were not represented by the Union.

There is insufficient evidence to infer that the value of a classification's duties increases because the classification's salary range designation has a letter prefix. A letter prefix does not necessarily result in a classification being assigned a new, higher salary range number. The Hay job evaluation system determines the value of work irrespective of a classification's pay option prefix. Although the Union cites the generally accepted premise that duties of higher value warrant higher pay, this principle is separate from another important element accounting for the differences in pay among classifications within a salary range. In this matter, the permanent positions are represented by the Union; the temporary positions are not represented by the Union. The dynamics of collective representation and collective bargaining on the one hand, and unilateral decision making by the State on the other hand, impact the comparative salaries in a salary range.

### Past Practice

Nettie Pye, Manager, Labor Relations, Department of Administrative Services, testified that during a recent five-year period, among the approximate 4,800 State employees represented by the Union, 44 persons were paid the Article 26.10 Work Out-of-Classification pay differential in circumstances similar to those of the Grievants. The 44 employees received the pay differential even though their temporary positions were in the same salary range as their permanent positions. Ms. Pye described those 44 differential payments as errors made by lower administrative units of State agencies. The Union contends that the differential payments to the 44 employees establish a past practice for interpreting the ambiguous language of Article 26.10.(a), "... perform the duties of a position at a higher level classification."

Over the decades, labor relations practitioners have formulated many definitions for a past practice. These definitions commonly include the following factors:

1. Clarity and consistency of the pattern of conduct or components of an activity,
2. Longevity and repetition of the conduct or activity,
3. Acceptance of the pattern, and
4. Mutual acknowledgement, implicit or explicit, of the pattern by the parties.

The party claiming the existence of a past practice, in this matter the Union, bears the burden of persuasion.

Among its duties, the Department of Administrative Services is charged with advising State agencies and departments regarding the interpretation and administration of collective bargaining agreements. Evidence shows that since 1997, DAS has consistently advised State agencies and departments that, with reference to Article 26.10.(a), employees temporarily working in positions within the same salary range base number are not working in a higher level classification, and therefore the employees are not entitled to differential pay. Notwithstanding the evidence that certain administrative units did not adhere to DAS's directives, there is no evidence that DAS implicitly or explicitly acknowledged and accepted the practice claimed by the Union. There is no past practice linked with the ambiguous phrase "higher level" in Article 26.10.(a).

### Article 81.4.(a) and the PERS Settlement

The State argues that an employee who works temporarily in a position within the same numbered salary range as the employee's regular position is working in a lateral position, not in

a position in a higher level classification. In support of its contention, the State cites Article 81, Section 4(a) of the Agreement (Ex. U #1, p. 54):

Section 4. Reclassification Equal or Lateral

(a) Reclassification equal or lateral is a change in an employee's job classification from one classification to another with the same salary range base number.

Additionally, the State cites a 2005 grievance settlement between the Department of Administrative Services on behalf of the Public Employees Retirement System (PERS) and the Service Employees International Union, Local 503, Oregon Public Employees Union. The PERS settlement states in part (Ex. E #5, p. 2):

Whenever a lateral or equal change is made to an employee's job classification (that is, from one classification to another with the same salary range number, excluding alphabetic extensions to range numbers), that has a salary rate the same as the employee's previous salary step, the employee's salary shall be maintained at that rate in the new classification.

Article 81.4 and the PERS settlement are not dispositive for the instant matter. Article 81 was the provision of the collective bargaining agreement at issue in the PERS settlement. Nothing in the terms of the PERS settlement indicates that the Union and the State intended the reach of the settlement to include a situation, as in this case, involving both bargaining unit (Union-represented) and management service (unrepresented) classifications. Additionally, the PERS settlement and Article 81 address issues involving reclassification of bargaining unit employees. The instant matter concerns the interpretation and application of a provision concerning differential pay for temporarily working out-of-classification.

Conclusion

Based on the Hay job evaluation system, "higher level" as used in Article 26.10.(a) means higher or greater value of work determined by relevant, neutral factors and point factor methodology. Therefore, "to perform the duties of a position at a higher level classification," would entail moving from a position in a lower level salary range to a position in a higher level salary range, that is, moving to a salary range that denotes greater value of work. In the instant matter, moving between classifications within a salary range, even when there is a higher salary, is a lateral change.

The Department of Revenue did not violate Article 26, Section 10 of the Agreement when it did not pay a work out-of-classification pay differential to the Grievants for the following work assignments:

Lois Williams, for her temporary work assignment as an Operations and Policy Analyst 3, a position she held from August 16, 2010, to June 11, 2012;

April McNeil, for her temporary work assignment as an Executive Support Specialist 1, a position she held from September 16, 2011, through February 1, 2012; and

Anthony King, for his temporary work assignment as a Principal Executive Manager C, a position he held from February 9, 2011, to April 2, 2012.

#### **AWARD**

The grievance is denied.

Signature \_\_\_\_\_

Ronald L. Miller

January 11, 2013

Date