IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
AFSCME LOCAL 189	)	
	)	
"AFSCME" OR "THE UNION"	)	
	)	
AND	)	
	)	
CITY OF PORTLAND	)	
	)	PEGGY WHELAN
	)	RECALL GRIEVANCE
"THE CITY" OR "THE EMPLOYER"	)	

HEARING: April 9, 2012

HEARING CLOSED: May 25, 2012

ARBITRATOR:
Timothy D.W. Williams
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Portland OR 98121

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Peggy Whelan, Grievant

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Kurt French, Steward
Stephanie Babb, Chief Steward
Peggy Whelan, Grievant

EXHIBITS

Joint

1. Collective Bargaining Agreement between City of Portland and DCTU, 2010 – 2013.
2. Grievance, 7/29/11.
3. City's Level One Response, 8/19/11.
4. Union's Level Two Response, 9/2/11.
5. City's Level Two Response, 10/21/11.
6. Union Appeal to Arbitration, 10/21/11.
7. Joint Factual Stipulation
8. Ordinance No. 176302 Adoption HRARs (Criminal History Checks, Driving Records Vehicle Loss Control)
9. HRAR 1.02 Administrative Rule Development and Issuance.
10. HRAR 3.09 Driving Records
11. HRAR 3.11 Criminal History Checks.
12. HRAR 3.16 Background Investigations
13. HRAR 4.13 Vehicle Loss Control
14. HRAR 7.06 Layoff & Recall
15. HRAR 7.07 Reinstatement.
16. HRAR 7.11 Unemployment Claims.
17. Housing Inspector Classification Specification.
18. Code Specialist Classification Specification.
19. Email exchange with C. French re conditions of recall, 6/11.
20. Labor Agreement DCTU, 7/1/72 – 7/1/74.
21. Labor Agreement DCTU, 1974-1975.
22. Labor Agreement DCTU, 7/1/76 – 6/30/78.
23. Labor Agreement DCTU, 7/1/78 – 7/1/80.
24. Labor Agreement DCTU, 7/1/80 – 7/1/82.
25. Labor Agreement DCTU, 7/1/82 – 7/1/84.
26. Labor Agreement DCTU, 7/1/84 – 7/1/87.
27. Labor Agreement DCTU, 7/1/88 – 7/1/92.
28. Labor Agreement DCTU, 7/1/92 – 7/1/95.
29. Labor Agreement DCTU, 7/1/96 – 7/1/98.
30. Labor Agreement DCTU, 7/1/01 – 7/1/04.
31. Labor Agreement DCTU, 7/1/04 – 7/1/06.
32. Labor Agreement DCTU, 7/1/06 – 7/1/10.

EMPLOYER

1. Chronology.
2. ORS 243.650 (Collective Bargaining)
3. Jobs Requiring CT's.
4. Recall /Reemployment Process Flowsheet.
5. Notice to Whelan re Layoff, 7/30/09.
6. Letter to Whelan re Recall from Layoff, 7/26/11.
7. Letter to Henson from Whelan re Election to Recall, 8/2/11.
8. `Whelan Pre-employment Packet.
9. Criminal Consent, 8/5/11.
10. Whelan Pre-Placement exam Reprt email from Robertson to Supriano, 8/8/11.
11. Motor Vehicles Record Evaluation, 8/5/11.
12. Email Exchange between A. Kanwit and C. Henson re Whelan driving issue, 8/9/11.
13. Notice of Vacancy (8/10/11) and Laid Off Certificate of Eligible.
14. Letter to Whelan Rescinding Recall, 8/11/11.
15. Whelan Unemployment Payments.
16. Chart – Recalled Employees Subjected to PCT, DMV, Criminal and Supporting Documentation.
17. Arbitrator's Award, Timothy Abbott, Grievant Laborer's Local 483 and City of Portland, 1/14.08.
18. Layoff/Recall/Reemployment Chart.
19. Report Accident Review Board Decision, 8/3/09.
20. Email, 8/22/114.
22. BDS List of Rehires
23. City's Information Request
24. Memo on Budget Request.
25. Budget Approval, 2/11/11.

UNION

1. Union information request conditions of recall, 8/22/11.
2. Union Information Request regarding Whelan rescinding of recall, 8/2211.
3. City's response to Union information request regarding conditions of recall.
4. City's response to Union Information Request regarding Whelan rescinding of recall.
5. E-mail P. Whelan and M. Lifeld regarding notice of recall.
6. E-mail P. Whelan and G. Supriano regarding steps to recall.
7. E-mail P. Whelan and BDS regarding request for reconsideration.

BACKGROUND

City of Portland (hereafter "City or "the Employer") and AFSCME Local 189 (hereafter "Local" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Portland, Oregon on April 9, 2012. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. A transcript was made of the hearing which was sent to each Party and the Arbitrator.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

FACTS

The matter before the Arbitrator is a grievance between AFSCME Local 189 and City of Portland. The Parties are bound by a Collective Bargaining Agreement (CBA) between the City and The District Council of Trade Unions. AFSCME Local 189 is an affiliate of the

District Council and Local 189's members are covered by the July 1, 2010 to June 30, 2013 District Council Agreement. The grievance in this case is between AFSCME Local 189 on behalf of Peggy Whelan, Housing Inspector, and the City.

The following is a brief summary of the events that led up to the filing of the grievance. It is based on documentary evidence and testimony presented during the hearing, and the written briefs submitted thereafter.

The Grievant, Peggy Whelan, began her employment in BDS as a Code Specialist I, Noise Control, in 2002. She was then hired as a Housing Inspector around 2007. Ms. Whelan was bumped from the Inspector position on August 17th, 2009 to a Code II Specialist at PBOT (E-1). She was then laid off from the Code II Specialist position on September 10th, 2009 (E-1).

In the summer of 2011, the Bureau of Development Services was given funding and approval by City Council to fill three Housing Inspector positions as there was a backlog of work in that sector of the City. The three positions were limited to funding for one calendar year each from the time the Council approved them.

The Grievant was recalled on July 26th, 2011 by the City of Portland roughly two years after she was laid off (E-6). Her recall was based on the seniority provision found in Article

14.5 of the CBA. She responded via hand-delivered letter to the HR office on August 2nd, 2011, notifying HR that she wanted to take the position and get back to work (E-6, P 3). The City had hired two other recalled employees more senior than Ms. Whelan on the recall list for the other two Housing Inspector Positions.

As part of her re-hire, Ms. Whelan was required to take a physical capacity test (PCT), which she passed. She was required to submit to a criminal history check, which she passed with no criminal record. Finally, she filled out a form to get her DMV record and had it sent to the City HR office as the third condition of her rehire.

Ms. Whelan was notified by the City on August 11th, 2011, that her recall was rescinded because Risk Management had determined that she was not eligible to perform the duties of the position based on a DMV check of her driving record that included six speeding tickets (E 14). The Grievant remained on the recall list despite not being hired to the new Housing Inspector Position.

Ms. Whelan requested that HR reconsider the recall, because on October 15th, 2011, enough of her speeding tickets would have fallen off of her driving record, rendering her eligible for the Housing Inspector position she'd been denied.

HR did approve her request. The Union included Peggy Whelan as a grievant under the umbrella of a grievance previously filed by the Union against the City on July 29, 2011 over the city’s use of PCT, DMV and criminal history checks (J 2). The City had denied the Grievance at Level 1, and the rescinding of Ms. Whelan’s recall was incorporated into the Union’s grievance at the Level 2 Grievance meeting on September 15th, 2011 (J 5, P 3).

The Parties were unable to settle the matter through the grievance procedure and, per Article 35.3.7, ultimately selected Arbitrator Timothy Williams, submitting the matter to arbitration on April 9th, 2012 at the City Attorney’s conference room at Portland City Hall.

At hearing the Parties provided the Arbitrator with the following two statements of fact and a stipulation:

1. Grievant has not paid Union dues since being laid off September 10, 2009.
2. Grievant collected unemployment from the State of Oregon after being laid off November 30, 2009, including but not limited to, the period after she elected to participate in the recall/reemployment process on August 2, 2011.

The parties stipulated that the Arbitrator should focus his award on the Peggy Whelan grievance as opposed to the class action grievance that had been earlier filed (Tr 6). Thus this decision and award is the Arbitrator’s final determination with

regard to the grievance filed on behalf of Ms. Whelan concerning her recall rights.

STATEMENT OF THE ISSUE

The Parties were able to agree on a statement of the issues which are as follows:

1. Is the grievance substantively arbitrable?
2. Is the grievance procedurally arbitrable?
3. Did the City violate Article 14.5 of the contract by requiring Peggy Whelan to pass a Motor Vehicle Record Evaluation as part of the recall process?
4. If so, what remedy will make the Grievant whole?

The Parties stipulated that the Arbitrator may retain jurisdiction following issuance of his Award to resolve any issues over remedy, if one is provided.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, July 1,2010 – June 30, 2013

Management Rights

The City shall exercise sole responsibility for management of the City and direction of its work force, except as expressly limited by the terms of this agreement.

14.5 Recall

14.5.1 If an employee has been transferred as a result of a layoff, that employee shall have the right to transfer back to his/her former classification in his/her former bureau or division from which s/he was transferred, if the City is going to reemploy an employee in that classification in that bureau or division. The transfer back shall be on a strict City-wide

seniority basis in the classification of the employee at the time the transfer occurred.

14.5.2 The City shall re-employ laid off employees in a strict seniority basis for the classification from which the employee was laid off.

14.5.3 Employees shall be placed on a recall list for the classification from which layoff occurred for five years, or removal as defined in 14.5.6 below, whichever occurs earlier.

14.5.4 The employee, by notifying the Bureau of Human Resources in writing, may become unavailable for recall no more than one specified period of time, except when documented medial evidence of lack of both personal and public transportation prevent the employee from being available for work.

14.5.5 On re-employment of laid off employees, the City shall notify the employee by Certified letter, with a copy to the Unions, mailed to his/her last known address The employee shall have five (5) days to report his/her intentions to the City and shall report to work within two (2) weeks after notification to the City.

14.5.6 **Reappointment** to the classification from which the employee was laid off, or refusal of appointment by the employee to a bona fide recall, shall result in the employee's removal from the recall list and right to recall, except that an employee recalled to a bureau other than that of layoff may opt to remain on the recall list for the bureau from which he or she was laid off

35. Grievances, Complaints and Arbitration

35.3.7 **Level Four – Arbitration**

c. The Arbitrator's decision shall be final and binding, but the Arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of this Agreement. The decision of arbitration shall be within the scope and terms of this Agreement and will be in writing.

d. The City and local union involved shall divide equally the Arbitrator's fee, …………..

POSITION OF THE UNION

The Union contends that the Arbitrator should grant this grievance and make Ms. Whelan whole in all ways for a number of different reasons.

First, the Union acknowledges that the City has the right to evaluate its employees to make certain they are qualified to do the work. It takes no issue with the fact that employees may need to take tests and or complete some re-emplyment protocols at some point in the recall process.

The Union is not concerned with the tests themselves, but the application of the results of those tests. If the results are applied differently depending on whether the employee is laid off or employed, the Union takes issue. In this case, Ms. Whelan would have not been penalized if her driving record had been evaluated after she was reemployed because the provisions of Article 22.14 and HRAR 4.13 would have prevented it.

Second, the Sherman Keller award in the Abbott Decision is not controlling, nor should it be used in this case to guide a new decision because it was an "instance of bad judgment that did not help guide the parties to a reasonable interpretation of the collective bargaining agreement." (Union Brief, p. 9)

In that case, Arbitrator Keller's holding that Management Rights trump strict seniority provisions collides sharply with Article 4 of the contract in this case, which states that the

City will exercise sole responsibility for management of its work force except when expressly limited by the terms of the contract.

If the Union must continue to honor the Abbott Decision, which the Union believes did not help to clarify the agreement or provide stability for the parties in decision-making, it will only add further confusion to the issue in contention. Honoring the Abbott Decision means replacing the strict seniority terms of Article 14.5.2 with the modified seniority terms within HRAR 7.06.

Third, the Union argues that the practice of conditioning reemployment upon successfully completing a Motor Vehicle Record Evaluation was not a mutually accepted practice just because it had been going on in the past. The City's actions against Ms. Whelan are a violation of the clear and unambiguous terms of the CBA, regardless of past practice.

Additionally, the Abbott decision involved a union that is a separate entity from AFSCME Local 189. "The City did not provide any evidence that a copy of the decision was provided to AFSCME Local 189 prior to the immediate issue being raised, let alone an explanation of the City's interpretation of this decision and how it would impact the reemployment of laid-off employees." (Union Brief, p. 10)

Fourth, there is no provision in the contract specifically addressing necessary demonstration of physical and technical qualifications upon recall to the same position from which the employee was laid off. There are provisions around returning from leaves of absence (Art. 20.2.3), and provisions for Risk Management reviewing driving records for employees who obtain occupational licenses (22.14.13). Nowhere in the CBA, however, is there a provision around conditioned employment for a recalled employee.

Fifth, the language of the current CBA has remained the same since 1972 (J-20, p 2), and the Union argues that it hasn't changed because the intent of the parties was to define strict seniority to mean that seniority would be the sole criteria for recall.

The City has attempted to redefine the term *reemploy* as a process where the skills and abilities of the laid off employee are re-evaluated and may end with the employee being unemployed rather than reemployed. The specific term used in Article 14.5.2 around recall is *reemploy.* That, the Union argues, means to again provide a job that pays wages or salary.

The CBA expresses an agreement between the parties that recall means reemploy. "The contract does not contain a special definition of the term "reemploy", nor did the City provide any evidence that the parties agreed to an alternative definition.

Absent any evidence, we must grant the term "reemploy" it's [sic] commonly accepted meaning." (Union Brief p 14). The Union argues that the intent of the parties in Article 14.5.2 can be discerned from the language alone, without the use of HRARs or other outside information.

HRAR 7.06, which governs layoff and recall, states that an employee on the recall list will be recalled unless they lack a specific skill, knowledge or license for the job. Ms. Whelan lacked none of those things. She did not lose her license because of the speeding tickets she'd received.

Furthermore, the Union also argues that when HRAR and CBA conflict, the CBA must govern. HRAR 1.02 states "(i)f there is a conflict between a citywide human resource rule and a collective bargaining agreement, the collective bargaining agreement prevails." The Union argues that the city erred in assuming that the Union agreed there was no conflict over this issue. (Tr. 180-181).

The Union points out that the CBA provides protections and accommodations for City employees that lose their licenses. Article 22.14 states that the City will accommodate an employee that loses their license for a period of 30 days. After this first accommodation, the employee may be further accommodated by transfer to a non-driving assignment, to a lower work classification, or may be laid off. If an employee retains a

valid license within 90 days, the CBA requires that they be returned to work, and will be recalled under the provisions of Article 14.

Why would the CBA protect employees that lose their licenses, but punish employees that have lesser driving infractions who still have their licenses? To the Union, this is absurd, and evidence that the City's discipline of Ms. Whelan was too harsh.

In sum, the Union argues that it is fair for the City to evaluate its employees for various reasons. The Union is very concerned that would be unwise for the Arbitrator to favor the City's argument in this case for the precedent it would set around HRARs trumping CBA terms in the same employment disputes that the CBA was designed to prevent. For these reasons and the reasons iterated above, the Union maintains that the City did violate Article 14.5.2 and should restore Ms. Whelan to her position with the City and make her whole in all ways.

POSITION OF THE EMPLOYER

The City contends that the Arbitrator should deny the Union's grievance because the City did not violate Article 14.5 of the CBA for all the following reasons.

First, article 14.5 is not an express waiver of the City's right to condition a grievant's rehire on his or her ability to

perform his or her job functions. The contract does not contain any provision that says management waives its basic right to assure that candidates that have been off the job for substantial periods of absence can still safely perform their job functions.

The City must protect safe working conditions, and the Union must support the City in this pursuit as per Article 22.1 in the CBA: "The City will exert every reasonable effort to provide and maintain safe working conditions, and the Unions will cooperate to that end and support the City when discipline is reasonably required in the case of safety regulation violations." (J-1)

Driving is an essential function of the Residential Housing Inspector position. Accordingly, the ability to drive a city vehicle is a conditional requirement for the position. HRAR 4.13 states that the necessary requirement for eligibility to drive a city vehicle is to "Have and maintain an acceptable driving record, to be determined by Risk Management." (J-13 pp. 1-2). The CBA doesn't address Risk Management's criteria for evaluation of a Motor Vehicle Record, but HRAR 3.09 does. (J-10 p. 3) HRARs are vetted through labor organizations before implementation. The Grievant has the power to restore her eligibility by not getting more speeding tickets.

Second, the City did follow strict seniority with regard to Ms. Whelan. "Based solely on her seniority, the City provided reemployment exclusively to Ms. Whelan." (Employer Brief p. 9) Seniority was the sole basis for the Grievant's recall and her exclusive right to participate in the reemployment process. The DMV evaluation was a separate hiring issue. To the City, Article 14.5.2 means that the most senior person on the recall list has the undisputed right to enter the reemployment process first, not that he or she is guaranteed reemployment regardless of compliance with physical, driving and criminal record parameters. The grievance should be denied because the City complied entirely with its obligations under Article 14.5 of the CBA.

Third, the City views the reemployment process this way: Recall and reemployment take place before a person is actually rehired and reappointed to a vacancy within a classification. (J-1, Art. 14.5.6, *Reappointment).* The City argues that strict seniority applies to recall and reemployment, but rehire and reappointment required the candidate to demonstrate that he or she will be able to safely perform the functions of the job.

Fourth, the Arbitrator should adopt the reasoning in the Abbot arbitration on this issue *(City of Portland v. DCTU/Local 483 (Kellar 2008*) E-17 pp. 15-16.). In this case, the arbitrator reasoned that "recall is but one of the aspects of

the re-employment process." He found a longstanding practice in which "individuals returning from layoffs as recalls were treated as new hires" regarding conditioned rehire. Rather than allow re-arbitration of Management Rights and Safety issues every time a recall comes up, the Arbitrator should adhere to the prior arbitration award so that the parties may have stability and finality, and to prevent forum shopping and wasteful re-litigation. All three preconditions for adherence to the Abbott award are met.

Finally, the Union will argue that Article 22 of the CBA requires the City to provide a recall from extended absences non-driving work for 30 days. The City believes that it is outside the scope of the stated issue before the arbitrator in this case, and it was never cited in the grievance. Article 22 only applies to the loss of a license for an employee currently working for the City, which is not the situation in this case. Ms. Whelan had not worked for the city in almost two years at the time of the recall.

In sum, the City contends that article 14.5 does not require the City to waive its rights to ensure that candidates can perform their recall positions safely and effectively. The city did fulfill the strict seniority recall policy with regard to Ms. Whelan. Strict seniority applies to recall and reemployment, and the City has the right, in its application of

HRARs, agreed upon by the Unions, to condition its subsequent rehire and reemployment practices upon eligibility. The Arbitrator should adhere to awards in prior arbitrations for consistency in practice and to avoid venue shopping. And any reference to Article 22 by the Union is a red herring issue that falls clearly outside the scope of this grievance.

As a result of these arguments, the City contends that its decision to return Ms. Whelan to the recall list should be upheld until her driving record fits Risk Management's parameters for on-the-job safety.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the issue that is presented to him and the terms of the Parties' collective bargaining agreement (CBA). The City initially informed the Grievant that she was being recalled from layoff (E 6) and later informed her that the recall was rescinded (E 14). The rescission was grieved and that grievance is before this Arbitrator. The pertinent language concerning recall rights from the CBA states:

> 14.5.2 The City shall re-employ laid off employees in a strict seniority basis for the classification from which the employee was laid off.

The Parties agreed to three primary issues and the collateral issue of the appropriate remedy only if the grievance

is sustained. The first two issues raise questions of arbitrability and the third speaks to the merits of the dispute. At the outset of the hearing the Arbitrator informed the Parties that his decision would be bifurcated by first responding to the questions of arbitrability and then turning to the third issue (merits) if the matter is found to be arbitrable.

Arbitrable

The City asserts that the grievance is neither procedurally nor substantively arbitrable. The Union disagrees. After extended study of the record, the Arbitrator finds that Ms. Whelan's grievance is both procedurally and substantively arbitrable. The reasoning for this conclusion is set forth in the following paragraphs.

First, the Parties acknowledge that no formal grievance was filed on behalf of Ms. Whelan. Rather, the City and the Union agreed to incorporate her grievance into a prior one that had been filed by the Union. The original grievance was dated July 29, 2011 and was filed on behalf of all the employees in the bargaining unit (J 2). With regard to Ms. Whelan's grievance, the City provides in its Level Two response:

> On September 15 at the Level Two grievance meeting, the Parties agreed to incorporate the Union's claims about Ms. Whelan's rescinded recall into this grievance. The City agreed to respond to both issues in its Level Two response. (J 5)

Second, the original grievance took issue with the right of the City to require laid-off employees to pass a physical capacity test, a criminal history check and a motor vehicle records check (hereinafter called the "three tests") before a recall could be turned into a rehire. Ms. Whelan was denied reemployment because, according to the City, the specific facts with regard to her motor vehicle records check indicated that she was not qualified to drive a City vehicle.

By combining the two grievances, the dispute between the Parties encompassed both the general claims raised by the Union and the specific claims associated with the unique facts as related to Ms. Whelan.

The Union, however, now takes the position that it has abandoned the general claims and is pursuing only the specific allegations with regard to Ms. Whelan's grievance. In its brief, the Union provides as follows:

> The Union readily acknowledges the City's right to evaluate its employees to ensure that they are qualified to perform the work for which they are paid to do. It would be absurd to contend that the City must employ people that are not physically and technically qualified to perform the work. We concede that the City, under reasonable circumstances, may subject its employees to tests and evaluations. At this time, we are not questioning the reasonableness of applying these tests to employees at some point during the recall process and have intentionally removed that question from the original grievance. We are not concerned with the tests, but how the results of those tests are handled. Regardless of when the test is applied, if the results of the tasks yield a different result dependent upon the

employees laid off or employed status, we take issue. [emphasis added](U Br 19, 20)

From this Arbitrator's perspective, the above paragraph constitutes a significant concession from the original grievance which challenged the right of the Employer to use the three tests. Previously the Union argued that for a recall the strict seniority provision of Article 14.5.2 barred the City from using the three tests prior to re-employment. Thus the only point of dispute left involves the facts associated with the Whelan grievance; specifically how the City applied the three tests so as to deny the Grievant re-employment.

Third, the Union's concession brings it into alignment with the decision of Arbitrator Keller who concluded in a recall case that the right of the City to use the three tests and the seniority provision of Article 14.5.2 "are in separate universes;" they do not and should not be read to conflict with each other (E 17). He further concluded that the City had, as protected by the management rights clause of the CBA, the right to require recalled employees to complete the three tests prior to rehire.

This Arbitrator affirms the award of Arbitrator Keller (the Abbott case) and affirms the ultimate decision by the Union to withdraw its opposition to the Employer's use of the three tests. The Employer is not barred by Article 14.5.2 from

administering the tests. Thus it appears that the City, the Union and this Arbitrator are all in agreement that the City has the right to require employees being recalled to complete the three tests prior to rehire. Where the Parties differ, what this Arbitrator is ultimately being called upon to resolve, is the extent to which an employee can challenge the way that the City applies the results of the three tests.

Fourth, the Keller award is also significant to the instant dispute in that he arrives at two conclusions. The first conclusion affirms the right of the City to use the three tests upon recall and before rehire. The second conclusion addresses the extent to which the City properly applied the results of the physical capacity test. Keller opines that Dr. Taylor correctly concluded that the egregious dishonesty of the grievant, in that case, was a sufficient basis to determine that he was not capable of performing the work in question. Specifically Arbitrator Keller provides:

> The simple fact is that Grievant has managed to lie his way into a corner. There is no question Dr. Taylor is an expert in the administration of PPEs. His conclusion was not questioned by any other expert. No evidence was presented during the hearing questioning his expertise. There was no evidence presented that he was biased.
>
> During the hearing I had an opportunity to observe Grievant's testimony. I concluded that several of his responses were disingenuous. In addition, he was clever at deflected questions. My overall impression of Grievant is that he lies with ease and his credibility is not to be trusted. (E 17, P 18)

In other words, the City's recall/rehire process can be challenged in two separate ways. The first is whether the City is entitled to use it given the strict seniority provision of Article 14.5.2. Arbitrator Keller ruled that strict seniority was "trumped" by the management rights clause when it comes to requiring the three tests. As noted above, this Arbitrator and the two Parties are now in agreement on the correctness of that conclusion.

The second potential point of challenge focuses on how the City uses the results of the three tests to either approve rehire or to deny rehire and places the individual back on the recall list. Arbitrator Keller affirms the work of Dr. Taylor and indicates that the Grievant has not demonstrated the ability to do the work in question. Thus the City, in that case, properly denied that Grievant rehire.

<u>Fifth</u>, Ms. Whelan's grievance is totally different. It does not involve the physical capacity test as she passed it. It does not involve egregious dishonesty. Her criminal background check created no employment problems. Rather the problem is her driving record and the manner in which the City used her driving record to deny her rehire. The Arbitrator finds the facts of Ms. Whelan's grievance are so dissimilar from the Abbott case that the results in the Abbott case cannot be

used to deny Ms. Whelan the right to have her case heard on its merits. The matter is substantively arbitrable.

As to procedural arbitrability (timeliness), the Arbitrator notes that Ms. Whelan was denied rehire by letter dated August 11, 2011 (E 14). The Union informed the City that it was contesting this decision on August 17, 2011 (J 5, P 3). Clearly the grievance was timely presented to the City. Thus the matter is procedurally arbitrable.

Finally, the Arbitrator fully considered the City's basic argument that the process of testing leading to decisions over rehire has been going on for a long period of time and that the Union has never grieved it up until recently. Thus the grievance currently filed is substantially untimely in that a similar grievance could have been filed long ago.

The Arbitrator rejects this assertion for two reasons. The first is the fact that the reasons to not rehire are unique to each case; the Abbott case being substantially different, for example, from that of Ms. Whelan. When the City uses the results of one of the three tests to decide that the laid-off employee cannot be rehired under the recall provision, it is an adverse action subject to challenge based on the specific merits of that case. The Arbitrator also notes that the City has acknowledged that the tests are applied "specific to the classification and what the essential functions would be of the

job" (Tr 145, 185, 186). Obviously, if there were a series of cases all essentially the same than the timeliness argument could reasonably have some merit. The Arbitrator found no evidence on the record of cases essentially similar to that of Ms. Whelan.

The other point is simply that the evidence indicates the majority of recalls result in rehires. If an employee on layoff is recalled, completes the three tests and is rehired, then there is no adverse action and no reason for the Union to challenge what the Employer has done. There is simply no evidence on the record to indicate that the Employer has a substantial practice of recalling, not rehiring and having the Union choose not to grieve.

Employer exhibit 16 is a list of recalls that includes the Grievant. All were rehired except the Grievant (Tr 213). The Employer provides the Arbitrator with no other unchallenged case, besides that of the Grievant, where a recalled employee that had a valid driver's license was denied rehire based on their DMV record. Thus the Arbitrator concludes that in examining the specific merits of the instant case there is no past practice that the Employer can rely on by which to find Ms. Whelan's grievance procedurally or substantively not arbitrable.

Merits

The Arbitrator begins his analysis of the merits by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant grievance does not involve an issue of discharge, but rather concerns the interpretation of contract language regarding seniority based call-back from layoff. The burden of proof, therefore, lies with the Union. As is generally true of any arbitration case involving the interpretation of contract language, this Arbitrator finds that a simple preponderance of evidence is the standard of proof that the Union must meet.

The Arbitrator carefully reviewed the written transcript of the hearing, the documents presented into evidence and each Party’s brief. After thoughtful consideration he concludes that the Union has provided a preponderance of evidence to affirm the grievance and sufficient to establish that the requirements of the CBA have not been met. As a result of this conclusion, the Arbitrator finds for the Union and upholds the grievance.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their briefs, he has chosen to focus the analysis on the arguments and evidence that he found weighed most heavily on the final decision. The fact

that a contention or point is not discussed does not mean that it was not considered. It does mean that it was not determined to be a major factor in arriving at the conclusion that the grievance should be upheld. The reasoning and the primary factors that led to this conclusion are laid out in the following multipoint analysis.

First, there is no dispute that the Grievant was recalled, that she accepted her recall and that the recall was later rescinded as a result of a failed motor vehicle record evaluation. The form used by the City to evaluate a perspective employee's motor vehicle record, the one applied to the Grievant, indicates that she was disqualified for having three or more class A, B or C traffic violations within the past 36 months (E 11, P 1).

The form indicates that she was evaluated on 8/5/11. Thus the 36 month period of time would have stretched from August of 2008 to August of 2011. Her DMV record indicates that she had a speeding ticket on 8/11/10, a speeding ticket on 12/4/08, a speeding ticket on 10/15/08 and a failure to obey a traffic control sign on 9/05/08. At no time did the Grievant lose her driver's license. Three of the citations occurred in a 3 month period of time and these 3 happened when the Grievant was still employed by the City of Portland; the last occurring more than nine months before she was laid off. The citation received on

August 11, 2010 occurred while she was on layoff. There is no evidence that the City saw fit to impose any level of discipline or to even notify her that her driving was unacceptable during her time of employment.

Second, the City persuasively argues that it must be able to apply the three tests when recalling employees, who may have been off work for as much as five years, because a lot of disqualifying events could have happened during the time period when the individual was not at work (Tr 18, 187). The Arbitrator has previously indicated that, consistent with a prior arbitration award, he concurs with the City's position on the use of the three tests. What is at dispute is not the right of the City to apply the three tests but rather how they were applied in the instant case. The key question is whether the City applied the tests, specifically the review of the DMV records check, inappropriately thereby denying the Grievant her recall rights under Article 14.5.2?

Third, the City emphasizes in its brief that it has an obligation under the CBA and outside of the CBA to provide a safe working environment (C Br 21). While obviously a very valid statement, the Arbitrator emphasizes the above conclusion that her driving record at the point of rehire was if anything slightly better than when she was fully employed. It seems incongruous to argue that an employee poses a safety risk at

rehire when the City was indifferent to the same or more serious conditions during her term of employment.

Ultimately the Arbitrator arrives at the conclusion that the critical issue for recall under Article 14.5.2, where the City finds reason to deny rehire, is a determination of whether the criteria used by the City to deny rehire exceeds the criteria that the City uses for existing employees to maintain employment. The Arbitrator is convinced by the evidence that, had the City not experienced financial difficulties, the Grievant’s employment would have been maintained and the driving record use by the City to deny her re-employment would never have become an issue – she would never even have been disciplined. This fact, as will be further explained below, places the City’s action in violation of Article 14.5.2.

Fourth, Article 14.5.2 is a very simple straightforward statement that recall will be by strict seniority. The Arbitrator notes that simple language in a collective bargaining agreement often carries an assumption of a broader meaning. For instance, they *just cause* provision for discipline and discharge in a CBA can be stated in a very simple sentence but carry with it a wealth of meaning that is generally understood by the parties including due process rights, progressive discipline rights, etc. Article 14.5.2 is a similarly simple sentence that contains a wealth of meaning. A primary basic assumption of

this language is that when recalled an employee can do the work. The Union concedes this point in its brief when it emphasizes that, "It would be absurd to contend that the City must employ people that are not physically and technically qualified to perform the work" (U Br 19, 20).

In the instant case, recall rights extend for a very lengthy five year period of time. In this Arbitrator's view, the longer the recall period the more an employer would have a right to create protocols for the purpose of ensuring the ability of a returning employee to perform the work in question. To put it another way, the City has a right to expect that a returning employee has an equal ability to perform the work as he or she had at the time of layoff. The three tests used by the City obviously are the essential elements in the City's protocol to ensure that employees can perform the duties of the position to which they are being recalled.

In the instant case, where the City has problems is the fact that it is imposing a more demanding standard on the Grievant than when she was laid off. Her driving record is the same as it was when she was working and it was not a problem at that time. The City does violate Article 14.5.2 to the extent that it creates a more demanding standard by which it weeds out employees who would never have lost their job but for the layoff.

The Arbitrator emphasizes that the equally able standard cuts two ways. Under the requirements of Article 14.5.2 the Employer cannot enforce a more demanding standard but it can enforce those that are reasonably equal. Thus, if an employee had a DUI and lost his or her license while on layoff, the Employer would not be under an obligation to rehire. Similarly, there are certain criminal convictions that would invalidate recall rights as well as the loss of the necessary physical capacity to do the work.

More importantly, it is this Arbitrator's conclusion that the equally available standard takes away from the City a responsibility to remediate any employment problems. The City, for example, does not have to rehire and then implement a just cause discharge. The City should be able to reasonably expect that the employee can immediately commence performing his or her normal job duties. Reorientation or some light training for new procedures are obvious exceptions to this point.

Fifth, what is paramount to this case is that the standard for driving a City vehicle for members of this bargaining unit is codified in the CBA. The Human Resources Administrative Rules related to an employee's driving record specifically provides in the second paragraph for a collective bargaining agreement exception to its rules. The Arbitrator finds that Article 22 of the parties CBA fulfills the "otherwise provided"

exception. Article 22 has a number of different provisions related to an employee's responsibilities with regard to driving a City vehicle. The one most pertinent to this dispute addresses the issue of the employee's driver's license and reads as follows:

> **Drivers/Commercial Drivers License.** The parties agree that an employee should only operate a City of Portland Motor vehicle with a valid driver's license. An employee who is required to have a valid driver's license as a condition of employment, and who loses his/her driving privileges must report their driving status to his/her supervisor by their next working day.

The Arbitrator notes that HR Partner Elizabeth Lopez answered "yes" when asked the following question on direct examination:

> And with respect to even a current employee, if Risk says, you know, "They are not allowed to drive a City vehicle," depending on the particular facts of any given case, an option could be that they can be laid off; right?

While Ms. Lopez answered yes, the Arbitrator finds not one shred of evidence to support this conclusion as it applies to the Grievant and the members of the same bargaining unit. Obviously the Grievant wasn't laid off when she had four tickets. Also, the answer seems contrary to the terms of the CBA which focuses on loss of license. The Arbitrator strongly believes that if the City laid off a member of this bargaining unit who had a valid driver's license as a result of Risk management doing an assessment of a DMV report, the layoff would

be successfully challenged by the Union. Moreover, the City provided not one example, centered on a negative DMV report, of a discussion with an employee, a disciplinary action taken against an employee, a discharge of an employee or a layoff, where the employee retained a valid driver's license.

In summary, the Grievant was equally able to do her work at the time she was recalled; she had a valid driver's license which was the requirement under the CBA to operate a City vehicle. Therefore, when the City denied her re-employment based on her DMV record it violated Article 14.5.2.

REMEDY

The Arbitrator has concluded that the Employer violated Article 14.5.2 when it rescinded the recall of the Grievant based on criteria more stringent than that required of employees to maintain their employment. The Arbitrator notes that during the hearing he took no evidence with regard to specific terms of a remedy. Rather, the Parties agreed that the Arbitrator would give general directions regarding a remedy while retaining jurisdiction in the event the Parties were unable to reach mutual agreement on the specific terms. The evidence does indicate that another employee was recalled to the position that the Grievant would have filled had her recall not been rescinded (E 1). Thus the Arbitrator's general directions are that the

remedy should make her whole for losses the Grievant incurred because she was not placed in the position subsequently given to another, and that her current employment status with the City be the same as it would have been had she filled the position.

CONCLUSION

The Arbitrator was given two primary tasks: 1) to determine if Ms. Whalen's grievance was arbitrable and 2) if arbitrable, to determine whether the grievance should be sustained or denied. Based on the Union's assertion that it was no longer pursuing a class action grievance but simply pursuing the merits of Ms. Whalen's grievance, the Arbitrator found the matter substantively and procedurally arbitrable.

As to the merits, the Arbitrator determined that while the City clearly had the right to conduct a review of a recalled employee's DMV record, it could not, under the terms of the collective bargaining agreement, refuse to rehire based on a standard more stringent than what employees in the bargaining unit were required to maintain during the time of their active employment. The Grievant was laid off on September 10, 2009. During the last 36 months of her employment, prior to her layoff, the Grievant had four traffic citations. The City had not discussed or disciplined the Grievant as a result of these four motor vehicle infractions and she was laid off as an

employee in good standing. The City refused to rehire her after she had been recalled because she had four traffic citations within the past 36 months.

On its face, her driving record upon which she was denied employment was the same as that for which she had received no censure as an employee. Moreover, the Arbitrator opined that since three of her citations would fall off within the first 3 months of rehire, her driving record was, from a certain perspective, better at the time she was denied employment than it was at the time she was laid off. The Arbitrator further found as incorrect the City's assertion that she would not have been able to drive a City vehicle had she been rehired. The City ordinance specifically provides for a collective bargaining agreement exception to rules imposed through Human Resources Administrator Rules. The CBA focuses on the loss of license as the basis for denying driving privileges and the Grievant at all times had her license.

For the above reasons, the Arbitrator upheld the grievance and provided a general make whole remedy. An award is entered consistent with these findings and the conclusion.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
BETWEEN	)	OPINION AND AWARD
AFSCME LOCAL 189	)	
"AFSCME" OR "THE UNION"	)	
AND	)	
CITY OF PORTLAND	)	
	)	PEGGY WHELAN RECALL GRIEVANCE
"THE CITY" OR "THE EMPLOYER"	)	

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The grievance is substantively arbitrable.
2. The grievance is procedurally arbitrable.
3. The City did violate Article 14.5 of the contract by requiring Peggy Whelan to pass a Motor Vehicle Record Evaluation as part of the recall process.
4. To remedy this contract violation, the Arbitrator directs the City to make the Grievant whole just as if her recall had not been rescinded and the City would have fully implemented her rehire.
5. Per the Parties stipulation, the Arbitrator retains jurisdiction for a period of sixty (60) days from the date of this award to resolve any disagreement over the terms and/or the implementation of the remedy.
6. Article 35 of the CBA provides in pertinent part that the "City and local union involved shall divide equally the Arbitrator's fee." Based on this provision, the Arbitrator has divided his fees equally between the City and AFSCME Local 189.

Respectfully submitted on this, 6th day of August, 2012 by

Timothy D.W. Williams
Arbitrator