

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>MINNESOTA TEAMSTERS PUBLIC</b>	)	
<b>AND LAW ENFORCEMENT</b>	)	
<b>EMPLOYEES' UNION</b>	)	<b>ARB ITRATION</b>
<b>LOCAL NO. 320,</b>	)	<b>AWARD</b>
	)	
<b>Union,</b>	)	
	)	
<b>and</b>	)	
	)	<b>BRIDGE WORKER</b>
	)	<b>POSTING GRIEVANCE</b>
<b>COUNTY OF ST. LOUIS,</b>	)	
	)	
<b>Employer.</b>	)	<b>BMS Case No. 06-PA-1306</b>
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Arbitrator: Stephen F. Befort

Hearing Date: July 22, 2008

Post-hearing briefs received: August 15, 2008

Date of decision: August 29, 2008

**APPEARANCES**

For the Union: Trevor S. Oliver

For the Employer: Timothy O. Lee

**INTRODUCTION**

Teamsters Local 320 (Union) is the exclusive representative of a unit of Highway Department maintenance employees employed by the County of St. Louis (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by failing to post a vacancy for seniority bidding. The grievance proceeded to an arbitration hearing at which the parties were afforded the

opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUES**

- 1) Is the grievance arbitrable?
- 2) Did the Employer violate the parties' collective bargaining agreement by transferring an employee into a vacant position without notifying the Union or posting the vacancy for seniority bidding?
- 3) If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **Article 1** **Recognition**

Section 1. The EMPLOYER recognizes that the UNION is the exclusive representative for a unit composed of all employees of the St. Louis County Highway Department Maintenance Divisions, who are public employees within the meaning of Minn. Stat. Sec. 179A.03, subd. 14, excluding clerical, supervisory and confidential employees and all other employees.

#### **Article 7**

#### **Probation, Promotion, Provisional Appointment, Layoff and Termination:**

Section 6. Voluntary Transfer. Before filling a vacancy by any other means, except on a temporary or provisional basis, the EMPLOYER shall transfer the employee with the greatest seniority in the classification in which the vacancy exists, who has on file with the Department Head a written request to transfer to the work reporting station where the vacancy exists. An employee who applies for a transfer and who is offered that transfer must accept the transfer and relocate. The EMPLOYER shall give prior written notice to the UNION of each vacancy to be filled. This Section does not limit the EMPLOYER'S right to transfer except as specifically stated in this Section. Notice of the classification and job location of a position available in the Department's maintenance divisions shall be posted by the Personnel Officer on the employee bulletin boards at each road and bridge maintenance work site for at least five (5) work days. Maintenance division employees in a related job classification that has the same or higher salary grade may apply for transfer to the vacant position by submitting a written notice to the Personnel Officer that is postmarked within five (5) calendar days of the stated posting deadline. The Civil Service/Personnel Director will determine the relatedness of job classifications in accordance with Civil Service Rules, and may require applicants to successfully complete a

qualifying Exam. All employees submitting notice of interest in the vacant position and who qualify shall be interviewed, and the appointing authority has the discretion to select one of the transfer candidates or fill the position from a promotional eligible register.

**Article 9**  
**Grievance Procedure**

**A. Employee Rights of Protection and Representation:**

Sec. 2. Every employee shall have the right to present the employee's grievance to the County free from interference, coercion, restraint, discrimination or reprisal, and shall have the right to be represented at all stages thereof.

**C. Grievance Procedure:**

In the event an employee covered by this Agreement claims that the employees' right or privileges under this Agreement have been violated, the matter shall be resolved in accordance with the following [grievance and arbitration] procedure:

Step 1: Within ten (10) working days after the first occurrence of the event giving rise to the claimed violation, the employee and/or the employee's representative shall submit the grievance in writing to the foreman, who, within ten (10) working days thereafter shall give an answer. Thereafter the parties shall have ten (10) working days to attempt to resolve the grievance by mutual agreement.

**Article 21**  
**Legality and Severance**

This AGREEMENT is subject to the laws of the State of Minnesota, including the St. Louis County Civil Service Law and all Civil Service Regulations made pursuant thereto, and at any time any provision is in conflict and held to be contrary to law by a Court of competent jurisdiction, which final judgment or decree no appeal has been taken within the time provided, such provision shall be void and inoperative. However, up until such ruling is given, all provisions of this AGREEMENT shall remain operative, or if such provision is ruled inoperative, all other provisions shall remain in full force and effect. The voided provision may be renegotiated at the written request of either party.

**RELEVANT CIVIL SERVICE RULES**

**10.14 VACANCY CAUSED BY MILITARY LEAVE OR LEAVE OF MORE THAN SIX MONTHS BUT LESS THAN ONE YEAR TO BE KNOWN AS TEMPORARY VACANCY IN PERMANENT POSITION.** A

vacancy created by an employee receiving a military leave shall be known as a temporary vacancy in a permanent position, and any person appointed to fill such a temporary vacancy in a permanent position shall be known as a substitute in that position and said substitute shall acquire only such Civil Service rights as are hereinafter specifically provided.

**10.15 NAME OF SUBSTITUTE TO BE PLACED ON RE-EMPLOYMENT LIST.** The name of any person appointed to a temporary vacancy in a permanent position as a substitute and who has been certified from an eligible list and certified after probation shall, upon reinstatement of the regular incumbent, be placed upon the re-employment list.

**10.16 SUBSTITUTE MAY BE APPOINTED AS REGULAR INCUMBENT.** If it shall have been determined that the regular employee who has been on leave of absence is physically or mentally unable or elects not to return to said permanent position, said substitute who has been certified from an eligible list and certified after probation shall be appointed to said position as the regular employee, subject to the provisions of these rules.

#### **FACTUAL BACKGROUND**

The series of events leading up to this grievance are, for the most part, not in dispute. Bridge Worker Craig Martinson temporarily left county service on military leave in late August 2004. Shortly thereafter, his leave period was extended through March 2006. The Employer's Public Works Department sought to hire a replacement to fill Martinson's vacancy, and in February 2005 requested a list of qualified applicants from the Employer's Personnel Department. On April 18, 2005, the Employer hired Justin Schilling from the list to fill Martinson's vacancy. Following a six-month probationary period, the Employer certified Schilling as a permanent employee as of October 18, 2005.

Shortly before Mr. Martinson's return from military leave in March 2006, the Employer filed a personnel request for a permanent replacement for Tim Zebott, another Bridge Worker, who was out on disability leave. When Martinson returned to work on March 6, 2006, the Employer transferred Schilling to Zebott's position at the Pike Lake

garage. It is undisputed that the Employer did not notify the Union of the Zebott vacancy or post notice of the vacancy at the eleven road and bridge work sites scattered throughout the county.

On March 9, 2006, Union Business Agent Michael O'Donnell filed a grievance on behalf of all members of the bargaining unit protesting the Employer's failure to post the open Zebott position and to permit seniority bidding pursuant to Article 7 of the parties' contract. The Employer, contending that the contract does not authorize the filing of a grievance in the absence of an aggrieved unit member, declined to process the grievance to arbitration. The Union then filed a motion to compel arbitration with the St. Louis County District Court, which granted the Union's motion on the grounds that Minnesota law requires the submission of the arbitrability dispute to the arbitrator for an initial determination.

Following the district court's order, the parties attempted to resolve the dispute by re-posting the Zebott vacancy. The Employer posted the vacancy on March 4, 2008 which resulted in only one interested applicant – Justin Schilling. The Union, maintaining that the Employer's posting was not handled in an appropriate manner, has now pursued the grievance to arbitration.

### **POSITIONS OF THE PARTIES**

#### **Union:**

The Union initially contends that this grievance is arbitrable because both the parties' contract and general arbitral principles recognize that a union can assert a class action grievance upon behalf of unit members. As to the merits, the Union argues that the Employer violated Article 7 of the contract by failing to post the Zebott Bridge

Worker vacancy for internal bidding in March 2006. The Union further maintains that the Employer's re-posting of the vacancy in March 2008 was inadequate because of shortcomings in the posting process and because Mr. Schilling is a "substitute" under Civil Service rules and ineligible to bid on the Bridge Worker vacancy. As a remedy, the Union asks that the Bridge Worker position be re-posted in a manner consistent with the parties' contract and that "the remedial order . . . make clear that Mr. Schilling is not eligible to apply for transfer under this CBA procedure."

**Employer:**

The Employer counters that this grievance is not arbitrable under the parties' collective bargaining agreement because no employee has alleged that he or she was harmed by the Employer's action. In terms of the posting issue, the Employer acknowledges that it erred in failing to post the vacancy in March 2006, but argues that any deficiency was cured by the March 2008 re-posting which resulted in Mr. Schilling, a permanent employee, being the only bidder for the position. The Employer concludes that, under these circumstances, it would be unfair to strip Mr. Schilling of his permanent employee status after he has spent more than three years performing work in the Bridge Worker classification.

**DISCUSSION AND OPINION**

**Arbitrability**

During the consideration of this grievance through the steps of the contract grievance procedure, the Employer maintained that the grievance was not arbitrable. Pursuant to a Motion to Compel Arbitration brought by the Union, the St. Louis District Court, without ruling on the merits of the Employer's objection, found that Minnesota

law requires that the arbitrability issue first be addressed by the arbitrator. That issue, accordingly, is now ripe for resolution on a de novo basis.

The gravamen of the Employer's arbitrability objection goes to the fact that no individual employee, other than Justin Schilling, has expressed an interest in bidding on the Bridge Worker position. In support of this view, the Employer points to the following language contained in Article 9 of the parties' collective bargaining agreement:

In the event an employee covered by this Agreement claims that the employees' right or privileges under this Agreement have been violated, the matter shall be resolved in accordance with the following [grievance and arbitration] procedures.

According to the Employer, this language establishes that the contract's grievance and arbitration machinery is to be reserved for situations in which an identified employee claims a specific injury. In its post-hearing brief, the Employer argues that "this situation is analogous to the basic requirement that judicial review of a legal matter requires an actual case and controversy."

The Employer's viewpoint, while admittedly correct in the context of typical civil litigation, misperceives the representational role of a union in a labor relations context. A union that has been selected as the exclusive representative of an appropriate unit of employees has both the right and the obligation to represent the interests of unit members in collective bargaining and grievance handling. *See* Minn. Stat. § 179A.06, subd. 5. The concept of exclusive representation means that an employer cannot bypass a union to strike individual bargains with unit members, J. I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944), and that the exclusive representative has wide latitude to harmonize the views of individual unit members in attempting to accomplish the best outcome for the unit taken as a whole, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

A certified union, in short, is not simply the spokesperson for individual complainants, but an entity with wide-ranging responsibilities to obtain the best deal possible for the unit it represents.

This representational role is recognized by the leading treatise on labor arbitration which summarizes arbitral precedent to conclude that a union's ability to file a group or class action grievance is widely accepted. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 211-12 (6<sup>th</sup> ed. 2003). The treatise goes on to explain:

In general, a member of a bargaining unit does not have standing to file a grievance without a showing that he or she has been adversely affected by the claimed violation and has a personal interest in the outcome. The situation is different, of course, if the grievance is presented as a "group grievance" (sometimes referred to as a "class action") or when its sponsor is an official of the union.

*Id.* at 211.

The Union's position on the arbitrability issue also finds support in a decision of the Minnesota Court of Appeals in Mora Federation of Teachers, Local 1802 v. Independent School District No. 322, 352 N.W. 2d 489 (Minn. Ct. App. 1984). In that case the employer objected to the union's ability to pursue a class action grievance where no aggrieved employee personally initiated the process by filing a grievance. In overturning the district's court's denial of the union's motion to compel arbitration, the court of appeals stated as follows:

. . . a union's duties include the representation of its employees and protection of their interests. . . . Failure to indicate expressly in the agreement that the union cannot also file actions on behalf of its members makes the union's argument that it has this authority both reasonable and plausible.

*Id.* at 491. Although the court of appeals did not state expressly that a union representative may pursue a class action grievance in the absence of an alleged injury to

an identified unit employee, the decision broadly supports the proposition that a union generally can pursue a class action grievance that furthers the interests of unit members.

In this instance, the parties' collective bargaining agreement does not expressly limit the right of the exclusive representative to initiate grievances in support of procedural or generally held employee rights. To the contrary, Article 9, Section C, Step 1 authorizes a grievance to be initiated by either "the employee and/or the employee's representative." Under the circumstances of this case, the Union has a sufficient stake in the enforcement of the parties' agreement to maintain a grievance alleging a class procedural violation without regard to the identification of an employee who may have suffered individualized harm.

### **The Alleged Posting Violation**

Both parties acknowledge that the Employer failed to adhere to Article 7, Section 6 of the parties' contract in filling the Zebott vacancy in March of 2006. That provision obligates the Employer to post notice of a vacancy it desires to fill at each road and bridge maintenance work site for a minimum of five work days. The Employer in this instance failed to post the vacancy and instead filled it by transferring Mr. Schilling to the vacant Bridge Worker position.

The Employer, however, claims that it cured any violation by re-posting the position in March 2008. At that time, the Employer, in an apparent attempt to resolve this dispute, posted the Zebott position at Pike Lake as vacant. Only one employee – Justin Schilling – bid on the vacancy. The Employer argues that this re-posting rectified any prior violation, and that the Employer is acting in compliance with the contract in continuing to employ Schilling in the Pike Lake Bridge Worker position.

The Union argues that the Employer's re-posting effort is insufficient for two reasons. First, the Union points out that the Employer failed to produce any documentary evidence at the hearing showing that the notice of vacancy actually was posted on all road and bridge work site bulletin boards as required by Article 7 of the contract. Second, the Union maintains that Mr. Schilling was not eligible to bid for the position since he only had the status of a "substitute" under applicable Civil Service rules.

In terms of the first objection, the Union is correct in noting that the record contains no direct evidence that the vacancy notice was posted at any facility other than the Pike Lake shop. The Employer, however, did introduce a copy of the posting document, and Personnel Officer Leah Shadle testified that the posting was sent by e-mail to each facility in accordance with regular practice. Although a copy of the e-mail message would have served as stronger evidence, I find that Ms. Shadle's testimony sufficiently establishes compliance with the contract's procedural requirements.

The Union's second objection is premised upon a construction of the County's Civil Service rules which are incorporated in the parties' contract by Article 21. The operative provision is Rule 10.14 which states:

**10.14 VACANCY CAUSED BY MILITARY LEAVE OR LEAVE OF MORE THAN SIX MONTHS BUT LESS THAN ONE YEAR TO BE KNOWN AS TEMPORARY VACANCY IN PERMANENT POSITION.** A vacancy created by an employee receiving a military leave shall be known as a temporary vacancy in a permanent position, and any person appointed to fill such a temporary vacancy in a permanent position shall be known as a substitute in that position and said substitute shall acquire only such Civil Service rights as are hereinafter specifically provided.

The Union reads this provision as conferring only "substitute" status on an employee hired to fill a vacancy created by a military leave regardless of duration, while doing so for other types of leave only if such leave is between six months and one year in duration.

The Employer, on the other hand, interprets this provision as limiting “substitute” status to replacements hired to cover leaves, regardless of purpose, that are between six months and one year in duration.

During her testimony at the arbitration hearing, Personnel Officer Shadle testified that the County’s longstanding practice has been to hire replacements for employees on military leave exceeding one year on a permanent rather than a substitute basis. Shadle testified that an offer of permanent status is needed to attract good candidates for long-term replacement duty such as the case with respect to Mr. Martinson’s eighteen-month leave of absence. She also opined that it would be unfair to a replacement employee such as Mr. Schilling to earn no ongoing status in spite of long-term service.

It is a fundamental principle in labor arbitration that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 605-30 (6th ed. 2003).

Here, past practice supports the Employer’s construction of Rule 10.14. Consistent with that practice, the County appointed Mr. Schilling as a permanent employee, and he has served with that understanding for more than three years. Under these circumstances, the Union’s objection that Schilling is only a substitute without any seniority bidding rights must be rejected.

## **AWARD**

The grievance is sustained in part and denied in part. The grievance is sustained as arbitrable under the parties' collective bargaining agreement. The grievance is denied on the merits as the Employer's re-posting of the Bridge Worker vacancy cured its earlier failure to post the position for seniority bidding..

Dated: August 29, 2008

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Stephen F. Befort  
Arbitrator