IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
BREMERTON METAL TRADE COUNCIL	)	
	)	
"BMTC" OR "THE UNION"	)	
	)	
AND	)	
	)	
PUGET SOUND NAVAL SHIPYARD AND INTERMEDIATE MAINTEANCE FACILITY	)	
	)	RYAN HARRISON
"PSNS & IMF" OR "THE EMPLOYER"	)	GRIEVANCE

HEARING:

September 21, 22, 2012
Bremerton, Washington

HEARING CLOSED:

October 12, 2012

ARBITRATOR:

Timothy D.W. Williams
2700 Fourth Avenue #305
Seattle, WA 98121

REPRESENTING THE EMPLOYER:

Steven Seaton, Attorney
Matthew Dunand, Assistant Counsel

REPRESENTING THE UNION:

Ryen Young, Chief Steward
Gabe Smart, Second Counsel

APPEARING AS WITNESSES FOR THE EMPLOYER:

James Giffin, Crane training supervisor
Ken Haines, Retired crane training supervisor
Robert Robinson, Supervisor

Harold Williams, Supervisor
Tim Boom, Supervisor
Teresa Watson, H.R. Supervisor
William Chargulaf, Crane operator/mentor

APPEARING AS WITNESSES FOR THE UNION:

John Tschida, Crane training instructor/license examiner
Debra Menkes, Crane training instructor/license examiner
Kevin Geno, Crane operator/mentor
Ryan Harrison, Grievant
John Jenkins, Crane operator/mentor
John Wilson, Crane operator/mentor
Jeffrey Arndt, Crane operator/mentor

EXHIBITS

Joint

1. Labor Agreement, effective April 23, 2010.
2. Grievance Documents.
3. E-mail job announcement, 9/14/11.
4. Performance statements concerning Ryan Harrison.
5. Code of Federal Regulations, 335.102
6. Crane Operator License (J Tschida)

Union

1. Mr. Harrison's awards and disciplinary history.
2. Mr. Harrison's training record (military) and resume.
3. Mr. Harrison's written and performance exam scores.
4. Mr. Harrison's O.J.T, records and hours,

4A. All of Mr. Harrison's phased training hours broken down.

5. LHAP (lifting and handling administrative procedure) 1001.

5A. Crane operator license action request from 2/2010 – 7/2011.
5B. LHAP – 738 shows that LHAP-1001 is not kept on the cranes.
5C. C/740 description.
5D. Pictures of category 1 and 2 cranes.
5E. NAVFAC purpose and scope and frequently asked questions.
5F. Section 13 of NAVFAC P-307 (Training and qualification)
5G. Chapter 3 of the NAVSEA 04 crane quality manual (CQM)

6. Crane operator license/qualification endorsement application)
7. Mr. Harrisons crane operator license.
8. Mr. Harrison's SF50 and 52 with notes (request for personnel action and notification of personnel action)

8A. Ken Haines email discussing the WG-9 (limited only to bridge cranes, etc.)
8B. Position description list (shows that management does not promote to 13011 permanently).
8C. Shows 13011 (P.D.) with 2 perminant.
8D. Email from Admin that describes 2 WG-9 position descriptions.
8E. Position descriptions (P.D.) 13011, 13020,13010, 13022 & OPM Federal wage system job grading standard.
9. Mr. Harrisons performance appraisals (PARPS) (Crane operating)
9A. PSNS & IMF instruction 12430.4D (Performance appraisal review process). Referenced in the CBA 2001.
9B. NAVSMZPD Puget P12430(5) (5-98), Mar 1998 (Performance Appraisal reviewprocess (PARP) handbook for supervisors and employees).
9C. PSNA and IMF instruction 12140.22 (Individual Development Plan (I.D.P.).
9D. Chapter 5 (recruitment & Internal placement) of the Pacific Northwest Human Resources Manual.
9E. Chapter 10 (Performance management) of the H.R. Manual.
9F. Chapter 23 (Employee training & development) H.R. Manual.
10. Data request and management responses to data request.
11. Settlement agreement showing that the discipline issued to Mr. Harrison for his alleged involvement in the crane accident was rescinded and removed from his records.
12. CBA articles and provisions.
12A. CFR's.
12B. Executive order 11348 (training policy handbook O.P.M.).
12C. 5 USC III A 23 2301 (Merit system principles)
12D. Temporary promotion and examples of advanced notice (cyberfeds).
12E. Merit promotion programs (Cyberfeds)

BACKGROUND

Puget Sound Naval Shipyards and Intermediate Maintenance Facility (hereafter "PSNS&IMF" or "the Employer") and the Bremerton Metal Trade Council (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Bremerton, Washington on

September 20 and 21, 2012. The Parties stipulated that the grievance was timely and properly before the Arbitrator to be decided on the merits of the case. 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. The Arbitrator made an audio recording of the hearing in a digital format as a part of his notes. A copy of the recording was sent to each Party as an attachment to an e-mail message.

An Employer witness was not available for testimony at the time of the hearing. Arrangements were made to take his testimony by way of the telephone on September 27, 2012. The taking of the telephone testimony on September 27th completed the evidentiary record.

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 provide written arguments which were timely received by the Arbitrator. Thus the award, in this case, is based on the written evidence, the testimony provided during the hearing and over the telephone and the Parties' arguments.

SUMMARY OF THE FACTS

The grievance in this case is between the Bremerton Metal Trades Council (BMTC) on behalf of Ryan Harrison, and the Puget Sound Naval Shipyard (PSNS). The Parties are bound by a Collective Bargaining Agreement (CBA) which contains an arbitration provision. The Agreement took effect on April 23, 2010 and the Harrison grievance arose during its term. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant began his employment as a wage grade rigger helper at Puget Sound Naval Shipyard in 2009. That year, Mr. Harrison learned that the Rigging and Crane Operations Division of the PSNS would hire crane operators. After expressing his interest in that position, Harrison was interviewed by Ken Haines, and was selected to undergo the Crane Operator Training Program.

On September 2nd, 2010, Harrison was recommended for advancement in the program by his mentor and the Crane Operations Manager. Harrison passed a performance examination for Category 2 Bridge Cranes, and received a crane operator's license. (U 3, 6, 7).

On September 12th, 2012, Harrison was classified as a wage grade limited boom crane operator (WG-9). The Grievant had

never trained on or operated a boom crane at PSNS at that time. Harrison independently operated category 2 bridge cranes in multiple shops and buildings (indoors) for roughly four months before training with a mentor on the shipyards (outdoors) (U-4).

On June 28th, 2011 (during the limited phase of training for his initial category 1 portal crane license, see U-5 at sheet 12), Harrison was involved in the derailing of the crane that he was operating. (J-2, U-20 at p.3) Fourteen days after the accident the Grievant was suspended as a disciplinary action for his involvement in the accident. The Grievant served his suspension but also grieved it. Ultimately the grievance was resolved when the Employer agreed to rescind the suspension.

On July 25th, 2011, Crane Operations Manager Jim Griffin removed Harrison from the Crane Operator training program. Harrison grieved the discipline on August 25th on the basis that he was "wrongfully and unjustly removed from the C/740 (Lifting and Handling Dept.) Crane Operator training program which resulted in a reduction in grade and pay" (J 2). The requested remedy was for Harrison to be placed back in the training program with back-pay and interest retroactive to his removal date (J-2 at sheet 1).

Per the provisions set forth in Article 30 of the CBA, the Parties processed the grievance through the steps of the grievance procedure but were unable to reach an agreement

resolving the matter. Thus, under Article 31 of the CBA, they selected Arbitrator Timothy Williams to settle the matter by way of arbitration. A hearing on the merits of the grievance was ultimately held on September 20 and 21, 2012 in Bremerton, Washington.

STATEMENT OF THE ISSUE

The Parties were unable to agree on a statement of the issue. The Union, in its pre hearing submission dated August 29, 2012, states the issue as follows:

> Was Mr. Harrison properly removed from the Code 700 (Lifting and Handling Departments) Crane Operator training program?

The Employer, in its pre hearing submission, states the issue with a focus on whether the CBA, law or regulation was violated:

> Did the decision (for reasons raised prior to management's grievance decision) to end Mr. Harrison's in-house crane training by assigning him back to his permanent position as a Rigger Helper (WG-5) violate the collective bargaining agreement, law, rule or regulation?
>
> If the decision did violate the CBA, law, rule or regulation what is the proper remedy?

Where the Parties are unable to agree on an issue statement, the general practice is to have the Arbitrator frame the issue as part of the decision. The Arbitrator, noting that 3107 from the CBA directs an Arbitrator to focus the decision on

the language of the CBA, law and regulation, states the issue as follows:

1. Did the decision to end Mr. Harrison's in-house crane training by assigning him back to his permanent position as a Rigger Helper (WG-5) violate the collective bargaining agreement, law, rule or regulation?

2. If the decision did violate the CBA, law, rule or regulation what is the proper remedy?

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, Effective April 23, 2010

ARTICLE 19
POISTION AND JOB DESCRIPTION

*** * * * ***

1902 Employee Right to Copy

A new Employee or an Employee who changed jobs within the Activity will be provided a copy of their job/position description within 30 calendar days of the effective date of the appointment. Individual Employee requests for a current copy of the job or position description should be made to the Shop/Code via the immediate supervisor. If a description is renumbered and there are changes that affect the Employee, they will be provided a copy. The Employer's policy is that all Employees are entitled to have a copy of their description; however, the Employer's policy is not to provide personal copies of other descriptions in which an Employee may have an interest. Employees assigned to a training position or who are detailed to a job/position which is not related to their regularly assigned duties, will, upon request, be provided a copy of the target/detail description if one exists.

ARTICLE 20
PERFORMANCE STANDARDS

* * * * *

2004 Employee Indoctrination on Performance Standards

At the beginning of the annual rating period or when a new or revised standard is applied, each Employee will be provided a copy of their performance standards. The appraiser and the Employee will discuss the standards at the beginning of the annual rating period or new rating period for clarity and understanding concerning what is required by the elements as they apply to the Employee's assigned work and responsibilities.

A new Employee, an Employee who changes jobs within the Activity or an Employee detailed to a position at the same or higher level for a minimum of 90 days or more, will be provided a copy of the performance standards for the new position (and upon request a copy of their job/position description) within 30 days of the effective date of the appointment or detail.

* * * * *

2008 Special Progress Review

a. If at any time during the rating period an Employee's performance falls below the "acceptable" level, the appraiser will conduct an immediate special progress review with the Employee. (The Employee has determined the performance levels at which special progress reviews will be conducted.) The review shall include the following:

(1) What constitutes acceptable performance on those elements;

(2) Corrective action(s) required by the Employee;

(3) A reasonable period during which the Employee will be given an opportunity to improve performance. The reasonable improvement period should normally be a minimum of 30 calendar days.

(4) What assistance the supervisor will provide the Employee in improving performance;

(5) The potential consequences should the Employee4's performance not improve; and

(6) The availability of the Civilian Employee Assistance4 Program and an offer to establish an appointment with that office if the Employee so desires.

b. The immediate supervisor should discuss each of the above with the Employee for clarity and understanding. If it is determined after a reasonable period that the Employee's performance has not reached the acceptable level, then the Employer may issue a letter proposing the Employee's removal from the Federal Service. During the 30 day notice period, supervision may consider reassignment to another po0sition or a change to a lower graded position in lieu of removal, unless the Employee initiates voluntary action acceptable to the Employer.

2009 Employees Serving a Probationary Period

The procedures in Section 2008 do not apply to Employees serving a probationary period, Veteran Rehabilitation Act (V.R.A.), employees serving a trial period, and Employees serving on a temporary appointment unless the action is processed under the appropriate provisions of 5 CFR.

ARTICLE 23
TEMPORARY PROMOTIONS

2301 Policy

Employees assigned non-supervisory duties above the level of their current positions of periods of a pay period or more shall be temporarily promoted to the higher level position. Such temporary promotions will be made in accordance with applicable regulations

ARTICLE 31
ARBITRATION

*** * * * ***

3106 Arbitration Hearing

…….

The fees and expenses of the arbitrator the cost of reporting and transcribing the proceedings, and other incidental costs incurred by the Employer, shall be borne equally by the Parties.

3107 Decision

The Arbitrator will be requested to render a decision within 30 days of the conclusion of the hearing, unless the Parties otherwise agree. The Arbitrator shall not change, modify,

alter, delete, or add to the provisions of the Agreement, as such right is the prerogative of the Parties only. The Arbitrator shall not interpret this Agreement in such a way as to be inconsistent with law, rule or regulation. The Arbitrator will have the authority to interpret this Agreement to apply it to the particular case under consideration; to modify penalties imposed as disciplinary/adverse action; and to award reinstatement of back pay and benefits consistent with the provisions of law and regulation.

POSITION OF THE UNION

The Union argues that Mr. Harrison was wrongfully removed from the lifting and handling department's Crane Operator training program, and that his removal violates both CBA and CFR (Code of Federal Regulation) terms.

The Union argues that Management violated 5 CFR 335.102 (1) and CBA article 23, 2301, because it failed to provide advance written notice of the conditions of Harrison's time limited promotion. Management also failed to provide Harrison in formally written form the reason for the limit of his promotion, and the requirement for competition beyond 120 days, and a provision in writing that he may be returned at any time to his previous position. Management wrongfully removed Harrison because it violated the above terms, and because Management was obliged to follow all the legal requirements around promoting Harrison.

The Union argues that Harrison's position description (PD) was not accurate, and that department head Giffin therefore

violated 12430.7c(2) for failing to ensure that it was accurate. If Harrison had been provided a copy of his PD in a timely fashion, he would have questioned the fact that the work described in the PD was not the same as the work he was actually performing. Harrison was doing bridge crane work but was still rated as a rigger helper, and was never provided a copy of the PD for a crane operator.

Management also violated 5 CFR 335.103 because due weight was not given to appraisal and incentive awards when Harrison was taken off the training program. Harrison had received many awards, and his performance had been rated acceptable by crane operator supervisors, who also left positive written comments. (U-1, 4, 9). The Employer also violated the CBA by not measuring and assessing Harrison's contribution to the agency in accordance with CBA 2001 (2). There are no formally documented discussions between Harrison and his crane supervisors during the time that Harrison was in the program until the crane accident. (U-4 at pg. 15).

The Union argues that Harrison was removed from his position because of his involvement in the crane accident, and because of the negative attention it brought to the department. The Union holds that Harrison's discipline was handed down to set an example to the rest of the employees, and to show the shipyard and the Navy that the department was serious about

crane accidents (Union Brief, p. 11). He was told that it was standard for his license to be suspended while the accident was being investigated, but he was not told that he would not return to operating cranes until eighteen days after the accident. On July 22nd, 2011, Harrison was told by Griffin that he only had twenty eight hours left to go and that his crane operations supervisors had told Griffin that Harrison would not be ready in time. This was the reason Harrison believed he was removed from the program on July 25th, 2011. Though Crane Operations Manager Griffin concluded that the primary reason Harrison was removed from the program was his inability to perform to the standards of the program, the Union contends that while in the program, Harrison's supervisors rated his performance as acceptable, and fulfilling requirements. They wrote positive comments about his performance. The Union argues that Harrison was unaware of the fact that he had been temporarily promoted to a boom crane position and was unaware that his position was in jeopardy. "He never interpreted comments by supervisors, about needing to practice, to mean that he was in jeopardy of being demoted and sent back to a rigger helper position. Harrison had been given no reason to believe that he was not doing a good job for the department" (Union brief, p. 9).

It wasn't until after the crane accident on June 28th, 2011, that Harrison received any negative feedback from management

regarding his performance, and this was the first time that a supervisor had ever written anything negative on his OJT records, argues the Union. When the Union requested data from Giffin about Harrison's field evaluations, the Union argues that those field evaluations had been sought out by Giffin only after the accident, and after Harrison had already been removed from the program. (J-4).

In sum, the Employer violated several critical standards set for in the CFR and the CBA that should have and could have protected both the Employer and the Grievant from arriving at arbitration, and could have prevented the crane accident. If Harrison's performance was far enough below standards to terminate his training program, then Management violated 2008 of the CBA by failing to document and conduct a progress review of Harrison's performance. The reason that important term is in the CBA is because it is only fair to give an employee, in this case, Harrison, an opportunity to improve when their performance is lagging.

The Union contends that Management was fully aware that they were violating the CBA and the law by the process which they used to remove Harrison from training. Though these processes had gone unchallenged in the past, the Union respectfully asks the Arbitrator to consider rectifying the situation by making the Grievant, Mr. Harrison, whole again by

ensuring that the employer reinstate him in the training program and compensate him for any financial damage this unlawful and unacceptable decision by management has caused him.

POSITION OF THE EMPLOYER

The Employer argues that Mr. Harrison's removal from the C/740 Crane Training program was just and fair and, most importantly, did not violate the CBA, rule or law. Thus his removal from the crane training program should be upheld. The Employer's case is presented in the following set of arguments.

Overall, the Employer believes it was improper procedure for the Union to express its claims against the Employer in its closing argument at arbitration. The Union raised seven claims during arbitration, and all but one of them were raised after the third step grievance decision by management. The Employer argues that the Union is attempting to grieve one thing and arbitrate another, which prevented these issues from being addressed in management's decision.

The Employer argues that the Union's assertion that Harrison earning a crane license means he should be allowed to remain a permanent bridge crane operator is flawed because as a safety condition, an employee cannot operate a crane unless he or she has a current valid crane license and proper endorsement for the particular crane he or she would be operating. Mr.

Harrison was only endorsed for the operation of indoor bridge cranes. Summarily, no license ever compels management to assign work under that license.

The Employer argues that Mr. Harrison can't be removed from the training program because he received an acceptable annual performance evaluation for that same time period by some of the same supervisors who supported his being reassigned away from training, and that he can't be removed unless he had an unacceptable performance rating. The Employer holds that there is no connection between assigning an employee from one job to another and an annual performance rating. Management can reassign an employee without awarding the employee an unacceptable performance rating. In this case, Management decided that it was no longer a productive use of training hours to have Harrison on crane training, and Jim Giffin concluded that Mr. Harrison did not have the aptitude for crane operations that Management had hoped for.

Though the Union argues that Mr. Harrison was not given a copy of his position description (his PD), the Employer argues that he was not required to be furnished said PD. Rather, pursuant to the CBA (J-1, section 1902), "Employees assigned in a training position or who are detailed to a job/position which is not related to their regularly assigned duties, will, upon request, be provided a copy of the target/detail description if

one exists." MR. Harrison was training on portal cranes, and though the Union will argue that he should have been on a bridge crane PD, the Employer contends that this assertion is both incorrect and irrelevant under any circumstances. In addition, no matter if Harrison had a copy of his temporary PD or not, management had the right to reassign him from his crane training position back to his permanent Rigger position.

Regarding the Union's assertion that the crane training program in this case does not meet the office of personnel management's regulations for training programs, the Employer responds that this is a topic for a whole different arbitration. In addition, the regulations in question deal mainly with equal opportunity issues related to selection of trainees, but Mr. Harrison was selected for training and has not been aggrieved under any set of circumstances, rendering this argument irrelevant in the eyes of the Employer.

Though the Union argues that an employee's training cannot be ended before he or she completes the maximum hours set forth in LHAP 1001, the Employer argues that no such standard has ever existed. What the Union is claiming that the LHAP 1001 "maximum hours" are really the minimum hours that must be allowed before management can end the crane training. The Employer contends that this is incorrect for at least two reasons. First, it was the Employer's statutory right to change Mr. Harrison's work

assignment at any time (less illegal reason, i.e., illegal discrimination as provided by law).

Second, LHAP 1001 provides that "A trainee that fails during any phase of the training/qualifications progression will be evaluated by supervision." (Section 4.3.5). In the purview of the Employer, this specifically disproves that there is any kind of minimum number of hours before which a trainee cannot "fail" and be removed from the training program after evaluation by supervision.

Though the Union argues that Management's decision to terminate Harrison's crane training program was "simply the wrong decision" (Employer's summary), the Employer counters that though John Jenkins believed Mr. Harrison was progressing like "normal" in his portal crane training, "everyone else who observed his performance did not." After Mr. Harrison was in the training program for a while, supervision began receiving regular complaints from the Riggers that Mr. Harrison was not doing well in his regular crane operations. The same skill problems were also noted by Harrison's trainer/mentors. Crane Operator Kevin Geno (also Mr. Harrison's friend) testified at the arbitration hearing that Mr. Harrison was "not getting" even the most basic and fundamental aspects of operating a portal crane. Mr. Geno refused to sign off on the training form that would have allowed Harrison to submit for the portal crane

testing. This lack of confidence in Mr. Harrison was also the consensus of the six very experienced crane operations supervisors (J-4).

Finally, if the Union claims Management failed to give Mr. Harrison the written notice required by regulation for temporary promotions, it was probably, at least in part, correct. So was "every other promotion prepared by the Navy Human Resource Service Center that handles all Navy personnel actions for the entire Northwest and Washington D.C." Every year, asserts the Employer, some percentage of those promotional actions are flawed. The Employer wishes to point out that this allegedly flawed personnel action management was promoting Mr. Harrison five full pay-grades. All of the information that should have been in Mr. Harrison's written notice was explained to him face-to-face and in detail by Mr. Haines. (J-3). If Mr. Harrison really knew nothing about his status, argues the employer, it would have been easy for him to ask and get all the information that he needed. Mr. Harrison is a "well-compensated" federal employee with years of service, notes the Employer, and is therefore not new at navigating such systems.

For all of the above reasons, the Employer urges the Arbitrator to deny the grievance and conclude that the Employer has acted within its rights as found in the collective bargaining agreement rule and law.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the issue that is presented to him. The issue before the Arbitrator is stated as follows:

> Did the decision to end Mr. Harrison's in-house crane training by assigning him back to his permanent position as a Rigger Helper (WG-5) violate the collective bargaining agreement, law, rule or regulation?

The Arbitrator begins his analysis 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 discipline or discharge, but rather concerns the question of whether the Employer acted consistent with the CBA, regulation, rule and law when it removed the Grievant from a crane training position. The burden of proof, therefore, lies with the Union.

As this is a contract interpretation dispute, the level of proof required of the Union is a preponderance of the evidence. In order to prevail, therefore, the Union must show by a preponderance of the evidence how the Employer's action violated a term of the CBA, a Federal regulation, a rule or statute.

The Arbitrator carefully re-listened to the testimony of both Employer and Union witnesses, studied the documentary

evidence and gave careful consideration to the briefs provided by the Parties. Based on this review, the Arbitrator has concluded that the Union's evidence is not sufficient to meet its burden of proof.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their briefs, he has chosen to focus this 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 denied. The reasoning and the primary factors that led to this conclusion are laid out in the following four point analysis.

Performance Documentation

Based on the evidence presented the Arbitrator concludes that the Grievant had a reasonable expectation that he was successfully completing the crane training program and was surprised when he was removed. He indicated on cross examination that he brought the grievance because he believed he was wrongfully removed from the crane training program. He was

not, however, able to respond when pressed with regard to how his removal had violated the terms of the CBA, a CFR or statute[1].

The Arbitrator will turn his attention to the question of a violation of CBA, CFR and statute in a later section of this analysis. At this point, however, the Arbitrator believes there is value in exploring in some detail the basis of the Grievant's personal belief that he was wrongfully removed from the training program. This exploration begins by noting the basic fact that the Grievant had applied for a training program that, if he had successfully completed it, would have resulted in his becoming a journeyman crane operator and being paid commensurate with that work. His new pay grade (WG 11) would have been a substantial increase over what he was making in his permanent position prior to starting the training.

The Grievant was removed from the program when he was close to the end of the training and at the point where, if his mentor had signed off, he could have taken a final proficiency exam on the outdoor crane which would have brought him within a very short distance of journeyman status. Based on the testimony at hearing, the Arbitrator understands that a crane trainee receives the basic crane operator's license by qualifying on an indoor crane and must next receive certification on an outdoor

[1] In the Arbitrator's view, the Union properly interjected that employees are not expected to be expert with regard to the labor agreement, regulations and statutes. Rather, it was the Union's job to have this knowledge and to properly protect members of the bargaining unit.

crane. Following the first outdoor crane certification, three additional outdoor crane certifications are needed, each on a different type of crane, to become a journeyman. But, once the first outdoor crane certification is achieved the rest are reasonably easy to acquire since there are few differences in the operation of the different types of outdoor cranes. In other words, one becomes a journeyman crane operator when you have a license with five certifications; one on the indoor crane and four on outdoor cranes.

The path for a trainee to acquire the five certifications involves both written examinations based on classroom material and hands on work under the guidance of a mentor. The trainee must pass all of the written exams and, in order to move forward in the program, have his or her mentor sign off on proficiency. Once the mentor has signed off, then the employee can take the proficiency exam which must be passed to achieve certification.

The Grievant was at the point where he had passed all of his written examinations. He had acquired a crane operator's license and been certified on the indoor crane. It is important to emphasize that a trainee cannot operate a crane independent of the presence of a mentor until he or she has been certified on that crane. Thus with regard to the indoor crane the Grievant was certified and, even though in a temporary training

position, he had independently operated the indoor crane for some time.

A monthly work record (OJT/OJE Employee Work Record) is kept on each trainee. The front page details the actual work performed during the month and the back has a rating system along with written comments. The Grievant's monthly record begins with June of 2010 and concludes with June of 2011. On June 28, 2011, while working with a mentor, the Grievant was involved in what has been called a very small crane accident. As a result of this accident he was suspended from crane operation. All of his evaluations were positive until the last one which was completed after he was suspended. He was rated as having "Fulfilled Requirements" on every single evaluation until the last which was checked as "Improvement Needed." Obviously, since the improvement needed evaluation occurred after he was suspended and then removed from the program, there was never an opportunity for him to work on the improvement that was needed. The written statements on his monthly work record are found as part of Union exhibit #4:

June/10	Ryan is doing good in his program and is showing interest in his job
July/10	Ryan is doing good, shows progress
August/10	Ryan has been doing a good job of learning his trade and shows good attitude…
September/10	Doing a good job, keep up the good work

October/10	Keep up the good work and keep practicing
November/10	Ryan is doing a good job and is progressing well
December/10	Mr. Harrison appears to be doing good so far, will need to see more operations from him
January/11	Mr. Harrison is progressing very well
February/11	Mr. Harrison is operating the crane smoothly and still needs to get radio control for OET
March/11	Mr. Harrison is getting smoother with time and still need to get radio control operations
April/11	Mr. Harrison is doing good on his training
May/11	Mr. Harrison is progressing well in his training and should receive his first Portal license soon
June/11	Mr. Harrison was involved in a crane accident on 6-28-11. Mr. Harrison needs to be more aware of his work area and not just follow signals given by riggers

The Arbitrator notes that the final comment admonishing the Grievant to be more aware of his work area and less reliant on signals given by the Riggers does not in any way cancel the overall tenor of the prior written evaluations and comments which indicate that his training was progressing positively at the time that he was removed from the crane training program.

Deficiency of Oral Communication

The Arbitrator finds that the oral communication upon which the crane training program relied provides poor support for management's actions removing the Grievant from the crane

training program. When the Grievant was brought into the program, Ken Haines was the Supervisor. He retired and Jim Giffin replaced him. The ultimate decision to remove the Grievant from the crane training program was Mr. Giffin's. In its brief, the Employer summarizes the reasons for the removal of the Grievant from the training program as follows:

> Jim Giffin concluded, based on many consistent reports, that at Mr. Harrison's stage in the training his skill level on the most basic of crane operations was inadequate. In other words, Jim Giffin determined that Mr. Harrison did not have the aptitude for crane operations that management had hoped for when it selected him for the training. (P 5)

At hearing, Mr. Giffin testified that he arrived at this conclusion based on verbal reports from his subordinates. On cross examination he acknowledged that at no time did he look at the written record with regard to the Grievant's performance. In other words, Mr. Giffin had received oral reports indicating that the Grievant's performance was substandard and he chose not to review the written record which clearly showed that the Grievant's performance was acceptable and meeting expectations.

The Employer did introduce a series of written statements by supervisory personnel regarding the Grievant's performance (J 4). For two primary reasons the Arbitrator gave no evidentiary weight to these written documents. For one thing, these documents were written at the request of a superior in order to help justify an action that had already been taken. Written

statements taken under such circumstances are questionable at best and have obvious problems with objectivity. Morover, the statements do not portend in any fashion to be a comprehensive summation of the Grievant's crane operation performance. Rather, they simply focus on deficiencies.

A second and more important reason that the Arbitrator gives no evidentiary weight to the written statements is that Mr. Giffin did not consider these documents at the time that he made the decision to remove the Grievant from the crane training program. Had he requested each of his subordinates to write an evaluation prior to the decision with the instruction to objectively evaluate Mr. Harrison's overall performance, and had those written statements been taken into consideration at the time the decision was made, then those statements could have been given some weight in this proceeding.

The Arbitrator further notes that the individuals who provided the written statements found in Joint Exhibit #4 testified at hearing. The all testified that the Grievant was deficient in his performance and that he had been verbally informed of that fact. The Arbitrator found much of this testimony suspect for the same reasons that he found the written statements deficient. Particularly concerning to the Arbitrator is the fact that two of the witnesses provided positive contemporaneous written documentation as to the Grievant's

progress in the crane training program and now verbally testified as to his deficiency. One witness, for example, testified that he had verbally informed the Grievant of problems with his performance but did not write anything negative because written comments "dog" the employee and he did not want to make comments in a form that had a lasting impact on the Grievant's employment record. While that may be an admirable thought, it hardly helps provide support to the Employer's decision to take an adverse action[2] against the Grievant.

The Arbitrator also questions the disparity between the oral comments and the written documentation from the perspective that a coaching/training activity is simply different from an objective evaluation of a trainee's performance. The first looks to answer the question of how to best motivate and instruct a trainee. The latter is concerned with creating an objective record of progress and determining whether the employee is successfully completing the program. When a mentor, for example, tells a trainee that he or she "did a good job," or that "you need to work on _____," these comments are more likely to be for the purpose of direction, encouragement and motivation. Daily positive or negative comments are probably not intended to give an accurate accounting of training program

[2] The Arbitrator throughout this award uses the term *adverse action* in the general sense of an action taken by the Employer that is contrary to the financial and professional interests of the employee.

progress. It may very well be that the two individuals that filled out the Grievant's *OJT/OJE Employee Work Record* were never instructed as to the importance of the document with regard to measuring the trainee's overall progress in the crane training program and filled it out more from the standpoint of a coach then from that of an evaluator. However, this Arbitrator concludes that the Employer is bound to the actual language of the *OJT/OJE Employee Work Record* which does indicate that it is a measure of progress in the program.

Also, testimonial evidence indicated that the Grievant was informed on a number of occasions that he needed to practice more. To the Arbitrator, the encouragement or instruction to practice more sounds like what a coach/mentor is expected to say and does not necessarily indicate substandard performance. One might think that all the trainees are encouraged to practice. The best professional athletes practice all the time which is not an indicator that they are doing poorly at their professions. Working to better or maintain skills is clearly important whether one is a professional athlete, crane operator, backhoe operator, truck driver or other professions that requires physical skills. Thus the fact that the Grievant was instructed to practice more cannot be interpreted to convey the information that his performance was sufficiently deficient as to cause his removal from the training program.

As the Arbitrator sees it, the primary problem for the Employer's case is that the only regularly kept written record scores the Grievant's progress as acceptable and provides written positive assurance of progress. While the authors of the comments on the *OJT/OJE Employee Work Record* may very well have not intended them to be an objective, comprehensive assessment of progress in the program, the forms on which the comments are recorded and the fact that they are the only written record strongly indicates that the comments do constitute a progress report. Most important, the last written comment on his *OJT/OJE Employee Work Record* prior to being suspended from the program stated that "Mr. Harrison is progressing well in his training and should receive his first Portal license soon" (U 4, May of 2011).

Having carefully reviewed all of the evidence with regard to the information provided the Grievant about his training performance, the Arbitrator concludes that at no time was he ever specifically informed that his performance was deficient to the point that he was in danger of being removed from the crane training program. To the contrary, written documentation indicates that he was told that he was progressing nicely. Undoubtedly managers and supervisors pointed to areas where he needed improvement but such information does not constitute a warning that deficiencies are sufficient to remove him from the

program. Good supervisory practice, if for no other reason, dictates that he be put on notice of possible removal and that he be given an opportunity to correct deficiencies. From this perspective, the Employer's actions are clearly deficient as he was summarily removed from the training program shortly after receiving the written evaluation that he was "progressing well[3]."

CBA, Regulation and Rule Violation

Ultimately, however, a finding that there were managerial deficiencies related to the removal of the Grievant from the crane training program is not sufficient to sustain the grievance; there must be a finding of a pertinent violation of CBA, regulation or rule. The Union recognizes this fact and in its brief raises significant questions with regard to contractual and regulation deficiencies found in the Employer's decision to remove the Grievant from the crane training program.

The Arbitrator begins his analysis of the Union's assertion that there were significant violations of the CBA, regulation and rule by noting that the Employer raised objections "to evidence offered as to issues not raised during the grievance process" (Letter of Submission, Page 4). The Employer also

[3] There is the matter of what everyone has agreed was a very small accident. The details of that event are not before the Arbitrator. More importantly, Mr. Giffin asserts that while the accident brought the Grievant's performance to his attention he was not removed from the program because of the accident; it was his overall failure to show progress towards achieving journeyman status that sent him back to being a rigger.

challenges what it believes is the fact that the Union raised one issue in the grievance "and is now trying to arbitrate another" (E Br 3).

The Arbitrator reads the Union's case somewhat differently than the Employer. The original grievance document uses the phrase "wrongfully and unjustly removed" from the crane training program (J 2). While the Employer is correct in asserting that a claim that a matter is unjust is not arbitrable, the term wrongfully can properly be fully explored through the arbitration process. Additionally, the Employer's assertion concerning what was and what was not discussed during the grievance process is strongly contested by the Union and inconsistent with the grievance documents that are in evidence. For example, the Step 2 grievance response by Mr. Giffin acknowledges that questions were raised as to the adequacy of information provided regarding the crane training program requirements. Mr. Giffin indicated that he believed the Grievant had received necessary information and based this conclusion on information he received from Mr. Haines (J 2).

The Union, pointing to the absence of any written information, disagreed with this conclusion. The Union's primary concern is that the CBA, regulation and rule consistently spell out a requirement to provide written information to the employee and the crane training program, as

the Grievant experienced it, provided no written information whatsoever. The Arbitrator summarizes the Union's overall case with the following four points:

1. The CBA, law, rule and regulation require that an employee receives written documents clearly establishing requirements of the position that they hold.

2. If an employee's performance is insufficient to meet the requirements of the position, he or she must be provided written notice of the deficiencies and given an opportunity to improve performance.

3. The Grievant was not given written information, as required, as to the requirements of his position and the parameters of the training program to which he was assigned.

4. The Grievant was never informed in writing as to his deficiencies and he was removed from the training program without a post notice opportunity to improve.

The particulars of the Union's case and the citations are found on pages 2 through 4 of its brief and the Arbitrator finds that some significant and appropriately documented issues are raised on those pages. Two points stand out. First, the Union notes the requirements of CFR 335.102(f)(1) which provides in part that:

> The agency must give the employee advance written notice of the conditions of the time-limited promotion, including the time limit of the promotion; the reason for a time limit, the requirement for competition for promotion beyond 120 days, where applicable; and that the employee may be returned at any time to the position from which temporarily promoted,… (J 5, P 1)

The Employer does not dispute the fact that the Grievant and the other trainees in the crane training program were not

given a written overview of the program to include a specific statement that they could be returned to their permanent position at any time. Mr. Haines testified that this information was provided orally at the outset of the program.

The Arbitrator notes that in his arbitral experience where the Employer uses a training session to convey important program information, evidence of the information is usually available in the form of a training handout or a copy of a PowerPoint slide. Here, even though the CFR specifically requires a written document, the Employer is forced to rely exclusively on the assertion that information was provided orally with no supporting written documentation.

The second of the Union's points that stands out to the Arbitrator is found at the beginning of page 4 and reads as follows:

> Management violated 2008 of the CBA. During the hearing Giffin stated that he had been receiving continued negative verbal feedback from his supervisors regarding Harrison's performance. If Harrison's performance had fallen below an acceptable level, it should have been formally documented and his supervisor should have conducted a special progress review. This review would have put Harrison on notice that his performance was not meeting management's expectations and given him an opportunity to improve his performance.

The Arbitrator notes that Section 2008 of the CBA specifically calls for a progress review if an employee's performance falls below an acceptable level. Additionally, as previously discussed in this award, prudent management practice

calls for an employee to be put on notice when the level of his or her performance is unacceptable, provided direction on how to raise that performance to an acceptable level and given an opportunity to achieve that goal. In other words, the requirements of the CBA and good management practice are one and the same.

The Arbitrator reaffirms a prior conclusion that there is no evidence the Grievant was ever given information that his performance was substandard to the point that he could be removed from the crane training program.

In summary, the crane training program relies heavily on an informal, coach/mentor approach to building the necessary skills needed for a trainee to become a journeyman crane operator. Clearly, it is not a program that adheres closely to written documentation mandates found in the CBA, regulation and rule. The evidence indicates that this informal, hands-on approach is generally effective and that most trainees successfully complete the program regardless of the fact that the specific requirements of the program are not provided in writing. Clearly, however, the absence of the proscribed written documents becomes a significant problem when the employer determines to take the adverse action of removing a trainee from the program. The significance of this problem is further discussed in the next section of this award.

Reserved Management Rights

The Arbitrator has carefully laid out in the prior sections of this award what he sees as the strengths of the Union's case. There are clearly some managerial deficiencies in the action removing the Grievant from the crane training program. Ultimately and by a narrow margin, however, the Arbitrator finds that the deficiencies in the Employer's actions removing the Grievant from the program do not rise to the level that they constitute a violation of the CBA, regulation or statute sufficient to sustain the grievance. The basis of this conclusion by the Arbitrator is laid out in the following four points.

First, managements' basic rights to run its business is clearly laid out and protected in labor law that applies to the Federal sector and in language found in the CBA. These rights encompass the assignment of work including, as found in the instant case, the assignment of employees to temporary positions. The Arbitrator notes that LHAP 1001 contains the administrative procedures for crane operator training; it is the controlling administrative document. At 3.4.3 it specifically grants to management the right to "Extend/dismiss a trainee or an operator from the training/qualification process" (U 5, P 4). The Grievant was extended an opportunity to participate in the crane training program and he was ultimately dismissed from the

program. The right is clearly reserved to management to do both. The Employer, in its brief, provides substantial argument with appropriate citations as to the significance of a protected management right and the limited authority of an arbitrator to interfere with that right.

Second, in this Arbitrator's view, the strongest part of the Union's case is its claims with regard to the violation of CFR 335.102(f)(1). Having written guidelines that spell out the terms of the temporary promotion related to the crane training program and the fact that one can be returned any time to their permanent position simply makes good management sense and is a requirement of the CFR. The Arbitrator has previously noted that by a razor thin margin he has concluded that the Union's case in support of the grievance is insufficient to sustain it. It is the violation of CFR 335.102(F)(1) that creates the razor thin margin.

Ultimately, the Arbitrator finds that this violation of the CFR, even though proven, is not sufficient to sustain the grievance because it cannot be persuasively shown that but for the violation the outcome would have been different. The "but for showing" is critical in a Federal Sector grievance case because if there is no showing that a violation impacted the outcome, then the outcome is not to be overturned. What has always been a useful metaphor to this Arbitrator is the call of

pass interference in a football game. A defensive player is not allowed to interfere with the right of the offensive player to catch the ball. However, a penalty will not be called if the pass was not thrown where it could be caught. In this situation, the defensive player commits the infraction but the penalty is not imposed because the ball was not catchable; the infraction did not cause the failure of the offensive player to catch the ball. Likewise for grievance arbitration in the Federal Sector, where the end result is not impacted by the infraction then the fact of the infraction cannot be used to set aside the end result.

The Arbitrator has previously set forth the fact that he gave little evidentiary weight to the oral and written statements of many of the Employer's witnesses. There is a significant exception to this finding and that is the testimony of Kevin Geno. The evidence indicates that Mr. Geno never told the Grievant that he was doing a good job while saying the opposite to his supervisor. Moreover, he is acknowledged by both Parties to be the Grievant’s friend, the individual that encouraged the Grievant to apply for the crane training program, he desired that the Grievant be successful in the program and he was a mentor for the Grievant. He testified that he was not able to sign off on the Grievant’s skill development progress. He further testified that the Grievant had not shown the

aptitude to properly handle one of the large outdoor cranes. In other words, both better information about the training program and more training would not have resulted in the Grievant successfully completing the program. There was a reasonable basis to conclude that the pass was not catchable.

Third, the Arbitrator is particularly mindful of the Union's arguments regarding Section 2008 of the CBA. This provision requires the Employer to identify unacceptable levels of performance and work with the employee to raise performance to an acceptable level prior to taking action against the employee. The Employer removed the Grievant from the crane training program because it concluded that his progress (performance) was not at an acceptable level. As previously discussed in this award, the Arbitrator found no evidence that the Grievant's supervisor ever specifically discussed with him the fact that his performance was sufficiently deficient as to call for his removal from the training program. Thus, at first glance, the removal is in violation of Section 2008.

The possible fact of a violation of Section 2008, however, quickly evaporates when one notes that Section 2009 provides that the "procedures in section 2008 do not apply to… Employees serving on a temporary appointment…." The Parties are in agreement that employees are serving in a temporary appointment when they are participating in the crane training program.

Their permanent appointment remains the job that they vacated when they were placed in the crane training program.

The Arbitrator has previously indicated his conclusion that creating a written record indicating that the Grievant was successfully passing the program while never formally sharing with him the reservations that his supervisors had with his progress constituted poor supervision. Poor supervision, however, is not the same as a violation of the CBA. The reality is that the Employer could not have violated Section 2008 because it did not apply to the Grievant in his temporary position as part of the crane training program.

Fourth, the Arbitrator turns, as a final point, to the most basic standard of review: arbitrary and capricious. An employment action can be overturned by an arbitrator upon a clear finding that the action was substantially arbitrary and capricious, no basis in fact. The Arbitrator finds some evidence that would support such a conclusion, particularly the evidence around the fact that Mr. Giffin made no effort to review the written record with regard to the Grievant's performance prior to taking the action of removing him from the training program. But, the compelling testimony of Mr. Geno is sufficient to assure the Arbitrator that the Employer's decision to remove the Grievant from the program was not arbitrary and capricious

In summary, while the Arbitrator found examples of deficient supervision, he found no violation of the CBA, law, rule or regulation sufficient to uphold the grievance and thus he will deny it.

CONCLUSION

The issue before the Arbitrator is whether the Grievant was removed from the crane training program in violation of the CBA law, rule or regulation. The Arbitrator determined that there were a number of management deficiencies with regard to the manner in which the Grievant was removed from the crane training program but that these deficiencies did not rise to the level that it gave the Arbitrator the authority to overturn the decision and return the Grievant to the training program. While the decision of the Employer to remove the Grievant from the program without any consideration of his written progress reports was almost sufficient to justify a finding that the decision was arbitrary and capricious, the good faith refusal of his mentor to sign off on his training precluded this determination. Also, management has a clear and unfettered right to determine who should enter the crane training program and to make decisions with regard to the removal of an employee from the program. The Arbitrator found no procedural deficiency

sufficient to interfere with this right. As a result the grievance must be denied.

An award is entered consistent with the findings and conclusions outlined above.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	AWARD
	)	
BREMERTON METAL TRADE COUNCIL	)	
	)	
"BMTC" OR "THE UNION"	)	
	)	
AND	)	
	)	
PUGET SOUND NAVAL SHIPYARD AND INTERMEDIATE MAINTEANCE FACILITY	)	
	)	RYAN HARRISON
"PSNS & IMF" OR "THE EMPLOYER"	)	GRIEVANCE

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 decision to end Mr. Harrison's in-house crane training by assigning him back to his permanent position as a Rigger Helper (WG-5) did not violate the collective bargaining agreement, law, rule or regulation?
2. The grievance is denied.
3. The CBA provides that the "fees and expenses of the Arbitrator… shall be borne equally by the Parties. Therefore, the Arbitrator has split his fee between the two Parties.

Respectfully submitted on this, the 7th day of November, 2012 by

Timothy D.W. Williams
Arbitrator