

**IN RE ARBITRATION BETWEEN:**

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**TEAMSTERS LOCAL #320**

**and**

**GRANT COUNTY**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS 08-PA-0247**

**JEFFREY W. JACOBS  
7300 METRO BLVD.  
SUITE 300  
EDINA, MN 55439**

**ARBITRATOR**

**July 22, 2009**

IN RE ARBITRATION BETWEEN:

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Teamsters Local #320,

and

DECISION AND AWARD OF ARBITRATOR  
BMS Case # 08-PA-0247  
Irene Shervey Grievance

Grant County.

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**APPEARANCES:**

**FOR THE UNION:**

Patrick Kelly, Attorney for the Union  
Kathleen Bates, Union Steward  
Irene Shervey, Grievant (Did not appear)  
Linda O'Meara  
Claire Hvass

**FOR THE COUNTY:**

Justin Anderson, Attorney for the County  
Pat Soberg, County Treasurer

**PRELIMINARY STATEMENT**

The hearing in the above matter was held on June 25, 2009 at the Grant County Courthouse in Elbow Lake, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated July 14, 2009 at which point the record was closed.

The parties also stipulated that a related grievance, known as the posting grievance had been settled prior to the hearing and that the supplemental posting is to include the fact that it is a Union position and that it will include a generic description of the duties, and more specifically the hours, and that the posting will be at the normal posting location.

**ISSUE PRESENTED**

Is the issue of the grievant's entitlement to compensation for insurance benefits arbitrable?

Is the grievant a covered employee under the labor agreement and is she therefore entitled to the benefits provided for covered employees pursuant to the labor agreement, including insurance compensation pursuant to section 18.2 C and D? If so, what shall the remedy be?

## **CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2006 through December 31, 2008. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

### **UNION'S POSITION:**

The Union's position was that the nominal grievant, Ms. Shervey, is a public employee within the meaning of the Minnesota Public Employment Relations Act, PELRA, and that she works in a covered position within the meaning of the recognition clause of the labor agreement. As such she is therefore covered under the labor agreement and entitled to all benefits provided for her position under that agreement. In support of this position the Union made the following contentions:

1. The grievant has held the position of Deputy Treasurer since June 2007. By September 2007 she had worked more than 67 days and worked on average well over 14 hours per week. The Union asserted that in fact she worked approximately 33 hours per week in 2007, nearly 35 hours per week in 2008 and more than 36 hours per week in 2009. See Union exhibit 10.

2. Under PELRA once a person in public employment works more than 67 days per year and 14 hours per week, that person is considered a "public employee." See M.S. 179A.01. The Union asserted that even the County has acknowledged that Ms. Shervey was a Public Employee, see Union exhibit 5, July 30, 2008 letter from the Grant County Attorney's Office to Local 320.

3. The Union argued that under the clear terms of the labor agreement, the position of Deputy Treasurer is a covered position and is "in the Union." Irrespective of whether Ms. Shervey was told when she was hired about the position being "temporary and without benefits" the clear terms of the labor agreement and the statute require that her position is a covered position whether Ms. Shervey likes it or not.

4. Ms. Shervey became a public employee covered under the Labor Agreement on or about September 13, 2007, when she had worked more than 67 days. Moreover, the savings clause of the agreement, Article VIII, provides that “this agreement is subject to the laws of the United States, the State of Minnesota and the County of Grant.” As such, the clear terms of PELRA would certainly take precedence over any verbal understanding made between the County and an individual employee.

5. The Union further argued that any such “agreement” would be patently contrary to the very underlying notion of collective bargaining – there are no side deals. Further, the grievance is the Union’s not any individual grievant. Thus, the fact that Ms. Shervey has indicated she did not want the Union to pursue this grievance is irrelevant as it is not hers to pursue. The Union argued most strenuously that this grievance is a matter of Union security and that a public employer may not subvert the provisions of the Recognition Clause of the Agreement and the whole notion of the collective bargaining relationship by striking a separate deal with individual employees.

6. The Union acknowledged that the County is not guilty of interference nor of anti-Union animus in this particular case that this is a matter of principle and of great importance to the Union since what we have here is a clear case of a person working in a covered position for more than the requisite number of days and hours to be considered a public employee under the statute. Under those circumstances, that person is covered and entitled to all contractual benefits.

7. The Union relied upon the provisions of Article 3.6 which provides as follows:

Article 3.6 REGULAR PART-TIME EMPLOYEE – A regular part-time employee is defined as a person receiving wages or a salary from Grant County on the basis of fifty-two weeks a year who works a minimum average of fourteen (14) hours per week or thirty five percent (35%) of the normal work week computed annually, and has completed the required probationary period.

8. The Union asserted that Ms. Shervey meets all these definitions since she clearly works well over 14 hours per week and has since her date of hire. Further, the person she replaced had worked the identical position on a full time basis for some 19 years and is doing the same job at the same location under the same supervision her predecessor did. There is no question that Ms. Shervey is a regular part-time employee under these provisions.

9. The Union further countered the County's argument regarding the probationary period and asserted that the County cannot avoid the clear provisions of the labor agreement and PELRA by implementing an arbitrary probationary period. Here, though it is clear that Ms. Shervey has in fact been working consistently for 34 to 36 hours per week since June of 2007. The County provided no documentation of any probationary period and it was clear that if there was a probationary period, she has long ago met that and is now nearly a full time employee in the Deputy Treasurer position.

10. The Union then turned to the provisions of Article 18.2 C and D in support of the claim that the grievant is entitled to either health insurance or the reimbursement provided for in those provisions. Those provisions are as follows:

Employees who are hired to work twenty (20) hours per week or more are eligible to participate in the Cafeteria Plan, if he/she so elects. Full time employees, as defined by this Agreement, shall receive the entire Cafeteria Plan contribution. Regular part-time employees, who are eligible shall receive a pro-rated contribution based upon the number of hours the employee was hired to work.

D. Effective January 1, 2008, the Employer's contribution shall be as follows: Six Hundred fifty dollars (\$650.00) per month (or the pro-rated portion thereof) to eligible employees who can show proof of coverage for medical insurance through the Group Plan or individual plan that meets the minimum benefits of Qualified Plan 62E.06 subd. 2. Number Two Plan. A plan of health coverage shall be certified as a number two plan if it meets the requirements established by Subd. 1 except that the deductible shall not exceed \$500.00 per person.

The Employer's contribution to the Cafeteria Plan shall be Nine hundred dollar (\$900.00) per month (or the pro-rated portion thereof) for single or dependent coverage to eligible employees.

The cost of the premium for single or dependent shall be pre-taxed.

11. Based on these provisions, the Union argued that Ms. Shervey is entitled to her pro-rated share of the \$650.00 called for in these provisions, since she has not elected to participate in the County's health insurance plan. The Union countered the County's claim that the benefits are only at her option, by asserting that the election for coverage is at her option but that the reimbursement "shall receive the entire Cafeteria Plan contribution." Thus, the Union asserted, the reimbursement is not optional and must be paid pursuant to the clear language of Article 18.2 C & D.

12. Finally, with regard to the question of timeliness raised by the County, the Union noted that the timeliness argument was literally raised the day before the hearing. Further, this case is in the nature of a continuing grievance and should be allowed even though the remedy may be limited.

Accordingly the Union seeks an award of the arbitrator ruling that the grievant is a public employee and is further covered as a regular part-time employee under the labor agreement and is entitled retroactively to any and all benefits provided for under the terms of the Agreement, including sick leave, disability insurance, vacation, holiday pay and medical and life insurance.

## **COUNTY'S POSITION**

The County's position was that the matter was not timely filed and is not arbitrable. Further, the County alleged that there was no contract violation since the grievant was hired with the specific understanding that she was a temporary employee with no benefits. In support of this position the County made the following contentions:

1. The County pointed out that the named grievant was hired in June of 2007 and that even the Union acknowledged that she reached the 67 day threshold in September of 2007 yet the grievance was not filed until May of 2008, well past the prescribed time period in the labor agreement. The County pointed to the provisions of Article 7.4 setting forth a 21-day time limit for the filing of grievances and argued that this case fell well beyond those limits and should be barred.

2. The County however acknowledged at the hearing that this argument was not raised until a day before the hearing in this matter and that under well-established arbitral precedent, the argument would likely not prevail under these facts. Accordingly, the County asserted that the matter could go forward on the merits.

3. The County asserted, that under the provisions of Article 18.2 C & D, any individual seeking to claim insurance or the reimbursement must elect to do so and that the grievant in this case has elected neither option. Her claim for these is therefore not arbitrable since under the undisputed facts she has not met the clear requirements for this benefit. Moreover, since her grievance was filed in May of 2008 any award of those benefits should be barred from a period prior to that.

4. On the merits, the County asserted that Ms. Shervey was hired as a temporary employee and that even though she does work more than 30 hours per week on an average basis and has worked more than 67 days she is not considered covered under the terms of the labor agreement. The definition of part-time employee requires that the employee pass probation and Ms. Shervey has never formally passed that. Thus, under the clear terms of the agreement, she does not meet the definition of a part-time regular employee and is not entitled to the protections and benefits of the labor agreement.

5. The County relied on the language of Section 3.7 defining “hourly employee,” as follows: “An hourly employee hired on a hourly/intermittent basis without any guarantee of hours. Policies and benefits listed herein do not apply to hourly employees unless specifically stated to the contrary.”

6. The clear understanding was that Ms. Shervey was hired as an hourly employee without any benefits. She has never sought them and in fact has indicated in the clearest terms that she does not want benefits nor does she even want to be in the Union. She has even gone so far as to write a formal letter to the Union asking the Union to drop her grievance. See County exhibit 7.

7. With request to the claim for insurance benefits, the County raised a separate argument based on the language of Article 18.2 C & D. The County asserted that in order to qualify for any such benefits, the individual must elect those benefits. Ms. Shervey has not only not elected health insurance but also has indicated that she does not want them at all.

8. More to the point, the language requires that the employee is only entitled to the health insurance benefits “if he/she so elects.” The County asserted that this language pre-empts the claim for any health benefits. Those benefits are optional and the County asserted that the Union cannot “require” any employee to seek optional benefits irrespective of whether the affected employee is covered under this Agreement or not.

9. The essence of the County’s argument is that Ms. Shervey was hired with the clear understanding that she was temporary hourly employee with no benefits and is in fact more appropriately covered by Section 3.7, which specifically excludes her from coverage under the labor agreement.

The County seeks an award of the arbitrator denying the grievance in its entirety.

### **DISCUSSION**

The facts were virtually undisputed; what was disputed was how the language of the Agreement and the operation of State law under PELRA impacted the outcome.

Initially, it must be noted that the named grievant did not appear at the hearing nor did she wish the matter to even proceed. Ms. Shervey even sent a letter to the Union asking that the matter be dropped. Having said that however, it was also clear that the Union brought the matter on behalf of itself essentially to uphold what it saw as the contractual requirements and the integrity of the Recognition Clause of that Agreement.

Ms. Shervey was hired as a Deputy Treasurer in June of 2007. She replaced a person who had held that position for some 19 years and the evidence showed that she performed the same job functions at the same location under the same supervision as the person who had held that job before her. It was undisputed that she works more than 30 hours per week on a regular basis and has since her date of hire, See Union exhibit 10, and that her hours have actually increased on an average basis over time. It was also undisputed that she reached her 67<sup>th</sup> day working for the County on or about September 17, 2007. There was no evidence of any probationary period being imposed or that she was ever told she would have to pass a probationary period.

The evidence further showed that when she was hired Ms. Soberg, the County Treasurer, told her that she would be a temporary employee with no benefits. The Union was not involved in those discussions and the evidence showed that this was a separate conversation between Ms. Soberg and Ms. Shervey and that Ms. Shervey accepted this as the terms of her employment. As noted above, she apparently has no desire to change that and does not wish to be in the Union. The evidence did show however that fair share dues have been deducted from Ms. Shervey's paycheck for several months and that the Union very much considers her a member and a covered employee under the labor agreement.

The grievance was filed on May 5, 2008. Initially there were two grievances filed; one to require the County to formally post the position pursuant to Article 11 of the labor agreement and the other to grant Ms. Shervey the status of a covered employee under the labor agreement and to all wages and benefits called for under the agreement. As noted above, the parties settled the posting grievance and have apparently agreed to post the position internally as a Union position. No further evidence was taken on that issue in this matter.

The question is now whether under these facts Ms. Shervey is a covered employee under the Labor agreement. By operation of both the clear language of the Agreement as well as PELRA it is clear that she is. Ms. Shervey clearly meets the definition under these facts of a regular part-time employees set forth above. She is working as a Deputy Treasurer and the parties both acknowledged that the position of Deputy Treasurer is a covered job classification within the labor agreement.

The County argued that Ms. Shervey is in reality an hourly employee subject to the provisions of Section 3.7 and asserted that the understanding was that she was hired without any guarantee of hours or benefits of any kind. The facts do not support that conclusion however. It is clear that Ms. Shervey is in fact working a regular schedule doing the same job as her predecessor and does not meet the definition of an hourly employee. Further there is nothing intermittent about her employment as the evidence clearly showed. While there was little evidence of negotiation history on this clause; it was clear that the plain meaning of the language when applied to these facts did not support the County's arguments in this regard.

The County raised the issue of a probationary period but this argument was without merit. First, there was no evidence that Ms. Shervey was ever given a probationary period. Second, she has been working on a regular basis more than 30 hours per week doing the job of Deputy Treasurer for two and a half years. On these facts, it cannot be said that she somehow has failed probation or that the probationary period is still in effect.

More importantly, an employer cannot avoid the effect of the statute and the labor agreement by simply continuing a "probationary period" indefinitely. To allow that would be to subvert the clear intent of the parties that the position of Deputy Treasurer be covered. Finally, and perhaps most importantly, once a public employee has worked 67 days, pursuant to PELRA that employee is a "public employee" under the statute.

The clear language of the savings clause noted above further strengthens the Union's argument that the grievant is subject to the provisions of the labor agreement once they have reached that threshold and are working in a covered position. Both requirements have been met here. Moreover, a review of Ms. Shervey's time records revealed that she has virtually always worked more than 14 hours per week and in most cases more than double that amount.

It was clear that Ms. Soberg's motives were pure and that when she was faced with the loss of the employee who had held the position for years, she needed to make sure that the public's work was completed. She then hired Ms. Shervey to get that work done. There was no evidence that she had any desire to undermine the Union or that she held any sort of anti-Union animus in any of this. However, all of that aside, a public employer is subject to state law and once the requirements of PELRA have been met, as they have been here, an employee who meets the statutory and contractual definition of a covered public employee and who is working in a covered position is subject to the requirements of the labor agreement. Here too the County acknowledged Ms. Shervey's status as a public employee under PELRA, see Union exhibit 5. Once that occurred, the rest of the pieces of the puzzle fall into place.

The next question is what benefits Ms. Shervey is entitled to having made the determination that she is a covered employee and entitled to the rights and benefits of the labor agreement. A review of the labor agreement itself reveals that sick leave, vacation pay and holiday pay are required. Article XV provides simply that "All employees shall be credited with one (1) day of sick leave for each month of service based on regularly scheduled hours." The remainder of Article 15 goes on to specify the details of how sick leave can be used and other matters not strictly at issue. The clear result here though is that Ms. Shervey is entitled to the benefits of Article XV as a regular part-time employee covered under the labor agreement.

Article XVI Holidays (16.1) provides that “the following days shall be paid holidays for all regular and probationary employees, based on their regularly scheduled hour.” The language goes on to specify the holidays and further provides for time and one half to be paid for all hours worked on a holiday. See e.g., 16.2. Again, the details of how and under what circumstances holiday pay is accrued and used were not strictly at issue but the result again is that Ms. Shervey is entitled to those benefits as a regular part-time employee.

Further, there was the question of vacation pay Article XVII provides that “All regular full-time employees shall earn vacation benefits according to the following schedule: (The language then specifies the accrual schedule). Article 17.6 provides simply that “regular part-time employees shall receive pro-rated benefits based on regularly scheduled hours.” The same sort of discussion applies here as well. Ms. Shervey is entitled to vacation benefits under Article 17 as a regular apart-time employee.

The Union raised these specific benefits, as well as health and disability insurance, and those will be discussed below. The ruling here for any other part of the labor agreement not specifically discussed in this Award is that Ms. Shervey is a covered employee and entitled to the benefits of the labor agreement as a regular part-time employee.

She is thus entitled to back pay for sick leave, vacation and holiday pay and any other benefit not specifically referenced in this Award (subject to the discussion of health, life and disability insurance set forth below) from the date of the filing of the grievance herein to the date of this Award. It was noted that Ms. Shervey became a “public employee” and was covered under the labor agreement prior to that time but the grievance was not filed until May 5, 2008. It is well understood that this is a continuing grievance as that term has been discussed by commentators and arbitrators throughout the years and that while the grievance is clearly not time barred despite the delay in filing, back pay awards are typically only awarded to the date of the filing of the grievance. See Elkouri and Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed, at pages 218-219 and FN 102.

One final question remains regarding medical and life and disability insurance. Here, while Ms. Shervey is clearly a covered employee under the labor agreement, the result is a bit different based on different contractual language. The language covering sick leave, holiday pay and vacation pay were all drafted to require that employees be paid certain prescribed benefits – they were not optional and the employee did not have to make any sort of election of coverage or take any further action. Once covered, the employees are entitled to those benefits pursuant to the applicable language. The same cannot be said for the medical insurance and Cafeteria Plan.

The County alleged that Ms. Shervey is not entitled to any benefits under Article XVIII, and specifically not section 18.2 C & D, since she has not elected to be covered. A close reading of the language reveals that this is a slight misreading of the language. The language as noted above in Section 18.2 provides that “Employees who are hired to work twenty (20) hours per week or more are eligible to participate in the Cafeteria Plan, if he/she so elects.” That clearly means that the employee must elect to be covered under the Cafeteria Plan and must elect to be covered by the County’s health plan. She has not done so and is not therefore entitled to County provided health insurance under that language and the arbitrator cannot therefore order that she be covered since she has not made the appropriate election.

If that were the only language in the Article the County’s argument would have far more merit but it is not. Section 18.2 C and D go on to provide as follows:

“Regular part-time employees, who are eligible *shall* receive a pro-rated contribution based upon the number of hours the employee was hired to work. (Emphasis added). 18.2 D. Effective January 1, 2008, the Employer’s contribution *shall* be as follows: Six Hundred fifty dollars (\$650.00) per month (or the pro-rated portion thereof) to eligible employees who can show proof of coverage for medical insurance through the Group Plan or individual plan that meets the minimum benefits of Qualified Plan 62E.06 subd. 2. Number Two Plan. . (Emphasis added).

The Employer’s contribution to the Cafeteria Plan shall be Nine hundred dollar (\$900.00) per month (or the pro-rated portion thereof) for single or dependent coverage to eligible employees

These provisions require that the County pay the health insurance up to \$900.00 as set forth in 18.2 D, or pay to the affected employee \$650.00 or the pro-rated portion thereof, to employees *who show proof of coverage for medical insurance* through another plan that meets the requirements of the Qualified Plan as set forth in the above cited language. Ms. Shervey has not provided that proof and under the clear terms of the language is not at this point entitled to those benefits. Accordingly, the arbitrator cannot award her a retroactive payment of \$650.00 per month since the language requires the employee to show proof of coverage under another qualified plan and she has not done that.

Having said that though, if Ms. Shervey does make the election to either take the County's coverage or to provide proof that she is covered by another plan pursuant to that language she will be entitled to the benefits provided for in the language. Obviously she will have to make that election but that benefit is out there for her and she will have to decide how much she desires not to be involved in the matter at that point.

A similar analysis applies to the disability insurance called for in Section 18.4. That language provides that "the County will pay up to the sum of \$3.15 per month toward the premium for disability insurance policy for each regular and probationary employee who qualifies for and is enrolled in the County's disability insurance plan." No evidence was provided on this question and it is not clear from the facts whether Ms. Shervey is qualified for this benefit or whether she must also take a positive step to enroll in it. Accordingly, no formal decision can be made on this issue other than to say that she is to be treated as a regular part-time employee as noted above. If she must make an election to qualify or must provide further information to qualify for the benefit that will again to up to Ms. Shervey to provide that information or to make that election before she is entitled to this benefit.

Finally, there is the question of life insurance. The applicable language at 18.3 provides that “the County shall provide \$3,000.00 in term life insurance for each regular and probationary employee.” (It was interesting to note this language even undercuts the County’s argument with respect to Ms. Shervey’s probationary status since it clearly applies even to probationary employees as well). Here though the real question is the appropriate remedy to be awarded. The parties gave the arbitrator the power to fashion a remedy. Certainly to require the County to pay for retroactive life insurance benefits would not make much sense so the remedy awarded for life insurance is that the County provides Ms. Shervey the life insurance benefit called for under 18.3 on a prospective basis going forward from the date of the Award.

To sum up then, the Award is that Ms. Shervey is a covered employee under the terms of the Agreement and PELRA as noted above. She is therefore entitled to retroactive back pay, if any, for any lost wages from the date of the filing of the grievance herein to the date of the Award. She is further entitled to any lost sick leave, vacation pay and holiday from the date of the filing of the grievance to the date of this Award and on a prospective basis from the date of the Award going forward. She is entitled to County provided life insurance on a prospective basis from the date of the Award going forward. Her entitlement to disability insurance, if any, is subject to the language of Section 18.4 and as noted above. Finally as noted above, Ms. Shervey is a covered employee for purposes of County paid medical insurance under Article XVIII and Sections 18.2 C & D but no back pay is awarded at this time for those benefits for the reasons stated above.

### **AWARD**

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above.

Dated: July 22, 2009

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Jeffrey W. Jacobs, arbitrator