

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**COUNTY OF BENTON**

and

**AFSCME, AFL-CIO, MINNESOTA COUNCIL 65  
LOCAL 1234, HUMAN SERVICES**  
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**BMS Case No. 09-PA-0126**

***APPEARANCES:***

Ratwik, Roszak & Maloney, P.A., by **Ann Goering**, appearing on behalf of Benton County, Foley, Minnesota.

**Dean I. Tharp**, AFSCME, Minnesota Council 65, appearing on behalf of Local 1234 (Human Services) and the Grievants.

***JURISDICTION:***

The County of Benton, referred to herein as the County or the Employer, and AFSCME, Minnesota Council 65, Local 1243, referred to herein as the Union, are parties to a collective bargaining agreement effective January 1, 2008 to December 31, 2009 and shall automatically be renewed from year to year unless notice is provided in accordance with Article 25 of the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on February 25, 2009 in Foley, Minnesota. The parties, both present, were afforded full opportunity to be heard. Replies briefs were filed in this matter and exchanged by the Arbitrator on March 16, 2009. In April, the Arbitrator advised the parties that a decision in this matter would be delayed due to complications in recovery from surgery.

***STATEMENT OF THE ISSUE:***

Did the Employer violate the collective bargaining agreement when it declined

to grant longevity pay until the completion of an employee's twelfth year of employment?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE:**

**ARTICLE 7**  
**EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE**

7.1 Definition of a Grievance:

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms or conditions of this Agreement.

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7.5 Arbitrator's Authority

The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union, and shall have no authority to make a decision on any other issue not so submitted.

The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator's interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.

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**ARTICLE 21**  
**COMPENSATION PLAN**

21.1 The Compensation Plan applicable, (sic) to employees covered by this Agreement is set forth in Appendix A, attached hereto and made a part of this Agreement.

21.2 Longevity. An employee who works for Benton County will receive longevity pay of \$100.00 for every two years beginning at year 12 as follows:

<u>Years of Service</u>	<u>Longevity Pay</u>
12	\$100
13	\$100
14	\$200
15	\$200
16	\$300
17	\$300
18	\$400
19	\$400

20	\$500
ETC.	\$500

21.3 Step movement shall be based on the employee’s anniversary date. The effective date for payroll computation changes shall be the employee’s classification anniversary date.

Step movement from step 10 to step 11 shall occur on the anniversary date following the movement to step 10 when employee has completed 15 years of service with the Employer.

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**BACKGROUND AND FACTS:**

In 1999, the Benton County Board, in response to a pay equity job evaluation and market study, voted to provide non-Union employees longevity pay of \$100.00 for every two years of service with the County after an employee completed 10 years of service. The longevity was paid on the last paycheck of the year. In 2000, to comply with the Fair Labor Standards Act (FLSA), the Board modified the longevity payment procedure so that it was calculated and paid on an hourly basis throughout the year commencing in January of the year in which an employee became eligible. During that same year, the County also negotiated a longevity benefit into the 2000-01 collective bargaining agreements of all of its established bargaining units which stated that “an employee who works for Benton County will receive Longevity Pay of \$100.00 for every two years beginning at Year 12 . . . .” This language replaced previous longevity language in some of the contracts.

During the summer of 2000, the County began negotiating its first contract with AFSCME employees in the Human Services Department, A longevity proposal similar to that found in the law enforcement contracts prior to the 2000-01 change was included in AFSCME’s initial contract proposal. The County countered and the issue remained open until the County’s proposal was incorporated into the parties’ draft tentative agreement in April 2001. The tentative agreement was rejected by the AFSCME bargaining unit and the employees went out on strike. The strike ended pursuant to a mediator proposal dated May 15, 2001 and AFSCME prepared the final contract which included the County’s proposed longevity language and it was

signed by both parties on June 15, 2001. The adopted longevity language was the same as that included in the collective bargaining agreements with all of the established bargaining units.<sup>1</sup>

In late July, 2008, the Union, believing that the Employer was delaying the eligibility for longevity one year inquired about the payment process. Finding that longevity payments begin on January 1 in the year an employee completes their 12<sup>th</sup> year of service rather than at the beginning of 12 years of service as the Union believed should be the case, the Union filed a grievance alleging that County has incorrectly calculated years-of-service eligibility and violated Article 21, Section 12.2 of the collective bargaining agreement. It is this dispute that is before the Arbitrator.

***ARGUMENTS OF THE PARTIES:***

The Union maintains that the Employer is delaying eligibility for longevity increases by one year rather than paying longevity increases according to the schedule and that employees are receiving longevity increases on January 1 rather than on the day they become eligible. As support for its position, it asserts that the contract language is “clear and unequivocal”; that since the Employer authored the language any interpretation of it should be construed against the Employer in accord with the concept of “contra preferentem” as stated in Elkouri and Elkouri, *How Arbitration Works, 6<sup>th</sup> Edition*, and that other provisions in the agreement give guidance as to how the years should be counted in this provision. It also declares that the record establishes that the payroll clerk is interpreting the contract language based upon 1999 County Board minutes rather than the contract.

In addition, the Union declares that there are several valid reasons for why it took nine years for its members to discover the error. Among the reasons it cites is the County’s conversion from a lump sum payment to an hourly benefit and the fact that the increases are granted on January 1<sup>st</sup> rather than the employee’s anniversary date. It also argues that error is difficult to discern since employees are not provided with a table that shows the correct hourly longevity amount but, instead, must convert the annual figure to an hourly amount and add it to their currently hourly pay; since the increase only occurs every other year thus increasing the

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<sup>1</sup> These units included the Deputy Sheriffs, Licenses Essential Supervisors, Dispatcher and Detention Officers, the

likelihood of the mistake not being discovered; since the longevity increase coincides with the January 1<sup>st</sup> COLA, and since insurance increases cause the longevity amount to be lost in the new amount. Moreover, it charges that employees trusted payroll to grant longevity increases in accord with the collective bargaining agreement.

Further, the Union rejects the Employer's arguments in this case. It not only asserts that there is no valid past practice and that the column titled "years of service" in the contract is only a title for the column and not an explanation meant to negate the clear and specific language preceding it, but that the Employer's interpretation cannot be explained without "twisting words or adding words to change the meaning."

As remedy, the Union seeks that all affected employees be made whole and paid longevity in accord with the clear contract language and on the date the employee becomes eligible. It also seeks that employees begin to receive longevity on the date the employee becomes eligible for the payment effective on the January 1, 2000 date the error was made.

The County, however, argues that it is the Union which has incorrectly interpreted the longevity language and that any ambiguity in the provision is "dispelled by the chart included in Section 21.2". Continuing, the County, citing two arbitration decisions<sup>2</sup>, declares that it "is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided" and posits that since the Union's construction of the language in question "nullifies the mathematical chart" it must be rejected. Further, it rejects the Union's method of calculating years of service and asserts that the Union is also mistaken in describing how the County calculates and applies longevity benefits.

As support for its position, the County charges that the bargaining history establishes that it has not violated the collective bargaining agreement and cites two other arbitration decisions in which it was stated that "arbitrators will make reference to past practice, bargaining history and other applicable rules of construction in order to arrive at the true meaning of the disputed provision."<sup>3</sup> According to the County, it adopted its longevity plan in

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Sheriff's Office Non-Licensed Essential Supervisors and the Highway Department.

<sup>2</sup> *John Deere Tractor Co.*, 5LA631 (Updegraff, 1946) and *Russell, Burdsall and Ward Corp.*, 84 LA 373 (Duff, 1985).

<sup>3</sup> *Keego Harbor, Mich. Police Department*, 114 LA 859 (Roumell, Junior., 2000) and *Inland Empire Paper Co.*, 88 LA 1096 (Levak, 1987).

1999; drafted language that was negotiated into all of its 2000-01 collective bargaining agreements with its organized bargaining units, and, ultimately, included that same language in the first AFSCME contract which was signed in 2001. It adds that it has implemented and administered the AFSCME language in the exactly the same way it has administered the longevity provisions in its other collective bargaining agreements and that eight years of established past practice shows that its implementation of the provision has been consistent with the parties' intent. Continuing, it rejects the Union's argument that it took eight years to discover the County's mistake and declares that "it is obvious that AFSCME knew or should have known how the longevity language was implemented" since each employee receives a longevity benefit notice of change in an annual Personnel Action Form. It also argues that "continued failure of one party to object to the other party's interpretation constitutes acceptance of such interpretation so as, in effect, to make it mutual" and cites several arbitration decisions in support of its argument.<sup>4</sup>

The County also rejects the Union's argument regarding "the maxim that disputed language should be decided against the drafter," as well as its argument contract language concerning an arbitrator's authority precludes the arbitrator from finding that "clear" language in an agreement may be modified by the parties' past practice. As support for its position, it declares that Elkouri and Eklouri, as well as The Common Law of the Workplace, indicate that this disputed language maxim is used "only as an interpretive tool of last resort" and that the Minnesota Supreme Court has upheld an arbitrator's award in which the "arbitrator found that an established past practice controlled in the face of a vacation schedule that was free from ambiguity. . . ."<sup>5</sup>

And, finally, the County argues that if the grievance is granted, the AFSCME bargaining unit employees will gain a "windfall of additional longevity not enjoyed by other County employees, even though the exact language applies in each of the County's contracts." Further, based upon this fact, the County urges that the arbitrator reject an award that grants AFSCME

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<sup>4</sup> *Fairbanks, Ohio, Local Bd. of Educ.*, 112 LA 996 (Stuart, 1999); *Polaris Indus.*, 72 LA 1104 (Kapsch, Sr., 1979), and *Owens-Corning Fiberglas Corp.*, 19 LA 57 (Justin, 1952).

<sup>5</sup> The Common Law of the Workplace, The Views of Arbitrators, First Edition, National Academy of Arbitrators, The Bureau of National Affairs, Inc., Washington, DC (1998) and Ramsey County v. American Federation of State, County and Municipal Employees, Council 91, Local 8, 309 N.W.2d 785 (Minn.1981).

“a benefit through the grievance arbitration process that it did not negotiate at the bargaining table.”

***DISCUSSION:***

At issue in this dispute is what the parties meant when they agreed to contract language which states that employees will receive a longevity pay amount for every two years beginning at year twelve. On its face, the language appears clear. The chart that follows this clearly stated language, however, muddles the interpretation. Since the language was adopted in 2001, the County has consistently administered the language so that employees do not begin to receive longevity until January 1<sup>st</sup> of the year in which they will have worked for the County a full twelve years and receive longevity increases only after completing each additional two years of service thereafter. The Union, on the other hand, believes that when the provision was agreed to the parties intended employees to receive longevity when they begin their twelfth year of service rather than when they have completed twelve years and at the beginning of each two additional years thereafter. Therefore, even though the language appears clear on its face the parties clearly differ over what they intended when the language was adopted and the issue is now before this Arbitrator for interpretation.

After reviewing the record and the arguments of the parties, it is concluded that the County has correctly implemented the language and that the contract has not been violated. This conclusion is based upon the overall history that led to the adoption of longevity for all employees within the County, the bargaining history which led to the adoption of this language; its implementation and administration in the County's other collective bargaining agreements, and the County's consistent administration of this language for over eight years within the unit that is now disputing its application.

Ideally, contract interpretation would result in clearly determining the parties' intent when the language was agreed upon. That seldom happens, however, so over the years arbitrators have looked to principles of contract interpretation for guidance in making a determination regarding disputed language. In doing so, arbitrators frequently consider the bargaining history and the circumstances surrounding it in an effort to ascertain what the

parties may have meant when they agreed to the unclear language as well as other contract interpretation tools.<sup>6</sup>

In this case, most compelling in determining the parties' intent is the history that led to the County providing a longevity benefit to its employees and the bargaining history that follows it even though the Union correctly argues that arbitrators may find that when language is ambiguous it should be construed against the party that proposed the language.<sup>7</sup> A review of the record adequately establishes that the County Board decided in 1999 to grant a longevity benefit to its non-union employees for every two years of service with the County after ten years and that they be paid that benefit once a year on the last paycheck of the year. It also establishes that this action was modified to comply with the Fair Labor Standards Act (FLSA) in May 2000 and that the modification resulted in the longevity payment being applied to an employee's hourly wage throughout the year and that employees were paid the benefit beginning January 1 of the year in which they would have completed twelve years of service with the County. The record further establishes that, consistent with that action, the County negotiated or re-negotiated longevity language with each of its organized bargaining units and that the language inserted in each of the collective bargaining agreements is identical to the language that was ultimately inserted in the first AFSCME collective bargaining agreement finally agreed to in June 2001. This evidence strongly indicates that it was the County's intent to provide the same benefit to the AFSCME bargaining unit employees when it proposed the language during bargaining the first AFSCME contract in 2000. Further, the fact that AFSCME's initial longevity offer was the same as that which had existed in the law enforcement contracts indicates it was AFSCME's intent to secure the same benefit as the other organized employees and that it was aware of how the benefit was administered.

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<sup>6</sup> The Common Law of the Workplace, The Views of Arbitrators, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, Section 2; How Arbitration Works, Elkouri and Elkouri, Sixth Edition, ABA Section of Labor and Employment Law, the Bureau of National Affairs, Washington, DC, 2003, Chapter 9, and Labor and Employment Arbitration, Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Section 9.

<sup>7</sup> The Common Law of the Workplace, The Views of Arbitrators, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC, 2005, page 81; How Arbitration Works, Elkouri and Elkouri, Sixth Edition, ABA Section of Labor and Employment Law, the Bureau of National Affairs, Washington, DC, 2003, page 477, and Labor and Employment Arbitration, Second Edition, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Section 9.03[4].

The record also establishes that employees in other organized bargaining units, under the same contract language, receive longevity beginning January 1 of the year in which those employees will have completed twelve years of service with the County. This fact, together with the fact that the AFSCME unit was also paid in this manner over the past eight years is sufficient proof to conclude that the AFSCME unit found this practice to be mutually acceptable over the years. In reaching this conclusion, the Union's argument that there were reasons why the unit did not realize that the contract language was not being administered as they had intended in the agreement was considered and found unpersuasive since it is undisputed that employees annually receive a Personnel Action Form which identifies any longevity payment an employee may be receiving in the coming year.<sup>8</sup> While this number reflects hourly payment it is not difficult to calculate whether the number is correct when the expected yearly longevity payment is divided by the yearly number of hours worked.

Accordingly, based upon the record, the arguments and the discussion above, it is concluded that the Employer has properly administered the language in dispute and that the collective bargaining agreement has not been violated.

**AWARD**

The grievance is denied.

By:   
Sharon K. Imes, Arbitrator

SKI  
May 11, 2009

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<sup>8</sup> This is contrary to the Union's argument that the hourly longevity rate gets lost since it comes at a time when the COLA increase as well as any increase in health insurance payments are also included in the overall pay increase. While that may be a fact relative to a pay stub, the fact that employees also receive a Personnel Action Form cannot be ignored.