

IN RE ARBITRATION BETWEEN:

LYON COUNTY

and

LAW ENFORCEMENT LABOR SERVICES

DECISION AND AWARD OF ARBITRATOR

BMS Case No. 10-PN-0925

JEFFREY W. JACOBS

ARBITRATOR

April 22, 2011

IN RE ARBITRATION BETWEEN:

Lyon County,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case No. 10-PN-0925
Jailer dispatcher unit

LELS

APPEARANCES:

FOR THE UNION:

Adam Burnside, Business Agent

FOR THE EMPLOYER:

Susan Hansen, Attorney for the County

Loren Stomberg, County Administrator

PRELIMINARY STATEMENT

The parties were unable to resolve certain issues concerning the terms of the collective bargaining agreement and requested mediation from the Bureau of Mediation Services. Negotiation sessions were held and the parties negotiated in good faith but were ultimately unable to resolve certain issues with respect to the labor agreement. The Bureau of Mediation Services certified 5 issues to binding interest arbitration pursuant to Minn. Stat. 179A.16, subd. 7 by letter dated September 15, 2010. This is the parties' first contract.

The hearing was held on March 18, 2011 at the Lyon County Government Center in Marshall, Minnesota. Post-Hearing Briefs were submitted to the arbitrator on April 1, 2011.

ISSUES PRESENTED

The issues certified at impasse and in dispute at the time of the hearing were as follows:

1. Wages 2009/2010 – General Adjustment 2009/2010 – App. A
2. Merit Adjustments 2009/2010 – App. A
3. Vacation – treatment of overage – Article 15
4. Holiday pay – Pay/hours awarded – Article 21
5. Retiree Health insurance – Appendix B

The parties were unable to reach agreement on any of the issues prior to arbitration. The parties dealt with these in slightly different order in their Briefs from the way they were listed in the BMS certification letter and from the way they were ordered at the hearing.

ISSUE 1 - WAGES – GENERAL ADJUSTMENT 2009 & 2010

UNION'S POSITION:

The Union's position was for a 3% general wage increase in the Merit Increase Grid for both 2009 and 2010. In support of the position for wage increases the Union made several arguments.

ABILITY TO PAY:

The Union asserted that despite alarmist claims regarding the economic downturn in recent years and the "bad" economy, the County could certainly afford the modest increases in wages the Union is seeking. The County has a 68% unreserved fund balance, which far exceeds the State Auditor's recommended 35-50% unreserved fund balance and could easily afford the modest increases in dollars this unit is seeking.

The Union countered the claim that this large excess fund was due to revenues brought into the County's fund balance in advance of the construction costs of a new jail. The Union asserted that there was no hard evidence of this and that if indeed these funds were secured for the express purpose of construction of a new jail they would not be listed as "unreserved" on the County's books. The Union thus asserted that the County is being disingenuous in its characterization of these funds and asserted that the County has ample money to pay for these requested increases.

The County noted that several arbitral commentators have expressed the view that labor, like any other commodity, must be purchased at a market rate. See Elkouri, and Elkouri, *How Arbitration Works*, BNA 6th Ed... Here even though the County does have the money it cannot simply plead "poverty" or that the taxpayers are angry about their taxes as a defense to a justifiable increase in the wages of these employees. If, as one commentator put it, the County needed a new truck it could certainly shop for the best price for it but in the end must pay what the truck costs and cannot expect a reduction in price simply because it does not have the money. It must either pay the price or go without the truck – just as any other consumer in the private market would have to. See Elkouri, at page 436.

PAY EQUITY

The Union asserted that Pay Equity is an important factor to consider and noted that if the requested increases were granted for both years the County would still be in compliance with the LGPEA. The underpayment ratio in 2009 is 147.7% - whereas only 80% is needed to pass under the LGPEA. In 2009 and 2010 even with the 3% increase it would be 168.8%. Obviously, the Union asserted, the increases do nothing to adversely impact the County's pay equity status.

EXTERNAL CONSIDERATIONS

The Union argued most strenuously that the pay structure for these employees should be maintained relative to other comparable jurisdictions around Lyon County. The Union compared the pay for these employees to the units in Cottonwood, Jackson, Lincoln, Murray, Nobles, Pipestone, Rock, Redwood and Yellow Medicine Counties. The Union noted that in 2008 these employees ranked second out of the 10 comparable counties. If the County's proposal were to be granted it would drop these employees to 5th in 2009 and 2010, substantially below where they should be in comparison to other County employees in the comparable group.

If on the other hand, the Union's 3% wage increase were awarded, the Lyon County jailer/dispatchers would retain, but not improve their relative position in comparison to other counties. Many arbitrators have noted that relative position is a sufficient factor to be used in determining what the parties would have negotiated had they been able to bargain their way to a collective bargaining agreement. It is also one of the statutory factors to be used under PELRA. The Union also noted that external comparisons should be used here even over internal comparisons since there are so few other employees in bargaining units and that those have not yet settled for 2010.

The Union pointed to other arbitration awards that use external comparisons as a significant statutory factor to be considered in making appropriate wage awards. The Union asserted that this is a significant factor and should be taken into account.

The Union argued that virtually all of the external comparison units received wage increases for both 2009 and 2010. The County noted that the average increases in these units for 2009 was approximately 2.60%. In 2010, the average wage increase for the comparable counties was approximately 2.25%. The Union asserted further that to deny wage increases for these employees would penalize them in comparison to other employees.

The Union countered the County's argument too on retention and attraction of employees by noting that the mere quantity of applicants for job openings is not meaningful. The quality of applicants is a factor as well – certainly if 100 applicants apply for one opening that may look good for purposes of explaining the wages and benefits for that job but if only a few of them are remotely qualified, that tells a very different story. Here while there was a large pool of applicants for recent openings, there was no evidence as to how qualified any of them were for these specific jobs.

The Union argued with regard to the merit pay increase issue, that many awards around the State of Minnesota have indeed awarded increases for 2009 and 2010. Thus, the County's argument that the "economy is in a shambles" should be rejected as well. While the County spent considerable time discussing the world and national economy. The Union argued that the arbitrator should award 3% and 3% in 2009 and 2010 due to the external market.

INTERNAL COMPARISONS

Initially, the Union noted that there is no truly strong pattern of settlements in Lyon County since so few of the employees are represented by Unions. Further, to say that there is a "pattern" for purposes of interest arbitration based on what the non-Union employees are forced to take by the employer is to render meaningless the requirement of collective bargaining. Non-Union employees have little to no power and must take what they are offered or leave it. Thus these wage "settlements" should be given little or no weight by interest arbitrators.

The only other unit to have settled in 2009 is the deputies. Further, the County actually signed that contract in September 2009 and cannot now assert that they were somehow constrained to pay their wage/merit pay increases in 2009 and 2010 because "there was a contract." The County knew well what the economy was like by September of 2009 and should its argument now should be rejected.

As the arbitrator indicated in *City of Shakopee and LELS*, BMS 10-PN-0959 (Lundberg 2010), where there is only one other unit represented by a Union, "there is no wage settlement pattern that can be referenced." See also, *LELS and City of Inver Grove Heights*, BMS 10-PN-1058 (Schiavoni 2010). Here the Union asserted, there is no internal pattern that can be referenced and that the more significant factor here should be the external comparison and the wages granted to those external groups. The Union noted that many other arbitrators have rejected the argument by public employers that there is a pattern of settlements in very similar situations.

CPI/OTHER CONSIDERATIONS

The Union pointed to the CPI and noted that the CPI of the Midwest has increased by 2 to 2.3% at least, making the County's 0% proposal all the more unreasonable. Further, while the County has seen decreases in funding from the State of Minnesota the County made conscious choices not to increase its levy even though real estate values stayed stable.

Further, the Union countered the County's claim that its jailers/dispatchers get to the top of the pay scale faster than other comparable employees in other counties. The Union noted that no employees in this unit are at the top of the pay scale and that the County's claims were inaccurate.

The Union asserted that the increases in CPI as well as these other economic factors demonstrate the equity in increasing the wages as the Union suggests and that the County has ample ability to pay these modest increases to keep these employees' wages competitive with the market.

COUNTY'S POSITION

The County's position is for a 0% increase in wages for 2009 and 2010. The County made the following arguments in support of this position.

ECONOMIC FACTORS:

Generally, the County asserted that it is faced with unprecedented economic pressures and deep cuts in its budget by the State. The County argued that one simply cannot ignore the economic situation in the State and indeed the entire country and that it would be irresponsible for the arbitrator to do so either.

The County pointed to a record \$6.2 billion that has yet to be funded and noted that local units of government will have to bear the brunt of additional cuts in aid from the State. The County asserted too that the taxpayers cannot continue to bear the burden of tax increases and that the arbitrator must take this into account. The County further asserted that even though there has been a slight recovery in the state of the economy nationally, the standard is to determine what the County would have negotiated at the time – i.e. 2009, immediately after the economic recession that began in the Fall of 2008. There is no question that the economy then was quite depressed and that no one was getting wage increases. Indeed many were simply happy to have a job at all.

The County pointed to multiple awards by other arbitrators who have recognized the serious financial crisis facing the State and the County and have awarded 0% in wages in many other jurisdictions. The County noted that the severe economic times results in a very slow growth of the CPI; which is yet another reason not to award the Union's request and to award the County's proposed 0% increase. The County asserted as a backdrop to the case in general, that one would have to be completely out of touch with the economic reality of our current times to ignore the brutal economic times in which we find ourselves. The economy must drive these decisions and the economy has not recovered sufficiently to warrant such large requests by this or any Union in the County.

The County noted that it has lost \$718,171 in unallotments since 2008. See County exhibits 15, 17 and 18. Its income from investments has also declined due to the drop in interest rates and their revenues also declined at the same time. The County asserted that it, along with many other local units of government throughout the State of Minnesota are in the vortex if a perfect storm of economic problems – they have seen the value of their property fall, their taxpayers are complaining bitterly about the taxes they pay and have demanded reductions in them or at the very least to keep them stable, they have lost income from the State and a general loss of the ability to raise revenue to fund its operations. The only option is to curtail wage increases and to defer projects to save money.

The County argued as well that the County Commissioners regularly hear from taxpayers who are concerned about the economy in general, their tax burden and their own situation. They expect that the County will do everything it can to hold down costs and to maintain a balanced and reasonable budget that minimizes the burden on constituents. The County asserted most strenuously that it is acting responsibly to contain these costs and has been consistent with its employees in its proposals.

INTERNAL CONSIDERATIONS

The County pointed out that most arbitrators use internal consistency as the most significant factor in determining interest awards and cited multiple awards where the arbitrators ruled that internal consistency is the main driving factor behind interest awards on wages as well as other fringe benefits and language changes. The County further asserted that these arbitrators have also noted that internal consistency is essential for equity and the morale of the employees. Further, if one unit “whipsaws” the County it will create dissension among the units and will virtually guarantee that other employees will request arbitration, as opposed to voluntary settlements. Such an award will thwart PELRA's policy in favor of voluntarily negotiated settlements.

Here the County noted that the deputies as well as all other employees accepted a 0% general wage increase for 2009 and 2010. To deviate from that would create all the problems these other arbitrators outlined and would create considerable disharmony within the County. The County asserted that this Union seems to want to benefit by glomming onto the money the County saved through the wage agreements reached with the other units.

While interest arbitration is a statutory right, the main purpose of PELRA is to encourage voluntary resolution of labor disputes and to achieve agreement through negotiations rather than arbitration. Here the County argued most vehemently that it would never have agreed to the wages sought by this Union under these circumstances and that the main tenet in interest arbitration must always be to determine what the parties would have negotiated for themselves had they been able to do so. Here there is virtually no possibility in this economy that this Union would have staged a successful strike over this issue, especially when the County's largest units, AFSCME and IBT #320 have already settled on their wage agreements for the coming years. Thus by all measures, the internal comparisons compel the County's position here.

The County pointed to the pattern of awards over time within this County and asserted that internal consistency has traditionally been the most important factor in determining wages among the groups in Lyon County. The County cited the prior awards of Arbitrators Miller and McCoy, who rendered awards in 2002, 2005 and 2006 between Lyon County and the LELS deputy unit, both of whom ruled that the County and LELS have continued to adhere to the past practice in an essentially consistent fashion whereby all County employees including members of the LELS unit have been covered by the uniform County-wide merit pay system and have received the same wage increase. See, County Exhibits 59-60.

The County distinguished several recent awards that have granted wage increases of as much as 3%. In *City of Brainerd and LELS*, BMS 09-PN-0550, the County argued that the case was the first such interest award that arbitrator has handled and argued that the basis of the award was suspect because he ruled that the CPI was 2.7% when in fact it is 0.6%. Further, the County argued the award demonstrated a lack of familiarity with Minnesota's economic reality and prevailing arbitral standards.

In *LELS and Coon Rapids*, BMS 10-PN-0861 the County argued that the arbitrator's factual assertions were suspect because he seemed to indicate that the recession was not as bad as it really is and because he found that external considerations were more important than internal ones. As noted above, the County asserted that the great weight of arbitral precedent is that internal considerations have always been found to be the most significant factor(s) in determining appropriate interest awards.

The County argued that the award in *LELS and City of Edina* BMS 10-PN-1183 was simply an aberration on every level. The award there seemed to be based on the arbitrator's mistaken belief that because the City of Edina does not receive LGA from the State of Minnesota, an award of three times the rate of inflation must somehow have been acceptable. The County also asserted that the arbitrator there ignored any pattern of internal settlements and was therefore patently contrary to the great weight of arbitral precedent with the labor relations community in this area and should be disregarded.

The County noted that the pattern of wage settlements for 2009 and 2010, including the negotiated settlement for 2009 for the LELS deputies was a 0% increase. The County asserted too that the 2010 pattern has also been a 0% increase and that the arbitrator should respect that internal pattern.

The County also corrected the Union's claim that certain elected and appointed officials received wage increases in 2009. Elected officials did not receive increases in 2009 but were eligible for merit increases in 2010 similar to other County employees. The County noted that this is also consistent with the merit pay position for 2010 and countered the Union's position regarding merit pay increases and wage increases for 2009.

The County also argued that breaking the internal pattern of settlements and wage awards would have a significant ripple effect and create a situation where all the other units will seek interest arbitration. PELRA encourages voluntary settlements and other units will expect a similar award if the Union's request is granted. This will of course have significant cost impacts on the County far beyond the dollars at stake here. The County noted that the Sergeants unit was certified in December 2009 and is still in the process of negotiating/arbitrating their contract. Any award here will certainly be the basis of an argument for that unit as well as any others who will want a similar award.

EXTERNAL CONSIDERATIONS

The County argued that external considerations should be given little if any weight. Further, the County asserted that Lyon County jailer dispatchers are paid a generous wage that is \$0.15 higher than the average of the comparable counties in the comparison group. The County also noted that its jailer dispatchers reach the top wage rate much faster than those in other counties.

Moreover, the County noted that its proposal is to grant merit increases in 2010, which could well result in wage increases of between 3.61% and 7.73%. See County Exhibits 51-52. This exceeds the percentage increase in any of the comparison counties. See County Exhibit 66. The County continued to argue that even if its 2010 position were awarded, the wages in Lyon County would still be competitive with the wages in the comparison counties.

The County further noted that its attraction and retention rates are quite high and that when it recently posted an opening for a position in this unit 66 applicants applied for it. Obviously, according to the County, if its wage and benefit package were not competitive one would not expect to have such interest in the position.

CPI/OTHER ECONOMIC CONSIDERATIONS

THE County asserted that the CPI should have no impact on this determination. The County asserted that the CPI for the period for 2009 was 0.6%. There is thus no reason for a 3% increase in wages – nearly 5 times the CPI.

Further, the County noted that even though inflation for 2010 is rising at 2.0%, the County's proposal is to grant merit increases for 2010, which will more than make up for any CPI increase, as noted above. See County Exhibit 29, which is a database for all urban consumers from Bureau of labor Statistics showing the CPI for both 2009 and 2010. .

The County asserted that when one considers the ability to pay, internal and external considerations and the true economic factors at play here, there is no justification for an increase in general wages for either 2009 or 2010.

DISCUSSION – WAGES 2009 AND 2010

To be sure, there were factors that cut in both directions on this record and both parties did an admirable job of pointing those out. The factors considered will be discussed separately below.

ABILITY TO PAY

Much was made of the economic conditions in the County and whether the County has the money to pay for the requested increases. The County presented considerable evidence regarding the loss of property values, the loss of aid from the State of Minnesota and the pressure on the County Board to keep taxes low by cutting costs in every possible way. Certainly, the general economy is relevant to this consideration as well. See County exhibits 9 through 29. These exhibits show that the economy around the State of Minnesota is still in a recession and that economic growth has yet to recover.

Further, it is clear that Lyon County, like many other local government units throughout the State, has experienced a loss of revenue from investments, a drop in property values and a decrease in economic activity. More to the point the County faces pressure from the taxpayers to lower costs and to “hold the line” on wages and other costs in order to maintain services.

The Union noted that the County’s unfunded reserves are well above the recommended amount by the State Auditor but the evidence showed that some of this was related to amounts set aside for a new jail facility and related therefore to capital costs rather than operational expenses.

Still though the County is doing relatively well, has reserves and the tax capacity to afford these costs even if the Union’s requested wage increases were awarded. Clearly, the County has the financial wherewithal to pay for the Union’s requested increase. That however is not the question. The question is not so much whether it *can* pay for the requested increases but rather whether it *should* be compelled to pay the requested increases based on internal and external considerations as well as cost of living and economic conditions.

On balance, the question of ability to pay is of very little evidentiary weight either way. The determination will depend on other factors on this record.

PAY EQUITY CONSIDERATIONS

First, the question of pay equity on this record was relatively non-controversial and was not a controlling factor. The evidence showed that the Union’s proposals would not result in non-compliance under the LGPEA and the Union asserted that under these unique facts granting the increases might actually bring the County more into compliance with the LGPEA. That fact alone does not control the result however. That requires a combination of factors, including pay equity.

As always in this type of determination the issue is to determine what the parties would have negotiated for themselves. The mere fact that the requested increase would not take the employer out of compliance, while certainly relevant, is not controlling. Obviously too, a request that *would* take an employer out of compliance with the LGPEA would constitute a far more significant consideration and be a significant factor in favor of the employer but no such evidence was presented here.

On balance this factor was neutral as well. Pay equity was certainly considered but on this record was not persuasive one way or the other. Other factors were far more significant.

CPI AND OTHER ECONOMIC CONSIDERATIONS

Second, there is the question of the CPI and other economic considerations. The CPI information showed that the relevant CPI on this record was 0.6% for 2009 and approximately 2.0% for 2010. The rate of inflation was therefore relatively low, as compared to longer historical periods.

The Union disputed some of the information presented by the County regarding the rate of inflation and whether the information provided by the County was relevant to Lyon County. Statistics of this nature are perhaps some of the most amenable to interpretation of any provided by the US Government. There are frequently arguments about whether the All Urban Consumer Index, as opposed to some other index, is appropriate for a county like Lyon County Minnesota. There is almost always some uncertainty about what the “correct” CPI index is. Certainly, the evidence showed that the CPI, whether the one used by the County is “more” relevant or not, has not been terribly volatile over the past few years and has remained relatively flat. Certainly too there was no evidence that the CPI in Lyon County has been significantly different than in other parts of the State or the country. On this record, while the CPI is a factor to be considered it was not given great weight in support of the Union’s claim and by a slight preponderance supported the County’s proposals.

The more interesting and relevant consideration was the overall economy and there was considerable information on that. The County pointed to a recent decision by Arbitrator Fogelberg in *Metropolitan Council and Teamsters Local No. 320*, BMS Case No. 09-PN-833 (Fogelberg, 2010), pp. 6-7 who noted as follows:

One would have to have been in a coma for the past few years in order to legitimately claim ignorance over the current economic condition. Not only in this state, but nation (if not world) wide. It is not necessary then to expound upon the eroding economy here. Suffice to say that the existing recessionary climate in which public employers operate today, and the relative hardships that this has caused and continues to cause, heightens the arbitrator's consideration of the statutory mandate of public employers to, "... efficiently manage and conduct their operations within the legal limitations surrounding the financing of (their) operations."

While it is not really necessary for one to have been in a coma, it is clear that the overall economy is radically different than it was even 5 years ago and shows some signs of recovery but has clearly not recovered to anything approaching the robust growth and overall optimism present prior to late 2008. While most Americans retain great hope for the promise of a recovery soon, the reality that it will take far longer than anyone anticipated and that we will at some point start having to live within our means, spend less than we make and return to a period of greater scrutiny of expenses at every level is beginning to slowly but surely sink in.

The evidence on this record support the conclusions set forth above and again support the County's position with regard to a general wage increase.

EXTERNAL CONSIDERATIONS

Here the evidence supported the Union's claims and frankly made this case a very close and a very difficult call indeed. The clear evidence showed that all of the surrounding comparable counties granted wage increases for both 2009 and 2010. See Appendix to Union Brief. The relative ranking of these employees compared to the 8 comparison counties noted above shows that over time they have been second among the group.

While internal comparisons and considerations are relevant, and will be discussed below, external considerations are also relevant. That is especially true where there is no strong pattern of internal settlements.¹ As will be discussed further below, the fact that the County's position would drop the relative position with regard to the comparable counties and the fact that all of those other counties granted wage increases in both 2009 and 2010 provided a stark contrast to the internal comparisons within Lyon County.

The County compared the hourly wages rather than the top wage rates, See County exhibit 63 and 64 and noted that the Lyon County wages are \$0.15 per hour higher than the average of those wages and only \$0.19 per hour lower than the average of those wages for 2010 if the County's 0% proposal is granted.

¹ The County relied heavily on *Hennepin County and Hennepin County Deputy Sheriff's Association*, BMS Case No. 10-PN-0776 (Jacobs, 2010) and other cases where the arbitrators found in favor of the employers and where there was strong evidence of an internal pattern of wage settlements. The distinguishing factor in *Hennepin County* and many of the other cases cited by the County in this matter is that there was such a pattern. In *Hennepin County* for example, the evidence showed that there were literally more than a dozen prior settlements with other units and other Unions within the County and that the Union involved in that matter was one of if not the last such unit to go to arbitration. They were thus bucking a consistent internal pattern of wage settlements that would have placed that unit in a substantially better position than all other units. It would also have placed the County in the difficult position of having to justify why a wage increase was granted to only one of many units. There was little question on that record that the parties would not have negotiated a wage increase in light of and in the face of all those other settlements for 0% increase.

The Union compared the top wage rates and noted that the relative position would fall from 2nd position in 2008 to 5th in 2009 and 2010 if the County position were awarded. If the Union position for 3% and 3% is awarded the Lyon County jailer dispatchers will retain their relative position but not improve it.

It was also quite clear that there is no pattern present here as there was in Hennepin County, supra, or in many of the other cases cited by the County in support of its case. There is one other represented unit that has a signed contract for 2009 and none have a signed contract for 2010. Apparently there are other units that have been certified by the BMS but they too are in the process of negotiating their contracts. Thus on this record, the same policy that might otherwise apply to internal patterns simply does not apply.

On balance this factor clearly weighed in favor of the Union. The question now is whether on these facts and with the history present in the County whether the need for internal consistency outweighs the external factors at play in this case.

INTERNAL CONSIDERATIONS.

As noted above, there is one other unit, the deputies, that have a collective bargaining agreement. While the County argues that the pattern should include the wages paid to the non-Union employees as well, evidence of what the non-Union employees receive is of much less evidentiary weight than what is being paid to the Unionized employees. There is some merit to the argument that non-Union employees have little or no bargaining power and must therefore take what is offered. Certainly there is a market at work and every employer, both public and private knows that they must pay competitive wages and benefits or risk losing valuable employees, there was little evidence of that sort of problem here.

The County noted that there are plenty of applicants for an opening within this unit recently; i.e. some 66 applicants for one opening. There was however little evidence of whether those applicants were in fact qualified for that job. One might also surmise though that if they were not qualified and were simply people desperate for a job, any job, what that says about the general economy. On this record there was insufficient evidence to draw any hard and fast conclusions about what that number of applicants might mean. What was clear was that there was insufficient evidence that people in these positions are seeking other positions thus showing that retention is not a problem.

The evidence submitted by the County in its Wages information, showed a clear and consistent pattern over time of the same wage increases for the non-Union and the represented units in Lyon County. From 2005 to 2009 the wage increases were the same. As noted above, while the non-Union settlements are of lesser evidentiary value, it was clear that the awards and/or negotiated settlements with the represented units closely mirrored those other wage awards.²

² The County argued that if the Union's wage request is awarded here it will provide a basis for other units to seek the same award for their employees. That argument is not persuasive on these facts. The mere fact that others may want the same thing is not generally a major factor to be considered in making such an award. If there is justification for such an award for a particular unit then that is the award that should be rendered based on all of the factors that are being considered here. The fact that it may cost the employer a little more is not a controlling factor as long as the other factors support such an award. Accordingly, this argument was given little weight but given the award on wages here, it was not of great consequence. When considering the merit pay award however it will as the internal consistency argument there, as will be discussed further below, works in the Union's favor in that issue. The fact that the County may or may not have budgeted for it does not control the determination.

More to the point, the only other bargaining unit to settle for 2009 was the deputy unit, also represented by LELS, and that showed a 0% increase for 2009. There was no evidence of how the deputy unit compared to any comparable external units but it is clear on this record that this is a significant fact in determining what the parties would have negotiated had they been able to voluntarily settle their contract.

After a consideration of all the factors here, including the external comparisons, the greater weight of the evidence here supports the County's position on wages. As noted this was a close call and the relative ranking of these employees should be taken into account by these parties and/or an interest arbitrator. While internal comparisons are important, one cannot completely ignore external market forces and it was clear that the comparison group did grant wage increases to its jailer/dispatch employees and at some point that will have to be adjusted, even though on these unique facts the weight of the evidence, including the internal settlement with the deputy unit, supported this result.

AWARD ON WAGES FOR 2009 AND 2010 APPENDIX A

The County's position is awarded

ISSUE # 2 - MERIT ADJUSTMENTS - 2009/2010 – App. A

UNION'S POSITION

The Union's position is for merit pay increases for both 2009 and 2010. In support of this position the Union made the following contentions:

The Union pointed to many of the same arguments it made regarding its position for 3% and 3% in 2009/2010 for general wages increases and those will not be repeated here. The Union asserted that the deputy unit has merit increases in its contract and that this should be granted to this unit for the very same internal consistency reasons most often raised by the County, and other public employers around the State for that matter.

The Union pointed out too that the 2009 contract with the deputies was finalized in September of 2009. Accordingly, the County's argument that it had to pay these because it "had a contract" is disingenuous. The Union also pointed out that the fact that none of the other non-represented units in Lyon County were granted merit pay increases is of no consequence because they have no bargaining power at all. If one uses the standard of what the parties would have negotiated for themselves the truest measure of that is what was voluntarily negotiated by these same parties for similar employees.

COUNTY' POSITION

The County's position is for no merit pay increase for 2009 but a merit pay increases as determined by appraised performance level for 2010. In support of this position the County made the following contentions:

The County too made many of the same arguments with respect to this issue as they did for the general wage issue and those will also not be unduly repeated. The County asserted that the 2009 and 2010 Lyon County budgets were predicated on 0.0% general wage increase and no merit increases in 2009 and merit increases in 2010. This applied organization-wide to Commissioners, the County Administrator, department heads and elected officials, i.e. Sheriff, County Attorney, Auditor/Treasurer and Recorder and non-Union employees. The County argued that there is a pattern of settlements that should be applied. Even though the deputy unit received merit increases, they are the only employees in the entire County to receive these. Granting the Union's request for merit increases in 2009 would set a dangerous precedent and compel other units to seek the same thing and would result in a vast difference in merit pay as between employee groups. Arbitrators should avoid such a result.

DISCUSSION OF MERIT PAY 2009-2020 – APPENDIX A

The parties made many of the same arguments here, and indeed combined these issues in many of their arguments, so these will not be repeated here. Suffice it to say that both the Union and the County raised virtually the same arguments with regard to its financial capacity and ability to pay.

The Union argued too that externally, the Lyon County wages would lag behind the comparison counties and should be adjusted. Granting a merit pay increase in 2010 might accomplish some of that(although there was no evidence as to how much on this record) but granting a 2009 merit pay increase would help to rectify what was clearly an issue as discussed above.

Further, and much more to the point, the internal consistency argument raised by the County was precisely what carried the day for the Union on this record. Here the deputy unit received a merit pay increase as a result of a voluntary settlement of the contract in 2009. Moreover, that contract was signed on September 1, 2009. The County cannot therefore argue that it was somehow constrained to pay this because it was locked into a contract.³

On this record, both internal and external factors support the Union's claim for merit pay increases for 2009. Finally, the parties appeared to be in agreement for 2010 that the employees would receive merit pay increases based on appraised performance levels. Thus the award will reflect the Union's position for 2009 and the merit pay increases for 2010 as well.

AWARD ON MERIT INCREASES – 2009-2010- APPENDIX A

The Union's position is awarded for 2009. Merit pay increases are awarded per the County's position for 2010.

ISSUE #3 - VACATION – TREATMENT OF OVERTIME – ARTICLE 15

UNION'S POSITION

The Union's position is to allow employees who have in excess of 240 hours of vacation leave to use those hours and not lose them. In support of this the Union made the following contentions:

The Union pointed out that as many 3 members of the bargaining unit have accrued vacation amounts grater than 240 hours and would be forced to use those or lose them if the County's position is awarded.⁴ These employees have accrued these over many years and have worked very hard for the County and should not be penalized by having worked rather than taking vacation.

Moreover, at least one of the employees has many more than 240 hours and, under the County's proposal would have to use up over 10 weeks of vacation in less than 20 months. This will not only cause both disruption within her department but also result in accrued overtime or other accrued time for the people who will have to cover for her.

Further, other employees are close to the 240 hours threshold and will be nearly there by the end of this year. Those employees will soon be in the same situation and the Union asserted that it is manifestly unfair to require them to use this before some arbitrary date set unilaterally by the County.

³ Obviously if the 2009 merit increase had been part of a multi-year contract signed *prior* to the economic recession of 2008 and 2009 was the final year of that contract, the result might have been different. Such was not the case however, as noted above. On this record, the fact that the non-Union employees received no merit pay increase in 2009 does little to aid in the determination of what represented parties would have negotiated as part of a collective bargaining agreement.

⁴ As of the hearing only one bargaining unit member had more than 240 vacation hours accrued but the Union continued to argue that the employees should be allowed to accrue more than 240 hours after an arbitrary date set by the County.

Finally, the deputy contract contains no such cap on vacation accrual nor any requirement that the overage be used up or forfeited by some employees on an arbitrary date. Internal consistency within these units, both of whom work in similar environments and who are represented by the same Union, should be respected. Moreover, the County offered no quid pro quo or other concession for this and offered very little in the way of a compelling reason to change what has been longstanding County policy on vacation accrual.

COUNTY POSITION

The County's position is for language as follows:

Article 15.1. Employees may accrue up to a maximum of 2 hours of vacation

Article 15.2. Employees with vacation accruals greater than 240 hours shall be allowed to remain at those accrued level until December 31, 2012 or their vacation accrual decreases to 240 hours, whichever occurs first. The 240-hour vacation accrual maximum will apply thereafter. Any vacation accruals greater than 240 hours after December 31, 2012 shall be forfeited by the employee.

In support of this position the County made the following contentions:

The County noted that there is only one employee currently who even has more than 240 hours of accrued vacation. Further there were others who very quickly were able to use their accrued vacation to get under the 240-hour threshold. This is thus hardly an onerous requirement and the employees should easily be able to do it even if they have more than 240 hours accrued currently.

DISCUSSION – VACATION ACCRUAL – ARTICLE 15

The most compelling piece of evidence on this issue is the fact that the deputy contract does not contain any such language. Further there was no compelling reason put forth as to why this needed to be changed other than administrative convenience in bookkeeping and perhaps some cost savings.

However, in a situation such as this, the very internal consistency argument put forth by the County on other matters works to support the Union's claims here. This frankly is a matter for the parties to negotiate rather than to be imposed by an interest arbitrator, especially where it is clear that the other represented unit has no such language or arbitrary cap on vacation accruals.

Further even though it might well be relatively easy for these employees to spend down their accrued vacation and that there may only be a very few employees to which this issue applies, perhaps even only one, it might work a forfeiture on some effective December 31, 2012. Even though this is an interest matter and not one of contract interpretation in a grievance setting, arbitrators should be wary of imposing requirements that work a potential forfeiture on either party unless there is a compelling reason for that or a clear quid pro quo shown in exchange for such a clause in the contract.

Accordingly, in light of the foregoing the Union's position will be awarded.

AWARD – VACATION OVERAGE – ARTICLE 15

The Union's position is awarded.

ISSUE #4 -HOLIDAY PAY – PAY/HOURS AWARDED HOLIDAYS - ARTICLE 21

It should be noted that there were really two issues involved here – the first was the number of holidays and floating holidays and the second was the question of double time pay for hours not worked on a specified holiday. These will be dealt with together but awarded separately.

UNION'S POSITION

The Union's position is first to add Columbus Day to the existing list of specified holidays⁵ currently agreed to by the parties. The Union proposed an "alternate solution, which would be to add Columbus Day but award only one floating holiday since currently there are 9 specified holidays and 2 floating days, for a total of 11. The proposal to have 10 specific holidays and 2 floating days would be 12 which would be more than the rest of the sheriff's department receives, but not more than many of the external comparables.

The Union asserted that either solution would be fair since many of the external comparison counties have a similar scheme. Further, the deputies have Columbus Day and one floating holiday, so awarding that would alleviate any claim to inequitable treatment within the department.

The Union's second position on the holiday issue is to continue the past practice of paying employees double time for hours not worked on holidays.

In support of this position the Union claimed that there has been a longstanding practice to pay employees double time for hours not worked on a holiday. Currently, employees receive 8 hours of pay and 8 hours of compensatory time if they are scheduled to be off on a specific holiday. In addition, if they work the holiday they receive time and one half pay for all hours worked on the holiday. The Union claimed that it is preposterous that the County "did not know" this practice was occurring since Sgt. Roelfsema sent a memo to the affected employees in 2007 describing exactly this process and even instructing employees how to fill out their time sheets. See Union tab on holidays, memo dated 12-26-2007.

The Union argued that this practice has been in place for well over ten years and should be memorialized in the contract as a binding past practice. The Union further argued that the County cannot now be allowed to take this benefit away without compensation of some sort, especially since this is a first contact. There was no quid pro quo for it and the County cannot legitimately claim ignorance of it.

COUNTY'S POSITION

The County was opposed to the addition of Columbus Day as a specified holiday. The County also took the position that there should be two floating holidays so that the total number of holidays is the same as for the deputy unit.

The County pointed out that granting the Union's request for the addition of Columbus Day and two floating holidays sets up a completely inequitable situation whereby the jailer dispatchers get 12 holidays where every other employee in the County, including the deputies would get only 11. The non-essential employees do not get Columbus Day and the County asserted that these employees have provided no reason whatsoever that they should be treated more favorably than other County employees in this respect

Externally, the County took issue with the Union's claim that other counties provide 12 holidays. See County exhibit 74, which shows that only Lincoln County employees get 12.5 holidays. Rock County employees get 11.2, since they get 2 hours on Christmas Eve. The rest of the counties in the comparison group receive 11 or fewer. Thus the County argued, the external comparisons should not be used at all since external comparisons for benefit of this nature are inappropriate and do not support the Union's claims on his point anyway.

⁵ The parties were able to agree as part of the tentative agreement herein to the following list of specific holidays: New Year's Day, MLK Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving and Christmas Day. In addition, they agreed that there should be two floating holidays.

With regard to the question of double time pay, the County's position is that this practice should be discontinued and replaced with language as follows:

Full time employees scheduled to work on any of the following nine (9) days shall receive one and one half their regular rate of pay. Full time employees not scheduled to work on any of the following days shall receive eight (8) hours of holiday pay for each of the following days:

| | |
|-------------------------|-------------------------|
| <u>New Year's Day,</u> | <u>Independence Day</u> |
| <u>MLK Day,</u> | <u>Labor Day</u> |
| <u>President's Day,</u> | <u>Veteran's Day</u> |
| <u>Memorial Day,</u> | <u>Thanksgiving</u> |
| <u>Christmas Day.</u> | |

In addition, all full time employees of the bargaining unit will receive two (2) floating holidays per calendar year to be scheduled with their supervisor. This floating holiday cannot be accrued or carried over to the next calendar year.

The County points out that the language cited above does not provide for compensatory time for hours not worked on a holiday. The County asserted that the practice of paying people 8 hours of pay plus 8 hours of compensatory time for not working is ludicrous and contrary to County policy. The County claimed that once they found out about this practice they immediately put the Union on notice in negotiations that it would seek to stop this practice and would insist on contractual language as described above.

The County asserted that once it put the Union on notice that it would insist on stopping this practice during negotiations and would insist on compliance with the language of the Personnel Policies, the Union has the burden of proving compelling reasons to justify why employees should be eligible to receive double time for holidays not worked. The County asserted that it would be putting all other units on notice of this change and will be seeking similar language discontinuing this practice.

Finally, no external comparison county has language or a practice similar to this and the practice should not be allowed to exist in clear contravention of existing County policy.

DISCUSSION OF HOLIDAY PAY – PAY/HOURS AWARDED HOLIDAYS - ARTICLE 21

NUMBER OF HOLIDAYS

The first issue pertains to the number of listed holidays. The internal pattern here is a mixed bag. The non-essential/non-Union employees get New Year's Day, MLK Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving and Christmas Day but do not receive Columbus Day. They also receive two floating holidays, for a total of 11 holidays.

The deputies, also represented by LELS receive New Year's Day, MLK Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving and Christmas Day and Columbus Day but receive only one floating holiday. This totals 11 holidays.

First, there is no justification for granting both Columbus Day and 2 floating holidays. That results in an award of 12 holidays when no other employees in Lyon County would get that many. There was no evidence presented that supported this position and internal consistency alone governs this issue.

The choice is thus between these two remaining options. Internal consistency is the most relevant factor.⁶ The difficulty is that there is no true consistency here. The non-Union employees get 9 specific holidays and 2 floating days while the deputies get 10 specific holidays and 1 floating day. Here, the deputies are a more relevant internal comparable, both because they are represented and because they are essential. Thus, the award is for the same language in the deputy contract.

DOUBLE TIME FOR HOURS NOT WORKED ON HOLIDAYS

This was a more difficult issue. The County knew about this practice. See 12-26-07 memo in the Union's exhibit book. Clearly too this would constitute a binding practice if this were a grievance matter. Just as clearly, even a binding past practice does not need to go on forever and may be repudiated by a party seeking to discontinue it. Proper repudiation of the practice shifts the burden to the party seeking to continue it to place language in the contract supporting the practice.

The trouble here is that those principles apply to a grievance case wherein one party grieves the elimination of a practice after there has been a proper repudiation of it during negotiations *and* there has been a new contract executed between the parties. The distinction is that there is no contact between these parties and never has been – this is a first contract. Just as obviously, the issue here is whether to place language in the contract eliminating the practice, as the County suggests, or perpetuating it, at least until it is bargained away or altered through negotiation, as the Union proposes.

Even though there is no contract, the above principles would seem to apply. If one party cannot repudiate a practice that is inconsistent with prevailing Policy language governing it, the practice would be perpetuated throughout the entirety of another contract. This would require the employer to repudiate it again during the next round of bargaining, which it could do if it chose to.

This sets up the somewhat incongruous result that a party can repudiate a practice if there is a contract but cannot if there is no contract. There appears to be no such arbitrary limitation on the concept of repudiation of past practice in the literature or in the reality of negotiations. While this may be the subject of a broader discussion among commentators, the fact that this is a first contract does not subvert the principles underlying repudiation of past practice. See Elkouri and Elkouri, *How Arbitration Works*, Supplement to 6th Ed.⁷

⁶ The external comparables were considered but given little weight. First, fringe benefits of this nature are typically determined based on internal consistency unless there is clear evidence that external comparables have some particular significance. There was no such evidence here. Second, external comparisons do not support an award of more than 11 holidays. Some comparison counties were at 11, some were slightly above that and some were below it. On balance the internal comparisons were far more relevant.

⁷ A practice may be discontinued by a proper repudiation of it in negotiations. One arbitrator noted that “There are a number of circumstances that a past practice can be eliminated. A practice may be eliminated [...] where the parties, dissatisfied with the past practice, negotiate language that makes the former custom a nullity. [...] Arbitrator Mittenthal stated: ‘And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant.’ Arbitrator Howell citing to Arbitrator Mittenthal’s seminal article on past practice, *Past Practice and the Administration of Collective Bargaining Agreements, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators* (BNA 1961). There is a difference between the repudiation of a past practice where the language is *ambiguous*, and thus reliant on the practice to give it meaning, versus the repudiation of a practice based upon *clear* language, which may not. In the former instance the parties need to negotiate different language to overcome the practice even where there has been a repudiation of that practice during negotiations by one party. In the latter, unless the parties negotiate different language, the clear language overcomes the practice where one party has properly repudiated it during negotiations. Here the language of the policy and the contractual language in the Deputy contract is clear and says nothing about the practice. Thus, this appears far closer to the situation where the language is clear and requires that the party seeking to change the practice bear the burden of including language in the contract perpetuating the practice. The Union must show why this practice should continue and there was no showing of a compelling need for it by the employees other than that it is a windfall for them. On this record, the County’s argument was more persuasive.

Here the County did provide proper repudiation of the practice during negotiations and placed the Union on notice that it would seek to adhere to the Policy language and insist that this be made part of the labor agreement in this round of bargaining. The question is then whether there is a compelling reason to continue the practice based on the equities of this case.

This is a thorny problem. It seems contrary to common sense that people would get paid more for not working than they would if they do, which appears to be the current practice. On the other hand, it is incongruous to take away benefits during negotiations, especially where the unit has recently been certified presumably to protect or enhance those benefits, where there has been nothing offered for those in exchange for the elimination or amendment of those benefits. After all, people do not certify a Union with the expectation that they will lose something they have had for years.

The other matter that complicates this discussion is the theory put forth by many public employers for years, i.e. that the party seeking to change an existing benefit must show that there is either a compelling need for it or that there has been a quid pro quo for it. This too is a mixed bag. There was no evidence that anything was offered for this change in benefits. However, there is a compelling need shown by the County since the practice of paying people 8 hours of pay plus 8 hours of compensatory time for not working on a holiday seems something of a windfall to employees.

On balance, again by a slim margin, these principles mitigate in favor of the County in this regard. Accordingly, the County's position is awarded on this issue

AWARD ON PAY/HOURS AWARDED HOLIDAYS - ARTICLE 21

NUMBER OF HOLIDAYS

The Union's alternate position is awarded on the issue of the number of holidays as follows:

Full time employees scheduled to work on any of the following ten (10) days shall receive one and one half their regular rate of pay. Full time employees not scheduled to work on any of the following days shall receive eight (8) hours of holiday pay for each of the following days:

| | |
|-------------------------|-------------------------|
| <u>New Year's Day,</u> | <u>Independence Day</u> |
| <u>MLK Day,</u> | <u>Labor Day</u> |
| <u>President's Day,</u> | <u>Veteran's Day</u> |
| <u>Memorial Day,</u> | <u>Thanksgiving</u> |
| <u>Christmas Day</u> | <u>Columbus Day</u> |

In addition, all full time employees of the bargaining unit will receive one (1) floating holiday per calendar year to be scheduled with their supervisor. This floating holiday cannot be accrued or carried over to the next calendar year.

DOUBLE TIME FOR HOURS NOT WORKED ON HOLIDAYS

The County's position is awarded with regard to the issue of double time hours for time not worked on holidays. The language cited above is awarded.

ISSUE #5 - RETIREE HEALTH INSURANCE – APPENDIX B

UNION'S POSITION

The Union seeks an award inserting the same language regarding retiree health insurance into this contract as exists in the deputy contract. The Union noted that this would allow the members of this unit who were employed prior to may 1, 1997 to continue their health insurance as it was promised to them for years rather than at the reduced rate now in effect for other County employees. In support of this position the Union made the following contentions:

The Board made a tacit if not explicit promise to its employees that those who worked for the County from prior to May 1, 1997 would receive 4% per year of service to be put towards the County dental and health insurance premium, not exceeding the amount paid to current employees. Thus, if a person worked for the County for more than 25 years, they would receive full health coverage in exchange for long and valuable service to the County. This is the way it worked from May 1, 1997 until February 3, 2009 when the County Board voted to drastically reduce the benefit for all eligible employees, See County Exhibit 77. Now the benefits have been drastically reduced due to a unilateral action by the Board and are capped at \$330.00 per month for a maximum of ten years. The Union noted that over time this reduction in what was promised to these employees is “mind boggling” and has a huge impact on their retirement.

The Union countered the County’s claim that some of these individuals “could have retired” during a short window of time prior to the reduction in benefits going into effect. The Union noted that this was a “Sophie’s choice” in that these employees could retire and get full health benefits but would then have to suffer the loss of income and additional PERA benefits as the result.

The Union noted too that there is currently a lawsuit pending between the non-Union employees, who are also greatly affected by this reduction in benefits and which also alleged that the County’s actions in changing this is a breach of a promise the County made to its employees for years and constitutes promissory estoppel. The Union also noted that the fact that the County failed to adequately fund these obligations over time is not the employee’s fault and that they should not be penalized for the County’s lack of foresight.

There is language in the deputies’ contract that guarantees this benefit to all employees who were hired prior to May 1, 1997 and the Union asserted that internal consistency compels that these employees have that same language. The fact that it is “historical” and that no deputies who are currently employed at Lyon County were hired prior to May 1, 1997 is of no consequence. The language is there and should be added to the CBA for these employees as well.

Finally, due to the pending lawsuit, if the Union position is awarded, it is possible the Arbitrator is affirming a benefit that all other County employees will have restored through the legal process. If the Union position is denied, three employees may very well find themselves as the only County employees *not* receiving the benefit as promised before the change.

COUNTY’S POSITION

The County’s position is for no language regarding retiree health insurance to be added to this contract and that these employees should be subject to the same policy within the County as applies to every other employee with respect to retiree health insurance. In support of this position the County made the following contentions:

The County stressed that there is no “contract” between the County and any of its employees regarding retiree health insurance. The Policy Manual, upon which this benefits was based explicitly says, and has provided for years, as follows:

I understand these manuals or any other Lyon County policy, practice or procedure, do not constitute a contract. Since the information, policies and benefits are necessarily subject to change, I acknowledge that revisions to these Manuals may occur.

The County noted that all three of the employees affected by this issue who are in this unit signed that express acknowledgement form indicating that they were aware that there was no ongoing obligation to provide this benefit and that it was not a contract.

The Policy manual also contains language to the effect that the policies may change and the employee's acknowledged that as well. Thus, the County argued, there was no binding contract formed here and the employees were always aware that the policy could, and sometimes did change, per action of the County Board.

The County further noted that the Policy manual has been amended several times over the past 25 years and that the main reason for this has generally been to save costs. Thus, the County asserted that employees have always known that there was no "promise" explicit or implicit in this benefit and that it could always have been amended or even canceled at any time. Due to the huge cost of this benefit, the County Board decided in 2009 to change it, as it had in the past, in order to effect a cost savings. The County pointed out the large contingent liability the County was faced with if this benefit were to continue and asserted that it simply could no longer afford to provide this benefit to employees.

Accordingly, rather than terminate the benefit immediately, as it could have, the County phased it out and gave employees a window in which to decide to either retire and take the full health benefit or to stay on and take a reduced benefit upon retirement. These employees could have chosen to retire, as some employees did, but they elected not to retire and take this benefit.

Moreover, the benefit available to the jailer dispatchers is the same benefit that is available to every County employee. Internal consistency mandates that it be the same benefit and that some employees not be given a much greater benefit than others.

The County also pointed to the deputy contract and argued that while the provision the Union is seeking is a part of that contract, there are in fact no deputies currently working for the County that have been there since May 1, 1997. Thus, the clause has no meaning and is there for historical purposes only and applies to no one.

The County noted that the Board took final action on this issue on February 2, 2009 and gave employees until February 24, 2009 to choose to take the old benefit or be covered by the new policy. Further, the BMS Status Quo order did not expire until February 24, 2009 and the Board's action was explicit in that it did not apply to those employees covered by the BMS Status Quo order, which was in place due to the certification of this unit. See County exhibit 77. Thus these employees were given months to decide what to do and they made a conscious choice and elected to stay and be subject to the new policy and be treated just as every other County employee would be treated.

The County argued that given these facts the arbitrator should not create an obligation that the County has decided to change and which they had every lawful right to change.

Finally, the fact that there is a lawsuit pending between the non-Union employees and the County is not controlling here. That matter is pending in the Court system and had not been decided. The County noted that it is strenuously defending that matter and that it has maintained there as it has here, that there is no promise or contract of any kind and that the County had the right under the terms of the policy and state law to terminate or amend its policy at any time. Further, there was no actual evidence that any employee relied on this benefit to remain with the County or to make other choices about their retirement. All that was presented was a bald assertion by the Union that employees did so rely and that they relied to their detriment on this benefit and that they should be allowed to continue a benefit the County can no longer afford.

DISCUSSION – RETIREE HEALTH INSURANCE – ARTICLE 21

The question of what this would cost was given very little weight. It is clear that the cost of providing a benefit like this is huge and that the County does not have the money now to adequately fund it. However, for this purpose the fact that a public employer has failed to adequately fund such an obligation does not control the result. It is incumbent upon public officials to make sure there is adequate funding for any obligations either before making it or after making it by assuring that there is a source to pay for it.

Having said that however, the real question is whether on this record the language sought by the Union should be placed in the contract and therefore creating the obligation to pay for retiree health insurance. As has been the case in this matter on several other matters, there were very legitimate arguments on both sides.

Certainly, the language the Union seeks is in the deputy contract. Frankly if there were even one such employee who was impacted by this the language would be placed in the jailer dispatcher contract on the basis of internal consistency. There is however no deputy currently affected by this language since none have apparently been with the County since prior to May 1, 1997. On this record, the fact that there is language in the deputy agreement does not control this result.

Certainly too, there is a lawsuit pending over this question and whether there was a tacit or explicit promise or other promissory estoppel theory that obligates the County to continue to pay for this for other employees. There is something of a conundrum here in that the lawsuit is pending and no result has been reached. If the Union's language is granted and the County prevails in the lawsuit, these employees would be the only ones to enjoy a greater benefit than any others of the County. If on the other hand the County's position is awarded and the employees prevail in the lawsuit these employees will be the only ones without it. Obviously too the result here has no bearing on how that lawsuit will come out since there may be a plethora of other facts presented there that were not presented here or other theories presented that will impact the Court's decision on this question that have little or no bearing on the standards in interest arbitration.⁸

The Board gave notice in August of 2008, prior to the certification of this unit and prior to the BMS status quo order herein, that it would be changing the retiree health insurance. The final decision was not made until February 2, 2009 and additional time was given to the affected employees to select what to do. The Board action in notifying employees of the possible change was done prior to the BMS Order. Further, the Policy itself does contain clear language that it does not create a contract and that it is subject to change. Indeed, the County has changed this Policy several times since 1985 based on the need to limit the number of employees that were covered by it and to save costs as health insurance premiums have continued to rise over time.

On balance, the County's position is the more reasonable here. That is not to say that some employees believed that they would always have the retiree health insurance benefit. Some may well have but there was insufficient evidence on this record to establish that. Obviously if the lawsuit is decided in favor of the employees that may well be the subject of negotiations between these parties in subsequent bargaining but that of course is left to another day. Accordingly, the County's position on this question is awarded.

AWARD – RETIREE HEALTH INSURANCE – APPENDIX B

The County's position is awarded.

⁸ It was clear though that these employees, due to their Union status are no longer included in the lawsuit. See, Minnesota Court of Appeals decision In Re. *Rick Anderson, et. al. v County of Lyon*, Case # A09-1979 (MN. App, January 22, 2010). That case held that the employees represented by the labor Union in this matter were dismissed from the lawsuit. The remainder of the matter has yet to be decided on the merits however as of the time of the hearing in this matter.

SUMMARY OF AWARD

AWARD ON WAGES FOR 2009 AND 2010 – APPENDIX A

The County's position is awarded

AWARD ON MERIT INCREASES – 2009-2010- APPENDIX A

The Union's position is awarded for 2009. Merit pay increases are awarded per the County's position for 2010.

AWARD – VACATION OVERTAGE – ARTICLE 15

The Union's position is awarded.

AWARD ON PAY/HOURS AWARDED HOLIDAYS - ARTICLE 21

NUMBER OF HOLIDAYS

The Union's alternate position is awarded on the issue of the number of holidays as follows:

Full time employees scheduled to work on any of the following ten (10) days shall receive one and one half their regular rate of pay. Full time employees not scheduled to work on any of the following days shall receive eight (8) hours of holiday pay for each of the following days:

| | |
|-------------------------|-------------------------|
| <u>New Year's Day,</u> | <u>Independence Day</u> |
| <u>MLK Day,</u> | <u>Labor Day</u> |
| <u>President's Day,</u> | <u>Veteran's Day</u> |
| <u>Memorial Day,</u> | <u>Thanksgiving</u> |
| <u>Christmas Day</u> | <u>Columbus Day</u> |

In addition, all full time employees of the bargaining unit will receive one (1) floating holiday per calendar year to be scheduled with their supervisor. This floating holiday cannot be accrued or carried over to the next calendar year.

DOUBLE TIME FOR HOURS NOT WORKED ON HOLIDAYS

The County's position is awarded with regard to the issue of double time hours for time not worked on holidays. The language cited above is awarded.

AWARD – RETIREE HEALTH INSURANCE – APPENDIX B

The County's position is awarded.

Dated: April 22, 2011

Jeffrey W. Jacobs, arbitrator